



*Victorian Aboriginal Legal Service*

## Australian Law Reform Commission

### Background to the Victorian Aboriginal Legal Service (VALS)

VALS is an Aboriginal community controlled organisation. It was established in 1972 by committee, and incorporated in 1975. The VALS is committed to caring for the safety and psychological well-being of clients, their families and communities and to respecting the cultural diversity, values and beliefs of clients. The VALS vision is to ensure Aboriginal and Torres Strait Islander Victorians are treated with true justice before the law, our human rights are respected and we have the choice to live a life of the quality we wish.

We operate in a number of strategic forums which help inform and drive initiatives to support Aboriginal and Torres Strait Islander people in their engagement with the justice, and broader legal system, in Victoria. We have strong working relationships with the other five peak Aboriginal Community Controlled Organisations in Victoria and we regularly support our clients to engage in services delivered by our sister organisations. Our legal practice spans across Victoria and operates in the areas of criminal, civil and family law (including child protection and family violence).

Our 24-hour support service is backed up by the strong community based role our Client Service Officers play in being the first point of contact when an Aboriginal or Torres Strait Islander person is taken into custody, through to the finalisation of legal proceedings. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

We seek to represent women, men and children who come to us for assistance in their legal matters, and are only hindered in doing this where there is a legal conflict of interest and we cannot act, or if matters fall outside our funding requirements. If this is the case, we provide warm referrals to other suitable legal representatives, which include Victoria Legal Aid, the Aboriginal Family Violence Prevention Legal Service, community legal centres and private practitioners as appropriate.

## OVER-REPRESENTATION OF ABORIGINAL PEOPLE IN THE CRIMINAL JUSTICE SYSTEM

The 1991 Report of the Royal Commission into Aboriginal Deaths in Custody (“**RCIADIC**”) acknowledged the long history of inequality and disadvantage experienced by Aboriginal peoples. It found that disadvantage in areas such as health, housing, education, employment and income were intrinsically linked to the overrepresentation of Aboriginal people in the criminal justice system. RCIADIC handed down 339 recommendations including increasing self-determination, access to education, access to economic opportunities as well as improving health and housing.<sup>1</sup>

At the time, these recommendations were handed down there was optimism in the Aboriginal community that the entirety of the RCIADIC recommendations would be implemented in each State and Territory. Some 26 years down the road the situation for Aboriginal people has not improved and our communities are still experiencing dispossession, marginalisation and exclusion<sup>2</sup> and we remain the most chronically disadvantaged group in Australia.<sup>3</sup>

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<sup>1</sup> Royal Commission into Aboriginal Deaths in Custody (1998) Austlii, Council for Aboriginal Reconciliation.

<sup>2</sup> Green, *The impoverishment of a people: The Aboriginal experience in Australia* in Kerr, *Thinking about poverty* (2006) 129.

<sup>3</sup> Trewin, *The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, ABS and Australian Institute of Health and Welfare (2005) xxi.

In Victoria, in both youth justice and adult prisons, Aboriginal people are incarcerated at higher rates than non-Aboriginal people per head of population, and the gap is rising. From 2005 to 2016, the Aboriginal imprisonment rate increased from 957 to 1,541 prisoners per 100,000<sup>4</sup>, an increase of 70%, compared to a 34% increase in the non-Aboriginal population. Aboriginal Victorians are now well over ten times more likely to be imprisoned than the general population.<sup>5</sup> Aboriginal unsentenced prisoners account for 27% of all unsentenced prisoners nationally and they are likely to spend 2.4 months on remand.<sup>6</sup> The picture is not much better for Aboriginal youth with 79 out of 520<sup>7</sup> youths incarcerated in Youth Justice Centres identifying as Aboriginal, with the vast majority being held on remand. Unsurprisingly, 36 had previously been incarcerated within the Youth Justice Centres with the most common offence types being robbery [30], acts intended to cause injury [40] property damage [19], prohibited weapons, and dangerous or negligent acts [21].<sup>8</sup>

Aboriginal women are 23 times more likely to be imprisoned than non-Aboriginal women. High numbers of Aboriginal people are also unsentenced and on remand, which is the result of a multitude of factors, including tightened restrictions on who can apply for bail and how many times they can apply. Statistics like these stand in startling contrast to the key message of RCIADIC, that is, ensuring jail is a last resort.

### *What are the factors that contribute to over-representation?*

#### *Social and economic disadvantage*

Aboriginal social and economic disadvantage is one of the main risk factors and remains entrenched across areas such as health, education, housing, income and employment.<sup>9</sup> The 1997 *Bringing Them Home Report* found that the trauma, both direct and indirect, experienced by Aboriginal children who were removed from their parents resulted in reduced levels of education which then meant restricted employment and income opportunities and contributed to the ongoing cycle of

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<sup>4</sup> ABS, Prisoners in Australia 2016, Catalogue 4517.0

<sup>5</sup> Darby et al, *Victoria's Prison Population 2005 to 2016*, Sentencing Advisory Council (2016), 13.

<sup>6</sup> Ibid.

<sup>7</sup> Department of Health and Human Services, Youth Justice Data Report, 31 December 2016

<sup>8</sup> Department of Health and Human Services, Youth Justice Data Report, 31 December 2016

<sup>9</sup> Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators* (2009).

disadvantage.<sup>10</sup> Research has shown that Aboriginal children who were removed from their parents as part of the Stolen Generations are at significantly higher risk of contact with the criminal justice system.<sup>11</sup>

#### *Effect of a criminal record*

Having a criminal record and being in prison can also result in significant levels of poverty and socio-economic disadvantage. Incarceration inevitably reduces employment opportunities, and data has indicated that Aboriginal people who have been arrested within the past 5 years are more than twice as likely to be unemployed than employed.<sup>12</sup> The stigma of a criminal record has a higher impact for Aboriginal communities in Victoria as compared to other states and territories as we do not have a spent conviction scheme.

#### *Homelessness*

The lack of housing is also a substantial risk factor for reoffending and given the lack of emergency and transitional housing available to the Victorian community this situation will only worsen unless there is increased investment. A research study found that previous offenders were twice as likely to return to prison within nine months if they were homeless.<sup>13</sup>

#### *Law and order approaches*

The overall environment within which remand and sentencing occurs is constantly changing due to emergent issues such as family violence or need for the government to take a tough 'law and order' approach. A study found 230 major changes to law and order legislation in Australian states and territories over only three and a half years.<sup>14</sup> They also found that successive changes to bail legislation were rapidly occurring in some jurisdictions as a result of sitting governments requiring

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<sup>10</sup> *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997)

<sup>11</sup> Hunter, 'Factors underlying Indigenous arrest rates', NSW Bureau of Crime Statistics and Research (2001).

<sup>12</sup> ABS, Crime and Justice 2005 (2005) Catalogue No.4102.0

<sup>13</sup> Blady et al, 'Ex-Prisoners, Homelessness and the State in Australia', *The Australian and New Zealand Journal of Criminology* (2006), Vol 39, No.1.

<sup>14</sup> L Roth, *Law and order legislation in the Australian States and Territories: 2003-2006*, Briefing Paper No 12/06, Parliamentary Library, Parliament of New South Wales, 2006, 1.

expedient responses to 'hot' political issues.<sup>15</sup> Rapid changes to the criminal justice system has historically disproportionately affected Aboriginal communities. For example, the abolition of intensive corrections orders, community based orders, home detention orders, decreased remand services could have impacted on the 48%<sup>16</sup> increase in the remand population and the 43%<sup>17</sup> increase in the Aboriginal prisoner population.

### *How does the criminal justice system impact on Aboriginal offending?*

If one is to truly comprehend the impact of the criminal justice system on Aboriginal offending, then one must understand that the majority of Aboriginal people view the criminal justice system as having enforced colonial authority and participation in the removal of Aboriginal children, needless prosecutions and deaths. Some researchers have argued that the legacy of past government policy has led Aboriginal people to be distrustful and disconnected from the mainstream system.<sup>18</sup>

Aboriginal people also feel that they are systemically discriminated against by the criminal justice system. For example, a smaller proportion of Aboriginal juvenile offenders than non-Aboriginal juvenile offenders were diverted by formal cautioning mechanisms or referrals.<sup>19</sup> The offence of public drunkenness is one that disproportionately affects Aboriginal people, increases the number of Aboriginal people in police cells and the risk of a death in custody.<sup>20</sup>

### *Why should the Government care?*

It is evident that the public and political concerns about Aboriginal over-representation in prison has faded considerably since the RCIADIC.<sup>21</sup> This reduction in concern could be due to cynicism, racism, general indifference or compassion fatigue or the prevalence of negative media attention around Aboriginal communities. For whatever reason the ever-increasing rates of Aboriginal imprisonment and the neglect of the RCIADIC recommendations means that the attitude of the current

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<sup>15</sup> A Steel, 'Bail in Australia: Legislative Introduction and Amendment Since 1970' in M Segrave (ed), *Australia and New Zealand Critical Criminology Conference 2009: Conference Proceedings* (Monash University and the Australia and New Zealand Critical Criminology Network, 2009), 228-243.

<sup>16</sup> G Fisher, *Victoria's Prison Population 2001 to 2006*, Sentencing Advisory Council, Melbourne, 2007, 5 & 7.

<sup>17</sup> Ibid

<sup>18</sup> Blagg, *Crime, Aboriginality and the Decolonization of Justice* (2008) 11.

<sup>19</sup> Productivity Commission, *Overcoming Indigenous Disadvantage* (2009) para 10.33.

<sup>20</sup> Guivarra, 'The Survival of Public Drunkenness Laws in Victoria' (2008) *Indigenous Law Bulletin* 7 (5), 19.

<sup>21</sup> Amnesty International Australia, 'Review of the Implementation of RCIADIC', May 2015 accessed at <https://changetherecord.org.au/review-of-the-implementation-of-rciadic-may-2015>

government must change if we are to move forward, together, to drastically reduce these rates and provide better outcomes for Aboriginal communities.

There are a number of reasons as to why the current government should move this issue to the forefront of their agenda, these include:

1. At 30 June 2016, there were 531 Koori people in prison in Victoria which is over 8 per cent of the total prison population.<sup>22</sup> Of these Koori prisoners, 91% were male and 9% were female. Three quarters of all Koori prisoners were aged less than 40 years.<sup>23</sup> As a result of these alarming rates of imprisonment, one in every five Aboriginal people have at some stage lost a parent to prison.<sup>24</sup> As a result arrest, prosecution and imprisonment may have become a rite of passage for young Aboriginal people rather than a source of shame or embarrassment. Many of the Aboriginal youth in juvenile justice facilities have or have had family members incarcerated within adult correctional systems and see themselves as likely to repeat the cycle. One Aboriginal youth had a view of helplessness when envisioning his future and felt that he would likely reunite with family *“when I go to adult prison”*. Another Aboriginal youth who identified with the cycle of offending experience by his family noted that he had uncles at Port Phillip Prison so *“when they put me in an adult prison, that is where I want to go”*. Sadly, this cycle of offending and incarceration is already severely affecting Aboriginal youth with the current rate of Aboriginal youth detention being 9.4% compared to 0.7% for non-Aboriginal youth<sup>25</sup> with a majority of these youth being diagnosed with Post Traumatic Stress Disorder, Complex Trauma Syndrome and other mental health issues as a result of state intervention.
2. Contact with the criminal justice system in the long term becomes criminogenic as long criminal records deter employers from considering Aboriginal people for advertised

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<sup>22</sup> Above, n 5. Also see Victorian Equal Opportunity and Human Rights Commission, *‘Unfinished Business – Koori women and the justice system, 2013’*, pp 16-17,

<sup>23</sup> Ibid.

<sup>24</sup> Quilty, S., Levy, M., Howard, K., Barratt, A. & Butler, T. (2004) ‘Children of prisoners: a growing public health problem’, *Australian and New Zealand Journal of Public Health*, 28 (4), 339–343

<sup>25</sup> Sentencing Advisory Council, *‘Victoria’s Prison Population 2005 to 2016’*, November 2016 accessed at <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Victorias Prison Population 2005 to 2016.pdf>

positions<sup>26</sup> and result in the involvement of child protection authorities. When the parent offends, Victoria Police often files a mandatory notification with the Department of Health and Human Services if they feel the child is at risk. Often these children will lose their primary carer to imprisonment and as a result be relegated to the care of the State. From 2013 to 2015 there was a 59% increase in the number of Aboriginal children in out of home care and of this over 60% were in a non-Aboriginal placement<sup>27</sup>. Not only do these children lose the connection to their parents, but also lose their connection to their community, their culture, and the safety this affords. The frustration and isolation that the child suffers as a result of these actions creates the ideal conditions for them to begin offending as a juvenile, often via criminal damage, and continually repeat these or other offences as a way to express the isolation and trauma they feel continuing the cycle of over-representation.<sup>28</sup>

3. A high rate of Aboriginal imprisonment is a significant contributor to Aboriginal economic and social disadvantage. A study conducted by criminologists examined the effect of an arrest record on Aboriginal employment prospects using data from the 1994 National Aboriginal and Torres Strait Islander Survey (“**NATSIS**”)<sup>29</sup>. Controlling for age, years completed a high school, post-school qualifications, whether the respondent had difficult speaking English, alcohol consumption and whether the respondent was a member of the Stolen Generations, they found that an arrest record reduced Indigenous employment for males and females by 18.3% and 13.1% respectively.<sup>30</sup>
4. The high rate of Aboriginal imprisonment is expensive as the average cost per day of keeping an adult in prison is \$289.83<sup>31</sup>, and with the imprisonment rate for Aboriginal people in

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<sup>26</sup> A study in Philadelphia looking at 300 youths aged from 13 to 18 found that having a criminal record reduced employability which led to higher rates of crime. Jeffrey Fagan; Richard B. Freeman *Crime and Justice*, Vol. 25. (1999), pp. 225-290.

<sup>27</sup> Steering Committee for the Review of Government Service Provision, ‘*Report on government services 2015*’, Volume F, *Community services* (Canberra: Productivity Commission, 2016)

<sup>28</sup> Currently from data provided by Department of Health and Human Services 79 of 520 children in youth justice centers are Aboriginal and/or Torres Strait islander.

<sup>29</sup> Hunter, B; Borland, J, ‘The Effect of Arrest on Indigenous Employment Prospects’ [1999] NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletins* 45

<sup>30</sup> Ibid

<sup>31</sup> <http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/corrections+statistics+quick+reference>

Victoria at 1,541 per 100,000 adults, compared with 134 per 100,000 for all Victorians,<sup>32</sup> the costs of incarcerating Aboriginal offenders is astronomical. This figure does not reflect the resources directed to juvenile offenders, police resources in responding to offending, the cost of investigating and prosecuting suspected offenders and the costs of responding to and treating victims. This money could be used to focus on justice reinvestment initiatives, therapeutic treatment programs, and education and employment initiatives for the Aboriginal community.

5. Australia endorsed the United Nations Declaration on the Rights of Indigenous Peoples which '*recognises the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world*'<sup>33</sup>. The United Nations has made it clear that in their view, Australia has failed to satisfy the commitment to uphold Indigenous people's human rights and rights to equality and non-discrimination. Much of the criticism recently has been focused on the breaches of the International Covenant on Civil and Political Rights as there had been no National Indigenous Representative Body established, no reparation to the Stolen Generation and the discriminatory nature of the Northern Territory<sup>34</sup>. Previously the International Convention on the Elimination of all Forms of Racial Discrimination noted '*with grave concern that the rate of incarceration of Indigenous people is disproportionality high compared with the general population*'.<sup>35</sup> The adverse attention comments like this attract from our international partners is detrimental to Australia's international interests as it devalues our promises and commitments to our international partners and indicates that we believe in symbolism over action.
6. On 13 February 2008, former Prime Minister Kevin Rudd apologised, on behalf of non-Aboriginal Australians to Aboriginal communities for the consequences of European colonisation and the '*laws and policies of successive Parliaments and government that have inflicted profound grief, suffering and loss*' and emphasises the need to '*righting the wrongs*

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<sup>32</sup> Sentencing Advisory Council, '*Victoria's Prison Population 2005 to 2016*', November 2016 accessed at [https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Victorias Prison Population 2005 to 2016.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Victorias%20Prison%20Population%202005%20to%202016.pdf)

<sup>33</sup> *United Nations Declaration on the Rights of Indigenous Peoples*

<sup>34</sup> Australian Human Rights Commission, *Report of the Australian Human Rights Commission to the Office of the High Commissioner of Human Rights in preparation for the Durban Review Conference*

<sup>35</sup> <http://www.abc.net.au/news/2009-04-14/indigenous-rights-declaration-just-the-start/1649666>



*of the past' so that we may move 'forward with confidence to the future'.<sup>36</sup> This apology has largely been symbolic as without State and Territory governments putting action behind these words by funding culturally appropriate early intervention, wrap around service delivery, prevention activities, education and employment initiatives rather than further criminalisation. If the Victorian Government is unwilling to address the underlying causes of Aboriginal offending then the least they can do is ensure that any legislative reform does not increase the rate of which Aboriginal people are being arrested, prosecuted and imprisoned.*

## RESPONSE TO CONSULTATION PAPER

### BAIL AND THE REMAND POPULATION

*Proposal 2–1 The Bail Act 1977 (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the Bail Act. Other state and territory bail legislation should adopt similar provisions. As with all other bail considerations, the requirement to consider issues that arise due to the person's Aboriginality would not supersede considerations of community safety.*

VALS agrees that other state and territories should adopt provisions analogous to Section 3A of the *Bail Act 1977 (Vic)*, which requires Magistrates to consider cultural background and family obligations that might impact Aboriginal and Torres State Islander people in bail hearings. VALS believes that any adoption of the provision in other states should reflect changes to the application of s 3A made by Victorian common law. In *DPP v SE (2017) VSC*, Justice Bell stated that s 3A considerations 'be taken into account in relation to all aspects of the bail-determination process,

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<sup>36</sup> <http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>

including assessing unacceptable risk and setting bail conditions.’<sup>37</sup> In the same judgement Justice Bell also strengthened the operation s 3A by reading in the cultural rights Aboriginal people possess under s 19(2) of the Charter. His Honour held at paragraph 21: ‘Section 19(2) operates with s 6(2)(b) of the Charter to supply an additional basis upon which the court should, when conducting bail hearings and determining bail applications, respect the cultural rights of Aboriginal persons.’<sup>38</sup> VALS believes the adoption of the provision in other states should be in relation to all aspects of the bail-determination process and should recognise Aboriginal cultural rights as they are defined in Section 19 (2) of the Victorian Charter of Right and Responsibilities.

VALS believes the shortcoming of s 3A should be considered in any adoption of the provision in other states and that in Victoria changes be made to ensure the intended outcomes of the provision are realised. The Royal Commission into Aboriginal Deaths in Custody and more recent reports highlight the need to reduce number of Aboriginal and Torres Strait Islander people on remand. The deaths in custody rate of unsentenced prisoners is consistently higher than the rate of sentenced prisoners (more than twice as likely in 2004).<sup>39</sup>

The introduction of s 3A has not had the impact of reducing the number of Aboriginal and Torres Strait Islander people on remand, due to other social and legal circumstances such as lack of transitional housing, a tightening of bail awards and poor interpretation of 3A by sitting magistrates. Since the introduction of the provision in 2010 the percentage and number of Aboriginal people on remand has continued to rise. In 2009-10 there were 263 Aboriginal and Torres Strait Islander people on remand in Victoria, by 2013-14 that number had increased to 443 and in the same period the proportion of Aboriginal and Torres Strait Islander people in prison on remand had increased by 8.1%.<sup>40</sup> The Victorian Equal Opportunity and Human Rights Commission report *Unfinished Business*:

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<sup>37</sup> Supreme Court of Victoria, *DPP v SE (2017) VSC 13*, accessed on 20 August 2017 at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2017/13.html?context=1;query=SE%20VSC%202017>

<sup>38</sup> Ibid.

<sup>39</sup> Australian Institute of Criminology, *Remand in Custody: Critical Factors and Key Issues*, May 2006, accessed on 20 August 2017 at [http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi310.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi310.pdf)

<sup>40</sup> Department of Justice and Regulation, *Key Statistics on the Victorian Prison System: 2009-10 to 2013-14*, accessed on 20 August 2017 at [http://assets.justice.vic.gov.au/corrections/resources/c72bf831-aa54-46f5-acd1-d6083652671d/cv\\_prison\\_stats\\_1.pdf](http://assets.justice.vic.gov.au/corrections/resources/c72bf831-aa54-46f5-acd1-d6083652671d/cv_prison_stats_1.pdf)

*Koori Women and the Justice System* found that 75 per cent of Koori women entering prison were on remand and less than 15 per cent of them received a custodial sentence. The high rate of remand is attributed to a lack of accommodation for Koori women to be bailed to and the under-utilisation of Section 3A in bail hearings.<sup>41</sup>

In order for the potential of s 3A to be realised VALS supports the recommendations made by the Law Institute of Victoria that the under-utilisation of s 3A be addressed by guidance and training, and by specialist bail support services for Aboriginal and Torres Strait Islander peoples.

VALS recommends that cultural sensitivity training and guidance on utilising s 3A be developed for Victoria Police, court registrars, magistrates, bail justices and legal practitioners; and that such training be developed and delivered by VALS in partnership with the Law Institute of Victoria and the Victorian Equal Opportunity and Human Rights Commission.

VALS solicitors have received ambivalent responses in the Magistrates' Courts as to the operational ambit of s 3A. Some Magistrates have stated that s 3A could only be applied to create flexibility of bail conditions, such as multiple residential addresses or the ability to attend funerals, but could not be used to inform cause or mitigate risk. Legal practitioners must know how to frame relevant questions around the Aboriginal person's culture and magistrates must be able to recognise 'issues that arise due to a person's Aboriginality'. The narrow understanding of how to apply s 3A is revealed in the **case studies below** and by the fact that the granting of bail due to consideration of s 3A is far more likely in an appeal to the Victorian Supreme Court than in the Magistrates Court.

The judicial ambiguity surrounding the application of s 3A may have resulted in practitioners holding back from s 3A submissions. Accordingly, VALS believes that the Victorian criminal law sector must receive s 3A training, so that Aboriginal cultural factors are identified at every opportunity and consistently applied by the Bench in conjunction with the cultural rights under the Charter, in bail applications.

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<sup>41</sup> Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System*, August 2013, accessed on 20 August 2017 at [https://www.humanrightscommission.vic.gov.au/media/k2/attachments/Unfinished\\_business\\_-\\_Koori\\_women\\_and\\_the\\_justice\\_system\\_-\\_Main\\_findings.pdf](https://www.humanrightscommission.vic.gov.au/media/k2/attachments/Unfinished_business_-_Koori_women_and_the_justice_system_-_Main_findings.pdf)

VALS has found that there is a critical undersupply of culturally specific therapeutic services, most notably in regional Victoria. This presents significant issues for our regional solicitors, who struggle with the availability of support services to be able to “show cause” in bail applications. The undersupply of men’s behavioural change programs is also deeply concerning, especially in the context family violence matters being fast tracked in courts, requiring immediate engagement of services. VALS recommends that culturally, gender and age appropriate housing and other bail support services be expanded for Aboriginal and Torres Strait Islander people. This includes expanding the availability of transitional housing provided by Corrections Victoria under its Better Pathways strategy.<sup>42</sup>

Aboriginal people constantly report they feel safer accessing services from Aboriginal organisations. They feel their circumstances are better understood and the responses to their needs will be culturally appropriate and quicker. The environments of Aboriginal organisations are usually more visually inviting and aim to provide more holistic services to address many needs. Further Aboriginal and Torres Strait Islander people often have distrust towards mainstream support services, as the services may not be culturally safe. VALS recommends that Court Integrated Support Program (“CISP”) Koori Case Managers be rolled out across to all Magistrates’ Courts. We have also had great outcomes from the support of Koori Case Managers from CISP and recommend that this Koori specific role should be rolled to all Magistrates’ Courts.

#### Case Study 1

Simon\* was a young Aboriginal person with an intellectual disability who was denied bail in the Magistrates Court and in an appeal, was granted bail in the Victorian Supreme Court after consideration of s 3A by the presiding Judge. At the time of the bail hearing he lived under a Custody to Secretary Order in a community-based residential facility and regularly attended school. He had a limited history of criminal offending relating mostly to property offences, none of which

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<sup>42</sup> Law Institute of Victoria, *Review of Victoria’s Bail System*, 31 March 2017, accessed on 20 August 2017 at [https://www.liv.asn.au/getattachment/bdba24a0-97c0-4632-b971-bc0728ed1950/20170331\\_LP\\_LIV\\_SUB\\_ReviewBailSystem\\_Final.pdf.aspx](https://www.liv.asn.au/getattachment/bdba24a0-97c0-4632-b971-bc0728ed1950/20170331_LP_LIV_SUB_ReviewBailSystem_Final.pdf.aspx)

involved violence against a person. He had also successfully completed a three month bond of good behaviour the previous year.

Simon went before the magistrate of the Children's Court of Victoria after being charged with and pleading guilty to the theft of a motor-vehicle and committing an indictable offence while on bail. The sentencing hearing was scheduled for less than one week after the mention and was then delayed for another 4 weeks. He was not granted bail and therefore spent the duration of this time remanded in custody. Directions from the presiding magistrate recognised that he was particularly vulnerable and at risk because of his intellectual disability, previously being the victim of an assault whilst in custody and because he is an Aboriginal person. The magistrate did not give proper consideration to s 3A and the young person was remanded in a high risk situation for over five weeks.

When Simon went before the Victorian Supreme Court on a bail appeal the presiding judge gave detailed consideration to s 3A and he was granted bail. The judge demonstrated knowledge of how s 3A should be considered and of Aboriginal cultural rights, and recognised the importance of Aboriginal culture to Simon's rehabilitation prospects. Simon was engaged with disability, Aboriginal, bail and child-protection services, all of which weighed in his favour. This case highlights the importance of magistrates and judges understanding how to apply s 3A and of Aboriginal bail applicants having appropriate bail support services available to them.

*Proposal 2–2 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.*

VALS agrees that State and Territory government should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop infrastructure to provide culturally appropriate therapeutic bail support and diversion option. Funding should extend beyond

infrastructure to provide Aboriginal and Torres Strait Islander organisations with the necessary funding to provide essential supports to not only the offender but their family as well.

### **Young Offenders**

Aboriginal and Torres Strait Islander young people are substantially over-represented in the juvenile justice system in Australia. 26 years ago, the Royal Commission into Aboriginal Deaths in Custody first highlighted the high rates of incarceration of Indigenous young people and adults. Despite the reforms to policy and practice prompted by the Royal Commission, substantial over-representation of Indigenous young people in the juvenile justice system persists, and Aboriginal overrepresentation is still described as one of Australia's most significant social issues. The experiences of Aboriginal youth both within the community and in the governmental system require both Aboriginal and non-Aboriginal community service organisations play critical role in delivering coordinated and client responsive services particularly at the points of early and crisis intervention.

The Youth Justice Review and Strategy observed that Victoria has become stagnant in its approach to Koori young people involved with youth justice and needs new and innovative ways to address the systemic issues of over-representation and lack of culturally appropriate programs. A significant gap in current culturally appropriate bail support and diversion options relates to the services available to Aboriginal and Torres Strait Islander youth. Often Aboriginal youth involved with the criminal justice system are suffering due to lack of identity and disconnection from culture and community, thus the only way to effectively divert them is to provide them with a culturally appropriate response that addresses the issues of the offending and repairs the disconnection they feel.

### *Involvement of Child Protection in Aboriginal families*

Between 2012-13 in Victoria, reports of child abuse or neglect for 1067 Aboriginal children were substantiated. This amounts to 68.6 per 1000 – the highest rate per 1000 in Australia. Aboriginal children are 9.4 times more likely to be substantiated than non-Aboriginal children in Victoria, and 49% of all Aboriginal substantiations occur between 0-4 years.<sup>43</sup>

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<sup>43</sup> Australian Institute of Health and Welfare

Family violence and parental alcohol and/or drug abuse are the current drivers for Aboriginal children's entry into the child protection system. The Commission for Children and Young People found that 88% of children reviewed were impacted by family violence and 87% were affected by a parent with alcohol or substance abuse issues.<sup>44</sup> There have been a number of instances where Aboriginal children have been placed into long term out-of-home-care ("**OOHC**") due to the lack of services available to address protective concerns, no allocated worker or a reluctance by one of the parents to remove family members from their home.

Not only do these children lose the connection to their parents, but also lose their connection to their community, their culture, and the safety this affords. The frustration and isolation that the child suffers as a result of these actions creates the ideal conditions for them to begin offending as a juvenile, often via criminal damage, and continually repeat these or other offences as a way to express the isolation and trauma they feel.<sup>45</sup>

#### *Out of Home Care, Juvenile Detention and Adult Incarceration*

VALS notes that there are identified links between the rates of children placed in State OOHC and the rates of those children that eventually become involved in youth detention and then progress into to adult correctional services and facilities. The Youth Parole Annual Report (2016/2016) states that '*45 percent of young people in youth justice centres had been subject to a child protection order and 19 percent of young people in custody were currently clients of child protection and youth justice services.*'

Following on from the above example, an Australian Institute of Health and Welfare publication released on June 30 2014 provided evidence that at any given time, the rate of Victorian Aboriginal children in contact with child protection services is over 60 per 1000 persons. Which is a drastic overrepresentation in comparison with an average of around 5 per 1000 non-Aboriginal Victorians.

The report also noted that Aboriginal children in Victoria were over 12 times more likely to come into contact with child protection services than non-Aboriginal Victorians which is the highest rate of

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<sup>44</sup> Commission For Children And Young People, '*Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria*', October 2016, page 10.

<sup>45</sup> Currently from data provided by Department of Health and Human Services 79 of 520 children in youth justice centers are Aboriginal and/or Torres Strait islander.

substantiation of Aboriginal and/or Torres Strait Islander children of any state or territory, this data was also substantiated by the Productivity Commission who reference the link to lack of adequate housing, financial security and education within Aboriginal communities.<sup>46</sup> These statistics demonstrate that Aboriginal children and young people in Victoria are at a far higher risk of entering youth justice and detention, and then progressing to adult prison.

Victorian Legal Aid published their research paper '*Care Not Custody*' on 25 January 2017 which outlined the links between out-of-home care and juvenile incarceration. The paper outlined that child protection client data from 2011 to 2016 indicated that, of those aged 11–17 who are placed in OOHC, almost one in three young people later returns to Victoria Legal Aid for assistance with a criminal matter. The problem appears to be particularly acute for children placed in residential care.<sup>47</sup> The report showed that one clear factor pushing children from care into custody is an over-reliance by at least some residential care facilities on call-outs to police to manage challenging behaviour. This means that – for example – property damage of a residential facility can lead to a criminal record at a very young age, and that these practices are entrenching children, often from a very young age, in a cycle of involvement with the police and the courts."<sup>48</sup>

#### *Particular issues for young offenders and diversion*

The diversion programs currently available to Aboriginal and Torres Strait Islander youth are not culturally appropriate and the mandatory programs our youth are required to attend such as the "ROPES" program are based in mainstream or governmental agencies. Further the current diversion options on offer target a younger cohort of offenders, 10 -13, and do not adequately address the separate issues faced by an older cohort of offenders who may have had interaction with the justice system previously. There is also a significant issue of access for Aboriginal and Torres Strait Islander youth who reside in out of home care, as they are often reliant on transitional workers to get them to and from appointments and may have a number of placement changes throughout the

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<sup>46</sup>Australian Government Productivity Commission, *Report on Government Services 2016*, Chapter 15, <http://www.pc.gov.au/research/ongoing/report-on-government-services/2016/community-services/child-protection/rogs-2016-volumef-chapter15.pdf>

<sup>47</sup> Victorian Legal Aid, '*Care Not Custody*', January 2017, page 1

<sup>48</sup> Victorian Legal Aid, '*Care Not Custody*', January 2017, page 3.



diversionary period leading to instability and uncertainty as to where they may be and their ability to commit to an inflexible diversionary program.

#### Lack of cultural applicability for young people

Often, young Aboriginal people are coming into contact with the criminal justice system because of their lack of identity or disconnection from culture and community. Culturally appropriate responses aim to address these issues and connect Aboriginal young people to their culture. However, we have had cases in where we have been told that the Ropes Program, being the only program police are 'mandated' to adjourn matters to, is the only program that can be done to complete a diversion, so we have situations where Koori Kids are being required to complete both Ropes for the police purposes and other cultural programs.

#### Age or content inappropriateness for older offenders

The Ropes programs may lend itself to being appropriate for younger offenders (for example, between the ages of 10-13) however as offenders get older, it is questionable whether such programs a suitable and actually has an impact on offending. Further, for young people who do not have an interest in physical activity, the Ropes program may not be the best option for the individual.

#### The requirements for the informant to attend the program

The requirement for the police officer who charged the offender to be a participant can cause time delays as rosters and work requirements are worked out. It can mean that children are waiting a long time to complete a Ropes Program, which may mean that there is more offending between the decision to go on the program, and actually completing it. For younger offenders, there needs to be fast responses to the behaviour that is being dealt with.

#### *Intersection of diversion and Koori Court*

Diversion technically does not require going before a Magistrate to be dealt with. There is scope, however, with Koori Court being the diversionary forum that it already is, that, once a person has pleaded guilty, after appearing before the Koori Court, that person may still get the sentencing

outcome of diversion, and not get a criminal record. This would allow greater use of culturally appropriate responses to address underlying issues of identity and cultural connection.

#### *Culturally appropriate programs*

A number of Aboriginal cooperatives from around the state have developed and engage Aboriginal youth in programs that divert them away from criminal offending. Some examples are:

- The Mildura and District Aboriginal Services, which offers Youth Justice Programs and Early School Leavers Program.
- Ballarat and District Aboriginal Cooperative, which offers Youth Services including after school programs and oversees the Aboriginal youth and Victoria Police teams that enter the annual Murray Marathon teams.
- Dandenong and District Aboriginal Cooperative Limited, which offers youth services that meet each week to support young people in their school work, the aspirational goals and other challenges in life, as well as referrals into other supports.

In addition to the youth specific programs, Aboriginal cooperatives have a range of programs that support families with their parenting and life skills and provide cultural connectivity. Particularly in the regional areas, where access to programs such as Ropes is not available, and there is greater opportunity for people to be 'on country', it is possible that these programs could be utilised to meet the ends of diversion in a culturally safe space.

Further, a number of other forums, such as the Regional Aboriginal Justice Advisory Committees ("**RAJACs**") and the Indigenous Family Violence Regional Advisory Groups ("**IFVRAGs**") offer programs that address justice and family violence issues in culturally appropriate ways, such as behavioural change or life skills. These are opportunities that could be utilised for local courts and regions.

#### Case Study

Barreng Moorop is a small intensive case management program for Aboriginal children aged 10-14 years old and their families, delivered in North Eastern and Western Metropolitan Melbourne. The program was developed in recognition that young Aboriginal children who have their first contact

with the criminal justice system aged 14 years or younger are among the highest risk indicators of subsequent involvement in the criminal justice system. It works in partnership with VALS, Jesuit Social Services and the Victorian Aboriginal Child Care Agency (VACCA) to deliver a culturally responsive service which focuses on meaningful engagement, building trust and connecting children to community and culture to strengthen their Aboriginal identity. Each participant is assessed individually and personalised case and cultural care plans are developed in collaboration with the participant and family. Barreng Moorop considers not only the needs of the child but also the other children within the family and the needs of the parents and/or carers, this way it functions as a holistic, family and community based diversion model that is geared towards implementing long lasting and effective early intervention to achieve long term change.

*Sarah\**

Sarah's formative years had been marked by neglect and disadvantage after first coming to the attention of child protection services at the age of six. When Sarah presented to the program, she had two unresolved criminal offences for theft and as an accessory to an attempted armed burglary and had recently been expelled from school. Her days were spent roaming aimlessly around shopping centres.

Sarah's family had involvement with the criminal justice system – her father and older brother had both cycled in and out of prison. Her brother, recently released from prison and living in the family home, was exhibiting violent behaviour and using illicit substances. Sarah was linked with a Barreng Moorop caseworker via a referral from Child Protection. Initially, Sarah was difficult to engage and the caseworker had to work hard to gain her trust and show that she could be a reliable, trustworthy adult. The caseworker's first priority was to get Sarah engaged in activities to reduce the risk that she could commit further offences as a result of having nothing to occupy her time. Although Sarah was sceptical at first, the caseworker convinced her to visit an Aboriginal gym in her local area. The welcoming atmosphere of the gym convinced Sarah to get involved in a group training program.

Meanwhile, the team at Barreng Moorop worked together to advocate for Sarah to be enrolled at a new school. The team also referred Sarah to a Koori Education Support program. In relation to her living arrangements, Rochelle and Sarah worked together to develop a home safety plan. Since the

formulation of the safety plan, her older brother has moved out of the home, however Sarah feels equipped to manage the situation if he returns. The caseworker also engaged with Sarah's mother Leila\*. Leila was keen to see Sarah back at school and out of trouble so Barreng Moorop assisted with funding school books, stationary and a school bag.

During this time, Sarah also attended court at the Collingwood Neighbourhood Justice Centre, where she participated in a Group Conference run by Jesuit Social Services in relation to her offences. Barreng Moorop supported Sarah through this process and assisted her to write apology letters to the victims in the crimes she committed. The caseworker also helped Sarah to learn more about her culture by taking her to an Aboriginal museum to engage in cultural history as well as to a Koori girls program to meet other Aboriginal girls. On seeing the positive changes in Sarah, Leila has agreed for the program to provide support for her other daughter, who while not involved in offending behaviour has been regularly receiving detention at school for disruptive behaviour. Twelve months later, and Sarah and her sister are doing well at school.<sup>49</sup>

The benefit of the intensive case management approach taken by Barreng Moorop and its holistic approach to change is why this program has been so effective for children like Sarah and is in its second cycle of funding with the Commonwealth Government.

#### A model from overseas – the Midtown Community Court, New York City

Midtown Community Court has two distinct diversionary options, where offenders accepted responsibility for their charges:

- 'Quality of Life' offending (such as minor traffic or public behaviour offences) attracted the requirement to attend a 2 hour course on basic law abidance – this was in recognition of the many different cultures and countries that people came from, and how their experiences may mean they do not understand how certain behaviours are illegal. On completion the offender would come back before the Magistrate and have the matter struck out.

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<sup>49</sup> <https://jss.org.au/helping-aboriginal-children-stay-out-of-the-justice-system/>

- Misdemeanours (similar to our summary offences, usually covering property offences such as theft or handle stolen goods or possession of small amounts of drugs) attracted an on the day initial appointment with a counsellor, followed by 3-5 individual counselling sessions to identify underlying reasons for offending and personal issues that needed linkages to supports. At the end of attendance at all the sessions, the person would come back to the Judge with a counselling report, then placed on a 6 month bond to be of good behaviour. At the end of the 6 months, if there was no further offending, the matters were recorded as dismissed, and the court file sealed.

The benefits of these two approaches is that people are actively receiving some sort of intervention or information that supports a change of behaviour. It makes people accountable for their actions, but can also support the individual to find appropriate supports that will assist them in more meaningful ways.

#### *Recommendations for an improved diversion programs*

VALS has a number of recommendations for creating a diversion programs that are consistent in approach, yet flexible to meet the needs of the offender and actually create an outcome that is more likely to divert a person away from the criminal justice system.

- Diversion should aim to address the underlying issues of offending and prevent people coming back. The conditions for diversion should address why people have gotten into a situation of offending – counselling, referrals to drug and alcohol and other supports should be considered.
- Individual actions the offender has taken to address their behaviour should be considered in lieu of, not in addition to, conditions of diversion.
- For young offenders, conditions including attendance at school or continuing with sport or cultural activity could be appropriate.
- Diversion should be monitored – where there has been obstacles to complying with conditions, there should be scope for second opportunities, particularly if the individual is dealing with a lot of issues personally.

- Allow lawyers and/or offenders to make submissions (in person or written) on the appropriateness of the diversion.
- Magistrates should have the final approval for the diversion program.
- Consider diversion where there has been previous low level offending, a different type of offending or a significant break in offending
- Training for the Bench in cultural awareness, diversion protocols and options to support greater consistency from the Bench when considering diversion and determining conditions.
- A broader range of offences to be considered for diversion, looking at individual circumstances.
- Conditions should be appropriate to the individual person's circumstances and reasons for offending.
- Magistrates Courts in different regions should look to create partnerships with Aboriginal organisations and other supports (such as health services with counselling programs) to create opportunities to link people into meaningful diversionary activities that address underlying causes of offending.

### **Persons with a disability or cognitive impairment**

Aboriginal and Torres Strait Islander people with a disability and/or cognitive impairment require additional services and support. Unsurprisingly people with cognitive impairments often have an extensive offence history due to their impairment and are less likely to have secure and stable housing, a known support network and links with support services to address the underlying factors of their offending. Often due to these factors these offenders are refused bail and incarcerated which can lead to a deterioration in their mental health. Where these offenders are granted bail their ability to comply with conditions is diminished not only by their inability to understand and comply with the conditions, given their circumstances, but also the harshness of these conditions. This increases the chance that the person will breach the conditions of their bail. State and territory governments should work with Aboriginal and Torres Strait Islander organisations to develop stronger bail support and diversion options for such persons.

## SENTENCING AND ABORIGINALITY

*Question 3–1* Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders? If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

VALS agrees that state and federal legislation should require the courts to consider the background of Aboriginal and Torres Strait Islander peoples and the impacts of colonisation as discrete sentencing considerations. Given that the severe impacts of colonisation are unique to Aboriginal and Torres Strait Islander peoples, legislation should direct the courts to consider these impacts as a means to reducing the inequality of incarceration that has arisen as a result of these impacts.

As an example, the Canadian Criminal Code section 718.2(e) states that particular consideration must be taken in the case of [Canadian] Aboriginal offenders in sentencing. This section arose as a response to the over-incarceration of Canadian Indigenous peoples in colonial circumstances not unlike Australia. If introduced in Australian jurisdictions, such legislation would provide a platform by which the disadvantaged background of Aboriginal and Torres Strait peoples could be investigated via Gladue-style reports, and alternative options to sentencing found.

Given that the incarceration of Aboriginal and Torres Strait peoples is one of the grossest statistical inequalities in the country, such legislation could be enacted under special measures provisions. As an example, Victoria already has legislation as per the Bail Act section 3A by which magistrates must consider the cultural obligations of Aboriginal people when setting Bail. Victoria also has the Charter of Cultural Rights and responsibilities section 19.2 which also acknowledges the unique cultural rights of Aboriginal peoples. Both of these examples provide some legislative direction for how such a statute could be enacted in Victoria, as well as invoking special measures provisions as per the *Equal Opportunity Act 2010* at a state level, and Federally, under the *Racial Discrimination Act 1975*.

*Question 3–2 Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?*

VALS supports the inclusion of reparations and/or restoration as sentencing principles in legislation in every jurisdiction. Such principles would allow room for consideration of alternative sentencing measures, and also allow room for alternative sentencing procedures to also exist.

The ethos of both restoration and reparations are also inclusive of the cultural values and traditional ways of administering justice by Aboriginal and Torres Strait Islander peoples. Generally, this was centred on maintaining the cohesiveness of the community and ensuring responsibility by the offender towards the victim and their family. Such justice was also based on mediation practices that involved community elders, the family and offender and victim. This type of justice is administered in some parts of Canada via Sentencing Circles and Community Councils, whereby various members of the community, including the victim and their family, the offender and their family, community elders and traditional teachers, come together with the judge and legal counsel to discuss the offense and explore and enact community resolutions.

As such, the courts are in a position to order a more considered, culturally appropriate and community led sentencing response based on traditional mediation practices and resolutions, such as participation in community programs and cultural responsibilities. This is especially useful in the case of young offenders, in order to keep them out of the mainstream justice system, and allows the local Indigenous community to deal with the offender as they see fit. Such an approach has been successful in ensuring Indigenous children and young people do not grow into adult offenders with increased levels of contact with the justice system.

Alternative sentencing measures and processes such as these could be explored if such provisions were made under amended Sentencing Acts in each jurisdiction in Australia. They are, in part, utilised in the Koori, Nunga and Murri Courts, but the principles of restoration and reparations are



not always underpinned by specific legislation. For example, in Victoria, Section 5(1) of the *Sentencing Act 1991* sets out the only purposes of sentencing an adult, which include: just punishment, deterrence, rehabilitation, denunciation and community protection.

In comparison, the principles of sentencing as codified by Canada's Criminal Code does not include punishment as a sentencing principle, and instead include: denunciation, deterrence, separation (of offenders from the community), rehabilitation, reparations and providing a sense of responsibility and acknowledgement of harms done by the offender (section 718 of the Canadian Criminal Code).

By having a basis in legislation, the inclusion of restoration and reparations as sentencing principles allows the courts to find innovative and culturally appropriate sentencing responses for, and inclusive of, Indigenous Canadian communities.

*Question 3–3 Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?*

VALS believes there needs to be more information provided to the courts when sentencing Aboriginal and Torres Strait Islander peoples. Such information would provide the basis for alternative sentencing measures to be considered. However, VALS also strongly advocates that such pre-sentencing reports need to be underpinned by legislation directing the judiciary to mandatorily consider the unique and disadvantaged background of Aboriginal and Torres Strait Islander peoples and the impacts of colonisation if they are to be of best use.

Currently, the historical impacts of colonisation and the person's individual background as per their disadvantage as an Indigenous person, are mostly only considered in the Koori, Nunga or Murri Courts. Even then, if the elders sitting at the bench do not know the offender or their family or community, there may be information lacking. Certainly, at the mainstream courts, little information is brought before the courts pertaining to the person's Indigenous background (unless presented by the offender's legal counsel) nor is there any legislative direction mandating the courts to consider such information.

VALS believes that there needs to be a mandated, community led and culturally appropriate method to obtain such information that would assist the courts in finding alternative sentencing measures to

prison, that would directly address the impacts of colonisation and disadvantage experienced by Aboriginal and Torres Strait Islander peoples. Such a process would ensure the courts are playing a vital role, not only in addressing the inequality of incarceration and lowering prison rates for Aboriginal and Torres Strait Islander peoples. Such reports would also allow vital information regarding the offender, their family and community to be brought before, and acknowledged by, the courts as part of the process of reconciliation.


VALS supports such reporting, in the form of Aboriginal Community Reports, in the same manner as Gladue reports are researched, written and presented in Canadian courts (see Question 3-4).

*Question 3–4 In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?*

VALS supports a Gladue-style reporting and case management process similar to that employed in Canada. Such reports are – as best practice – prepared by Indigenous community members, who interview the offender, their family and community, and other relevant people to gain a better perspective as to the background of the offender. Detailed academic information is also incorporated to demonstrate the links between the offender’s personal experiences and the broader impacts of colonisation, and provide rigorous legal context. Recommendations are also made to the courts as per alternative sentencing measures that are aimed at addressing the underlying traumas and disadvantages caused by colonisation.

However, we also note that such reporting processes are underpinned by the sentencing legislation as per section 718.2(e) of the Canadian Criminal Code. Also, as a best practice model, such a model is supported by case management workers post-sentence, adequately resourced culturally appropriate and community led programs, and training and support of the judiciary.

*Question 3–5 How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?*



VALS is of the view that such 'Aboriginal Community Reports' should be prepared and written by Aboriginal community members, alongside relevant and appropriately trained social workers or similar. This is to ensure that the information contained in these reports is from an Aboriginal community perspective and remains independent from court processes. This also ensures that the 'voice' of such reports remains from an Aboriginal and/or Torres Strait Islander perspective as well as incorporating the relevant sociological, legal, historical and academic information. Such a scheme should be funded by relevant government agencies but with the view of supporting self-determination and community control over how such reports are developed.

The reason why Gladue reports have been successful in Toronto, for example, is the flexible nature by which they can be prepared. While there are guidelines as to what information must be contained, it is not a pre-prepared 'tick a box' type of report, and remains open for new and additional information – and different methods for information gathering – to be explored.

Furthermore, in order for these reports to be successful, the judiciary must remain open to the information that is contained within the report, maintain the offender's privacy, and most importantly, not use the information against the person (for example, to increase a sentence, deny bail/ parole or provide a basis for the involvement of child protection). As such, the judiciary must be 'on board' this process, and at best case scenario, directed by legislation (such as s718.2(e) of the Canadian Criminal Code) to consider the information contained within the Aboriginal Community Report.

Furthermore, the report must also contain recommendations for alternative sentencing measures. As such, alternative sentencing measures – such as culturally appropriate, community led programs – must be funded and resourced; otherwise the information in the report becomes redundant. In the best-case scenarios in Canada, not only will the judge adhere to the recommendations made, and find community led alternative sentences, but the offender will also be supported by a caseworker, who will assist that person through the sentencing regime and beyond. This ensures that the needs of the offender – which are addressed in the Aboriginal Community Report – are supported in a through care model to provide that person the opportunity to remain out of jail.

## SENTENCING OPTIONS

*Question 4–1 Noting the incarceration rates of Aboriginal and Torres Strait Islander people: (a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and (b) which provisions should be prioritised for review?*

VALS is of the view that any and all mandatory minimum sentences should be reviewed and abolished. There have been numerous studies that demonstrate that not only do mandatory minimum sentences actually have the potential to increase crime – and not provide a deterrent as commonly assumed – but negatively impact marginalised communities such as Aboriginal and Torres Strait Islander peoples. Mandatory minimums are also costly to the economy, as more often than not, the accused will contest their matter thus taking up time in the courts. The costs are also exacerbated by the terms of imprisonment, as well as the increased likelihood for recidivism once the offender is released.

Higher recidivism rates are also a factor with respect to mandatory minimum sentences for children and young people. As opposed to providing a deterrent, the impact of mandatory minimum sentences and terms of incarceration for youth means a rise in criminogenic behaviour learned within the prison system. Mandatory minimums also deter the offender from assisting police with their investigations, as there is no sentencing discount for doing so. Furthermore, other factors determining a potential sentencing discount such as remorse, are ignored. VALS therefore is of the opinion that mandatory minimums are the antitheses of individualised justice, and provides no room for the judiciary to take into account the accused's background of deprivation and disadvantage.

As has been stated elsewhere in VALS' response to the ALRC discussion paper, VALS is of the strong opinion that a sentencing measure as per s718.2(e) in the Canadian Criminal Code should be introduced in each jurisdiction in Australia, whereby the inherent impact of colonisation and the inequality of incarceration that has been thrust upon Aboriginal and Torres Strait Islander peoples should be addressed by the courts in each and every sentencing circumstance.

Furthermore, mandatory minimum sentences – although not currently in force in Victoria – undermine the role of initiatives such as the Koori Courts, and other therapeutic courts, whereby the

person entering a guilty plea has the opportunity to have a sentence imposed with their background and current circumstances in mind. To introduce mandatory minimums would provide no rationale for the person to enter a guilty plea and have their matter heard at the Koori Court. Lastly, mandatory minimums are completely antithetical to the premise that VALS firmly supports, in that all and every alternative to prison should be explored for Aboriginal and Torres Strait Islander peoples.

**Question 4–2** *Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?*

VALS maintains its position that provisions should be made for each and every alternative to prison be made by judiciaries in each jurisdiction. In particular, as the ASRC have noted in the discussions paper, short term prison sentences are detrimental to Aboriginal and Torres Strait Islander peoples – especially women – and serve no real therapeutic or deterrent purpose at great economic expense.

VALS also notes that should short term sentences be abolished, there is the possibility that longer sentences will be imposed as no alternatives are available. However, this approach is somewhat disingenuous, being an either/ or approach. VALS instead strongly recommends that justice reinvestment schemes be researched, funded and implemented, especially for those Aboriginal and Torres Strait Islander people who would normally receive a short-term sentence which will have massive negative impacts in the long run. In this respect, short term sentences should be abolished, but only in the situation by which the money invested in supporting short term sentences be reinvested into culturally appropriate and community led justice reinvestment programs.

**Question 4–3** *If short sentences of imprisonment were to be abolished, what should be the threshold (e.g., three months; six months)?*

VALS refers to the above statement, whereby there should not be minimum sentencing options in place. Instead, VALS advocates for culturally appropriate and community led justice reinvestment programs.

Such programs should be supported and funded by the money previously invested to support short-term sentences, and underpinned by legislation such as that in Canada, making it mandatory for the judiciary to consider the impacts of colonisation and inherent disadvantage for Aboriginal and Torres

Strait Islander offenders. This would ensure there are provisions made for alternative sentencing options other than prisons, thus rendering short term sentences unnecessary.

***Question 4–4** Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?*

VALS again reiterates the above statements, in that alternatives to prison should be made available in the case of low-level offences which would ordinarily attract a short-term prison sentence. As such, the preconditions for abolishing such short-term sentences should be that justice reinvestment programs that are community led and culturally appropriate be funded and initiated to provide an alternative to short-term prisons sentences, should the legislation be amended to abolish them. In the absence of alternatives, there is the consideration that magistrates will instead simply impose the longer minimum sentence.

However, the requirement of a potential legislation similar to s718.2(e) in Canada, would necessitate the funding and establishment of alternative sentencing regimes such as cultural programs and community initiatives, in order to provide an alternative to incarceration that the potential legislation would necessitate.

***Proposal 4–1** State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.*

VALS advocates not only for community based sentences, but for community adjudicated sentences via a community council of elders, in particular for low level offences and in cases of children and young people. For example, Aboriginal Legal Services in Toronto have developed a community council, whereby the sentencing is decided by a council of Indigenous elders. Essentially, the offender is referred by the judge and will not return to court, unless the community sentence as directed by the elders is not completed. As such, it is up to the community council to ensure the right sentence is undertaken, with appropriate supports.

This option is only open to low-level offenses, and if the offender does not comply with the Community Council's sentencing regime, they do not get another chance with this process. The aim

of this is to take Indigenous offenders out of the colonial justice system and to provide a level of autonomy within the community to make their own justice decisions, in a manner that is culturally appropriate.

Nishnawbe-Aski Legal Services in Thunder Bay (Canada) also run youth community sentencing programs that are based on a restorative justice, mediation process. This system is utilised across a whole range of charges including as serious as assault. After a finding of guilt, the court will hand over the young person to the community council who will engage (most times) with the victim(s) who will also play a role in determining sentence. The mediation/ sentencing circle may also include a community elder, the circle facilitator (Nishnawbe-Aski Legal staff member), police representative, family members and community chief/ head elder.

The sentencing conditions will be agreed upon by the members of the circle and the offender, and will be monitored by the relevant community workers. Once the sentence has been completed, the offender returns to courts and with their worker, establishes to the court that their sentence has been completed under community direction. Once this is the case, the charges are dropped from the official record and the offender does not have a criminal record. If the offender does not successfully complete the community sentencing program, they are hand-balled back to the mainstream courts and sentenced accordingly, which of course may result in a criminal record and harsher, mainstream penalty. This process is active in reducing recidivism.

VALS supports such systems of community control over mediation and culturally appropriate community sentencing solutions, in particular in low level offences and children and young people.

Studies in Australia have also proven that community led, culturally appropriate diversion programs, for example, have far higher rates of success than those that are run by non-Indigenous agencies. In the same manner, culturally appropriate, community based sentencing methods that are rooted in traditional practices of Indigenous sentencing. An example of this is Victoria is Wulgunggo Ngalu Learning Place in Gippsland, which is a community led, culturally based centre for Aboriginal men to assist them to complete Community Corrections Orders (“CCOs”). The programs are run all with culture at the centre, and is proven to have higher completion rates of CCOs for Aboriginal men and contributed to reducing recidivism.

*Question 4–5 Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?*

VALS advocates that a similar legislation be introduced in each state and territory, and federally, akin to that of s718.2(e) by which due consideration must be given to the disparate and unique impacts of colonisation on Aboriginal and Torres Strait Islander peoples during sentencing and mandate the judiciary to consider and find each and every alternative to incarceration. In support of such a legislation, VALS advocates strongly for provisions to be made for diversion and therapeutic sentencing, as well as justice reinvestment initiatives in the first instance.

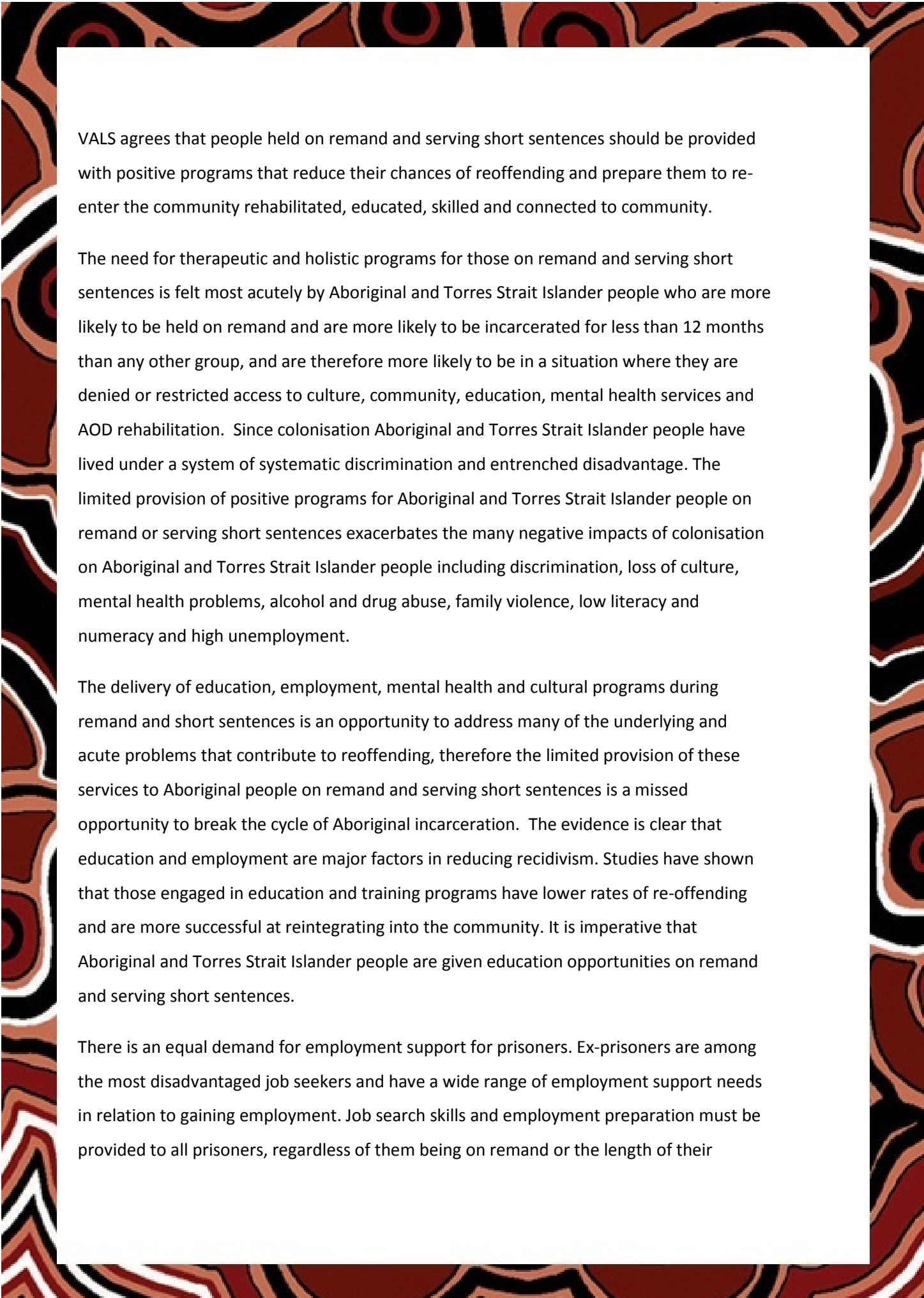
Furthermore, legislative reform is required to ensure a greater role based on Aboriginal and Torres Strait Islander community leadership groups – such as elders or community councils – to deal with low level offences and find suitable, community led and culturally appropriate sentencing regimes. This will ensure that Aboriginal and Torres Strait Islander communities have a greater say and element of self-determination with respect to justice outcomes. As already discussed with reference to community run diversion programs in Australia and those community sentencing models in Canada, community run justice initiatives have better outcomes due to the element of self-governance and basis in cultural practices.

How these alternative sentencing outcomes will look should be decided upon by the relevant community and should be able to have flexibility to ensure community responses are appropriate for the cultural and language groups.

### PRISON PROGRAMS, PAROLE AND UNSUPERVISED RELEASE

*Proposal 5–1 Prison programs should be developed and made available to accused people held on remand and people serving short sentences.*



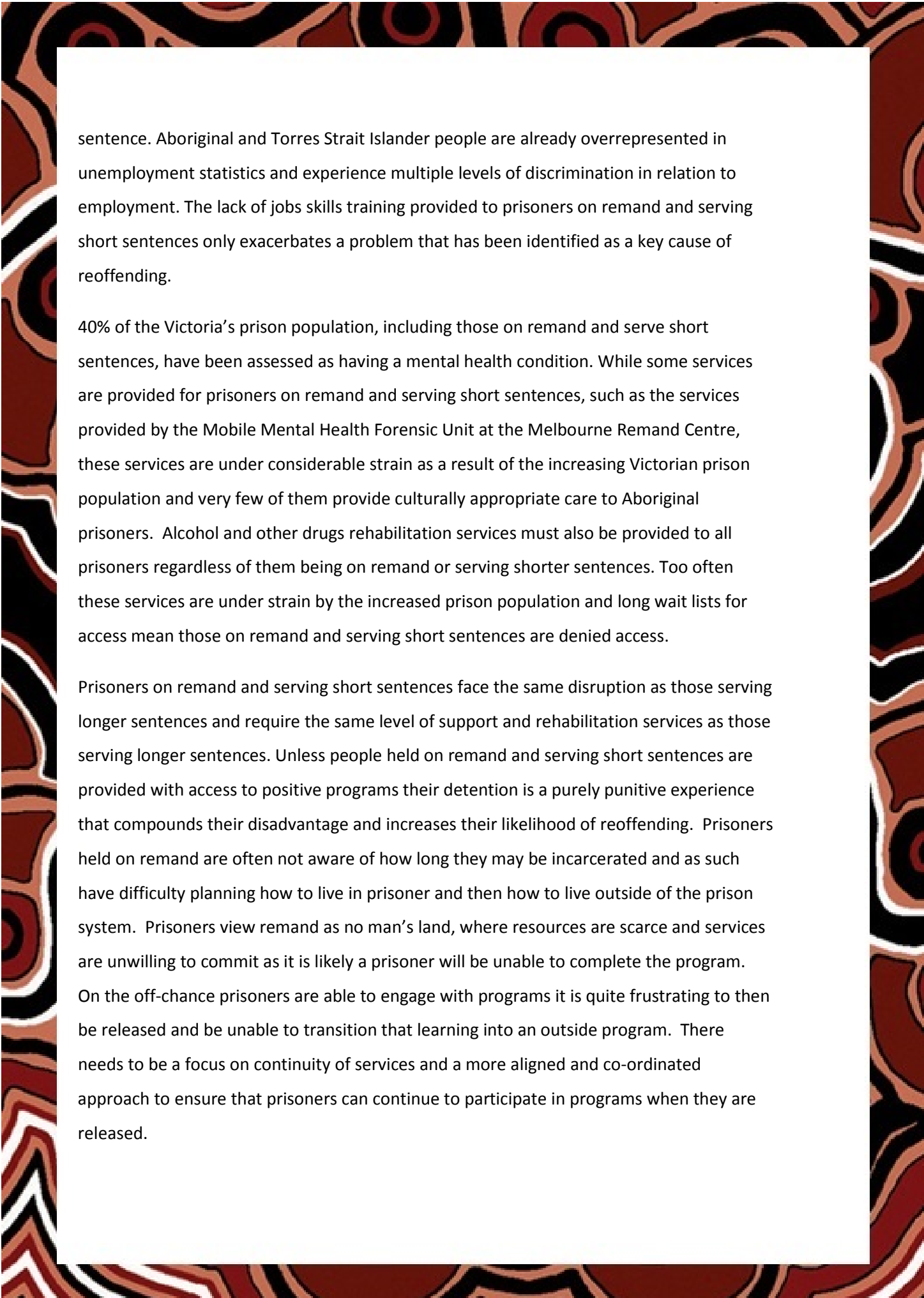


VALS agrees that people held on remand and serving short sentences should be provided with positive programs that reduce their chances of reoffending and prepare them to re-enter the community rehabilitated, educated, skilled and connected to community.

The need for therapeutic and holistic programs for those on remand and serving short sentences is felt most acutely by Aboriginal and Torres Strait Islander people who are more likely to be held on remand and are more likely to be incarcerated for less than 12 months than any other group, and are therefore more likely to be in a situation where they are denied or restricted access to culture, community, education, mental health services and AOD rehabilitation. Since colonisation Aboriginal and Torres Strait Islander people have lived under a system of systematic discrimination and entrenched disadvantage. The limited provision of positive programs for Aboriginal and Torres Strait Islander people on remand or serving short sentences exacerbates the many negative impacts of colonisation on Aboriginal and Torres Strait Islander people including discrimination, loss of culture, mental health problems, alcohol and drug abuse, family violence, low literacy and numeracy and high unemployment.

The delivery of education, employment, mental health and cultural programs during remand and short sentences is an opportunity to address many of the underlying and acute problems that contribute to reoffending, therefore the limited provision of these services to Aboriginal people on remand and serving short sentences is a missed opportunity to break the cycle of Aboriginal incarceration. The evidence is clear that education and employment are major factors in reducing recidivism. Studies have shown that those engaged in education and training programs have lower rates of re-offending and are more successful at reintegrating into the community. It is imperative that Aboriginal and Torres Strait Islander people are given education opportunities on remand and serving short sentences.

There is an equal demand for employment support for prisoners. Ex-prisoners are among the most disadvantaged job seekers and have a wide range of employment support needs in relation to gaining employment. Job search skills and employment preparation must be provided to all prisoners, regardless of them being on remand or the length of their



sentence. Aboriginal and Torres Strait Islander people are already overrepresented in unemployment statistics and experience multiple levels of discrimination in relation to employment. The lack of jobs skills training provided to prisoners on remand and serving short sentences only exacerbates a problem that has been identified as a key cause of reoffending.

40% of the Victoria's prison population, including those on remand and serve short sentences, have been assessed as having a mental health condition. While some services are provided for prisoners on remand and serving short sentences, such as the services provided by the Mobile Mental Health Forensic Unit at the Melbourne Remand Centre, these services are under considerable strain as a result of the increasing Victorian prison population and very few of them provide culturally appropriate care to Aboriginal prisoners. Alcohol and other drugs rehabilitation services must also be provided to all prisoners regardless of them being on remand or serving shorter sentences. Too often these services are under strain by the increased prison population and long wait lists for access mean those on remand and serving short sentences are denied access.

Prisoners on remand and serving short sentences face the same disruption as those serving longer sentences and require the same level of support and rehabilitation services as those serving longer sentences. Unless people held on remand and serving short sentences are provided with access to positive programs their detention is a purely punitive experience that compounds their disadvantage and increases their likelihood of reoffending. Prisoners held on remand are often not aware of how long they may be incarcerated and as such have difficulty planning how to live in prisoner and then how to live outside of the prison system. Prisoners view remand as no man's land, where resources are scarce and services are unwilling to commit as it is likely a prisoner will be unable to complete the program. On the off-chance prisoners are able to engage with programs it is quite frustrating to then be released and be unable to transition that learning into an outside program. There needs to be a focus on continuity of services and a more aligned and co-ordinated approach to ensure that prisoners can continue to participate in programs when they are released.

For Aboriginal and Torres Strait Islander people to benefit from prison programs it is essential that the programs are culturally appropriate, in most cases this means the programs should be designed, managed and delivered by Aboriginal and Torres Strait Islander people. Victoria has a number of targeted Aboriginal programs that have delivered positive outcomes for those entering the community, including Men's Cultural Journey, Dilly Bag, the Torch and Growing Up Kids. However it is important that other essential prison programs are culturally appropriate and delivered to those on remand and serving short sentences, these include: anger management programs, alcohol and drug treatment, sex offender treatment, cognitive skills programs and jobs training.

#### Case Study

*Adam\* is a 43 year old Aboriginal male who has a long history with substance abuse whom VALS assisted through our ReConnect program. Adam advised his caseworker that his family was disconnected and whilst he was in jail he realised that he did not want this to be the case for him and his children. Adam stated that he thought that he needed to change, not just for him, but for his children so that he could see them and develop a relationship with them to prevent them from being further disconnected from family and culture like he was. Adam had found that one of the best diversions for him from further offending was art and he wanted to use this diversion to change so that he could assist his youngest son whom was having some difficulties in foster care and behaving badly.*

*Adam did not have anywhere to go post release as he had spent the majority of his life couch surfing and his parents were unable to assist due to their own personal issues. Adam had put in applications for housing but was concerned at the long waiting list. The caseworker was able to assist Adam to put in an application for CVSHP housing as they had been notified of vacancies.*

*Adam advised the caseworker that he had long standing issues with drugs and alcohol and wanted to attend Wulgunggo Ngalu Learning Place. The caseworker assisted Adam to submit an application and supported him through the assessment process. Adam was able to secure a place at Wulgunggo Ngalu where he received assistance with drugs & alcohol, mental health, life skills and cultural strengthening. Adam was also assisted with his art and was supported and guided by the*

caseworker in how to advertise and sell his artwork to earn income. Adam was also supported to undertake cultural strengthening activities which he reported as never having done before but being needed in order to address the disconnect from family and culture he felt. After being discharged from Wulgunggo Adam reported, over the proceeding months, as being committed to staying out of jail and indicated an intention to support his family and undertake a TAFE course on art.

*Question 5–1 What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander peoples held on remand or serving short sentences of imprisonment?*

Rehabilitation of prisoners is more effective when the treatment meets the specific needs of the offender and is delivered in a style and mode that is consistent with the culture needs, ability and learning style of the offender. Aboriginal and Torres Strait Islander people are denied the benefits of many rehabilitation programs because so many of them are not designed or delivered in a culturally appropriate way and Aboriginal and Torres Strait Islander programs are severely under-resourced. The 2015 Victorian Ombudsman's report on the rehabilitation and reintegration of Victorian prisoners found that many of the Aboriginal and Torres Strait Islander programs ran infrequently, were often cut short and were repeated to the same prisoners without changes.<sup>50</sup>

For programs to be effective in responding the needs of Aboriginal and Torres Strait Islander people on remand and serving short sentences they must:

- Managed, designed and delivered by Aboriginal and Torres Strait Islander people. Aboriginal people have reported feeling shame and distrust at mainstream services. Aboriginal workers understand, share and respect the cultural background and needs of Aboriginal prisoners. Aboriginal prisoners are less likely and able to speak freely with non-Aboriginal people who don't have a shared history of discrimination and marginalisation.

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<sup>50</sup> Victorian Ombudsman, *Inquiry into the Rehabilitation and Reintegration of Prisoners in Victoria*, September 2015, accessed on 31 August 2017 at <https://www.ombudsman.vic.gov.au/getattachment/5188692a-35b6-411f-907e-3e7704f45e17>

- Well-resourced and consistent. The Marumali Stolen Generations program was not delivered at any prison during the 2008-9 or 2010-11 financial years and other programs have been cut short.
- Supported by case-management from Aboriginal Community Controlled Organisations.
- Prison officials undergo cultural awareness training and be instructed to refrain from judging the cultural identity of Aboriginal prisoners, such as using labels like 'traditional' and 'non-traditional'
- Provision for engagement with an Aboriginal Community Controlled Organisation prior to release to discuss appropriate transition plans, such as housing, Centrelink and employment, and to ensure the offenders understand the requirements of bail or parole conditions.
- Designed around the Aboriginal concept of health which is described as being, "holistic, encompassing mental health and physical, cultural, and spiritual health. Land is central to well-being. This holistic concept does not merely refer to the 'whole body' but in fact is steeped in the harmonized inter-relations which constitute cultural well-being. These inter-relating factors can be categorized largely as spiritual, environmental, ideological, political, social, economic, mental and physical."<sup>51</sup>
- Access to legal and community supports to address issues such as housing, family violence, drugs and alcohol, mental health and child protection support.

### Case Study

*Patrick\* is a 43 year old Aboriginal man who required support to reintegrate back into his community. Patrick is a father of a 13-year-old son and also has adult step children and wanted to set a good example for his children upon his release by not drinking alcohol and focusing on spending quality time with his son. Patrick indicated during pre-release contact visits that he would require*

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<sup>51</sup> Swan, P. & Raphael, B. 1995, 'Ways Forward' National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health, Part 1 and Part 2, Australian Government Publishing Service, Canberra. <<http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-w-wayfo>>.

*assistance initially in coordinating his appointments and ensuring he is linked with the correct services whilst completing a Community Corrections Order.*

*During pre-release visits, Patrick informed the caseworker that historically he had regularly consumed illicit drugs however he had no desire to resume that behaviour. Although Patrick was committed to remaining drug free he did identify that he had significant issues with alcohol that had gone unaddressed. The caseworker explained that he would need to undertake alcohol treatment as it was part of the requirements of his release and that we could support him to do that. Patrick disclosed a number of physical and mental health issues that required the caseworker to conduct referrals and ensure that Patrick had services to attend upon release. Due to Patrick's memory loss he was also supported to attend appointments and an assessment of his support system was conducted.*

*Patrick was residing with his partner at the time of incarceration, however due to an intervention order he could not return to the family home. Patrick was aware of housing support services in his local area, however he could not receive assistance due to his family violence history. Upon Patrick's release the caseworker assisted Patrick with his housing needs as well as providing emergency relief. It was also identified that Patrick would need assistance with using public transport to get to and from any new residence and as a result the caseworker was able to provide assistance with this. Without this assistance it would be unlikely Patrick could attend his medical appointments or that he could attend visits with Corrections.*

*Prior to Patrick going to prison, he was receiving a Disability Support Pension from Centrelink and has continued on this payment upon his release. Patrick was encouraged by the caseworker to set employment and/or education goals for himself and one of the major ones he identified was obtaining part-time employment as a cleaner so that he could support himself and assist his family. Patrick also identified that he would like to learn more about Aboriginal art and culture and as a result the caseworker identified art and cultural activities that Patrick could engage in when released.*

*Patrick is very positive about the progress he is making. Overall, VALS worked with Patrick for 12 months, varied the intervention order so he could return to live with his family, provided support to navigate public transport, made appointments, attended community events with Patrick and*

*supported Patrick to care for himself. RC Patrick has not reoffended and an exit plan was developed collaboratively with Patrick.*

***Proposal 5–2** There are few prison programs for female prisoners and these may not address the needs of Aboriginal and Torres Strait Islander female prisoners. State and territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.*

VALS has developed a proposed 'economic participation facility' which aims to assist and transition exiting Aboriginal and Torres Strait Islander female prisoners. VALS has delivered outreach to Dame Phyllis Frost women's prison since 2011 and has recently dedicated increased resources to meeting both the legal and non-legal needs of women living in prison. This proposal also encompasses the development of an economic participation facility, where all jobs available are special measures positions dedicated to supporting people exiting prison to engage in education and employment. Every position would mentor a trainee in the same area. The facility will comprise a residential arrangement, which provides independent living. The residents will be expected to pay rent, manage a budget, maintain their accommodations in good order and make a labour contribution to the ongoing operations of the centre.

VALS notes that there are a few prison programs for Aboriginal and Torres Strait Islander female prisoners that are holistic, culturally appropriate and specific to their needs. Much of the current research base looks at the needs of the Aboriginal and Torres Strait Islander prisoner population as a whole rather than considering the specific needs and causes of offending for Aboriginal and Torres Strait Islander females. Therefore, VALS recommends that the Commonwealth Government undertakes research into the programmatic needs of Aboriginal and Torres Strait Islander female prisoners.

***Question 5–2** What are the best practice elements of programs for Aboriginal and Torres Strait Islander female prisoners to address offending behaviour?*

The criminal justice system for indigenous communities is a source of harm. If anything, the operation of that system has aggravated the social and economic disadvantage of indigenous persons. It has done so historically and continues to do so. Moreover, that same system has by the means by which it imposes punitive punishments such as imprisonment has undermined what has been termed the 'social capital' of indigenous communities.<sup>52</sup> The term 'social capital' extends the analysis of the impacts of imprisonment from beyond the individual subject to the term of imprisonment to the family and community of the person subject to that punishment. One study looking at social capital conducted by Hagan & Dinovitzer found:

*'The most obvious concern is that the effects of imprisonment damage the human and social capital of those who are incarcerated, their families, and their communities, including the detrimental impact of imprisoning parents on their children. Less obvious concerns involve foregone opportunities to invest in schools and the selective direction of existing and new resources away from minority to majority group communities where prisons are being built and operated. More specifically, imprisonment may engender negative consequences for offenders whose employment prospects after release are diminished; for families who suffer losses both emotional and financial; for children who suffer emotional and behavioural problems due to the loss of a parent, financial strain, and possible displacement into the care of others; for communities whose stability is threatened due to the loss of working males; and for other social institutions that are affected by the budgetary constraints imposed by the increases in spending on incarceration'.<sup>53</sup>*

In Victoria, in adult prisons, Aboriginal people are incarcerated at higher rates than non-Aboriginal people per head of population, and the gap is rising. From 2005 to 2016, the Aboriginal

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<sup>52</sup> Hagan, J & Dinovitzer, R, 'Collateral Consequences of Imprisonment for Children, Communities and Prisoners' in M Tonry & J Petersilia (eds.) *Prisons: Crime and Justice: An Annual Review of Research*, Vol. 26, (1999) University of Chicago Press, 121-162

<sup>53</sup> Hagan, J & Dinovitzer, R, 'Collateral Consequences of Imprisonment for Children, Communities and Prisoners' in M Tonry & J Petersilia (eds.) *Prisons: Crime and Justice: An Annual Review of Research*, Vol. 26, (1999) University of Chicago Press, 121-162



imprisonment rate increased from 957 to 1,541 prisoners per 100,000<sup>54</sup>, an increase of 70%, compared to a 34% increase in the non-Aboriginal population. Aboriginal Victorians are now well over ten times more likely to be imprisoned than the general population.<sup>55</sup> Aboriginal unsentenced prisoners account for 27% of all unsentenced prisoners nationally and they are likely to spend 2.4 months on remand.<sup>56</sup> These statistics outline the aggregate pain of indigenous communities but they don't do justice to collective story of the Aboriginal person to whom the State is inflicting pain upon. Individuals not only suffer the humiliation and isolation of prison which only reinforces the negative conceptions they have of themselves, but they also feel as though they have irreparably damaged their family who relied on them economically, socially and feel inordinate guilt for the children they leave behind.

In order to address offending behaviour and the harm caused by periods of imprisonment Aboriginal and Torres Strait Islander female offenders require programs that contain the following elements:

- A layered approach to exiting prison that provides varying levels of light and intensive intervention levels so that service delivery can be tailored to meet individual needs
- Provision for engagement prior to release to discuss appropriate transition plans and ensure the offenders understand their release conditions and who to contact if they run into difficulty.
- A wrap around service delivery model involving eight major areas of Aboriginal service delivery in Victoria:
  - Culture;
  - Employment;
  - Health;
  - Education;
  - Housing;

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<sup>54</sup> ABS, Prisoners in Australia 2016, Catalogue 4517.0

<sup>55</sup> Darby, 'Victoria's Prison Population 2005 to 2016', Sentencing Advisory Council, 2016, page 13.

<sup>56</sup> Ibid.

- Community services;
  - Legal services; and
  - Youth and child specialist services.
- Development of life plans which have specific, measurable, achievable, realistic and timely actions, and which are supported through a case management model with a coaching/mentoring focus.
  - Designed around the Aboriginal concept of health which is *“holistic, encompassing mental health and physical, cultural, and spiritual health. Land is central to well-being. This holistic concept does not merely refer to the ‘whole body’ but in fact is steeped in the harmonized inter-relations which constitute cultural well-being. These inter-relating factors can be categorized largely as spiritual, environmental, ideological, political, social, economic, mental and physical”*<sup>57</sup>.
  - Consistent case management by an Aboriginal Community Controlled Organisation.
  - Access to legal and community supports to address issues such as housing, family violence, drugs and alcohol, mental health and child protection support.
  - Access to brokerage funds to allow Aboriginal Community Controlled Organisations to provide relevant supports for the offenders’ reintegration into the community and to assist in supporting the offenders’ family to visit regularly, engage in family mediation/dispute resolution if required and to support the offender to visit their community and commence their journey home.

*Proposal 5–3 A statutory regime of automatic court ordered parole should apply  
in all states and territories.*

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<sup>57</sup> Swan, P. & Raphael, B. 1995, ‘Ways Forward’ National Consultancy Report on Aboriginal and Torres Strait Islander Mental Health, Part 1 and Part 2, Australian Government Publishing Service, Canberra.  
<<http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-w-wayfo>>.

VALS supports the proposal that automatic court ordered parole should apply in all states and territories, but stresses that such a regime will only be effective if parole support services are increased and a greater emphasis is given to support and rehabilitation overly stringent supervision.

There is evidence that court-ordered parole in Queensland has been effective in reducing the number of low-risk prisoners on short-sentences. This is because 40 per cent of people that receive court-ordered parole are paroled straight from court, thus diverting them from prison. There is also evidence that 80 per cent those paroled straight from court successfully complete their parole order, which is a positive sign of rehabilitation and reduces the likelihood of reoffending.<sup>58</sup> Well-resourced and rehabilitation-focused parole support reduces reoffending. A study by the Australian Institute of Criminology found that 'more active supervision can reduce parolee recidivism but only if it is rehabilitation focused.'<sup>59</sup> Services like the VALS' Reconnect program have proven successful in supporting prisoners on parole by providing a post-release worker who assists them in identifying and achieving goals, transitioning back into the community and meeting their parole conditions. VALS believes any changes to the parole system must be rehabilitation focused and increase funding to programs like Reconnect that have a proven track record of reducing reoffending.

Unfortunately clients of VALS experience a parole system that is overly stringent and punitive, which has led to extended periods of incarceration. Since the changes to Victorian parole conditions in 2013 there has been a sharp increase in prisoners 'maxing out' their sentences to avoid parole. This has contributed to the increase in the prison population and to increased recidivism as people are leaving prison with no support services. The changes have also led to parolees being punished twice for parole breaches, as a breach of parole is now a separate criminal offence punishable by jail time.

VALS also believes that any changes to the parole system in Victoria should adopt the rules of procedural fairness. The current system of parole in Victoria provides the Community Correctional

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<sup>58</sup> Balanced Justice, *Court Ordered Parole*, 29 August 2013, accessed on 27 August 2017 at [http://www.balancedjustice.org/uploads/1/3/1/0/13108841/final - court ordered parole.pdf](http://www.balancedjustice.org/uploads/1/3/1/0/13108841/final_-_court_ordered_parole.pdf)

<sup>59</sup> Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice no. 485*, 24 April 2015, accessed on 27 August 2017 at <http://aic.gov.au/publications/current%20series/tandi/481-500/tandi485.html>

Services with substantial discretion in assessing breaches of parole and there are no opportunities for those that breach parole to seek advice, judicial oversight or review of the decision. The adoption of procedural fairness for parolees will encourage increased positive participation of prisoners in parole proceedings and will contribute to the rehabilitation and reintegration of prisoners into society, which is in the wider interests of community safety.

*Question 5–3 A statutory regime of automatic court ordered parole applies in NSW, Queensland and SA. What are the best practice elements of such schemes?*

Court ordered parole in NSW, Queensland and SA have produced mixed results in reducing reoffending. Some states have seen an increase in parole breaches for those on court ordered parole and therefore greater jail time and a continuation of the cycle of reoffending.

There are three elements that are required for the successful operation of court ordered parole:

- In cases of revocation of parole, the time spent on parole should be taken from the remaining sentence. Time on parole should be recognised as time served. This provides an incentive for those with limited parole support to comply with parole conditions
- Parole supervision must be rehabilitation focused and not overly stringent. The recent strengthening of Victorian parole conditions led to a sharp increase in revocation of parole based on allegations, suspicion and minor breaches. It has also led to the prisoners completing their full sentences in order to avoid parole conditions, and therefore entering the community with little or no support services.
- People on parole must be linked in with relevant services, including housing, health, job support and services that are gender and culturally appropriate. In Victoria only 700 of the 6,600 people on parole each year were provided with transitional support.<sup>60</sup>

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<sup>60</sup> Jesuit Social Services, *Reducing Reoffending: the Key to Creating Safer Communities*, 17 September 2015, accessed on 25 August 2017 at <https://jss.org.au/reducing-reoffending-the-key-to-creating-safer-communities-ombudsman-report/>

*Proposal 5–4 Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.*

VALS strongly agrees that time spent on parole should be recognised as time served. Such a change would create a considerable incentive for parolees to successfully complete their parole and comply with parole conditions that improve their rehabilitation prospects and reduce recidivism. Therefore reducing the incarceration and increasing rehabilitation.

Under the current system in Victoria parolees can have parole revoked for a minor breach, such as being minutes late to a curfew, and be back in prison serving the full remainder of their sentence. Recognising time spent on parole is a way of recognising and rewarding the positive actions of parolees towards rehabilitation and is in stark contrast to the current system in Victoria, which is a punitive approach that provides little incentive for parolees to comply with parole conditions and severe punishment, such as a separate criminal conviction, for breaches of parole.

### FINES AND DRIVER LICENCES

VALS refers to the joint submission of the Infringements Working Group (IWG) and VALS on the topic of fines and driver's licences.

### JUSTICE PROCEDURE OFFENCES

#### *Sentences*

*Proposal 7–1 To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services*

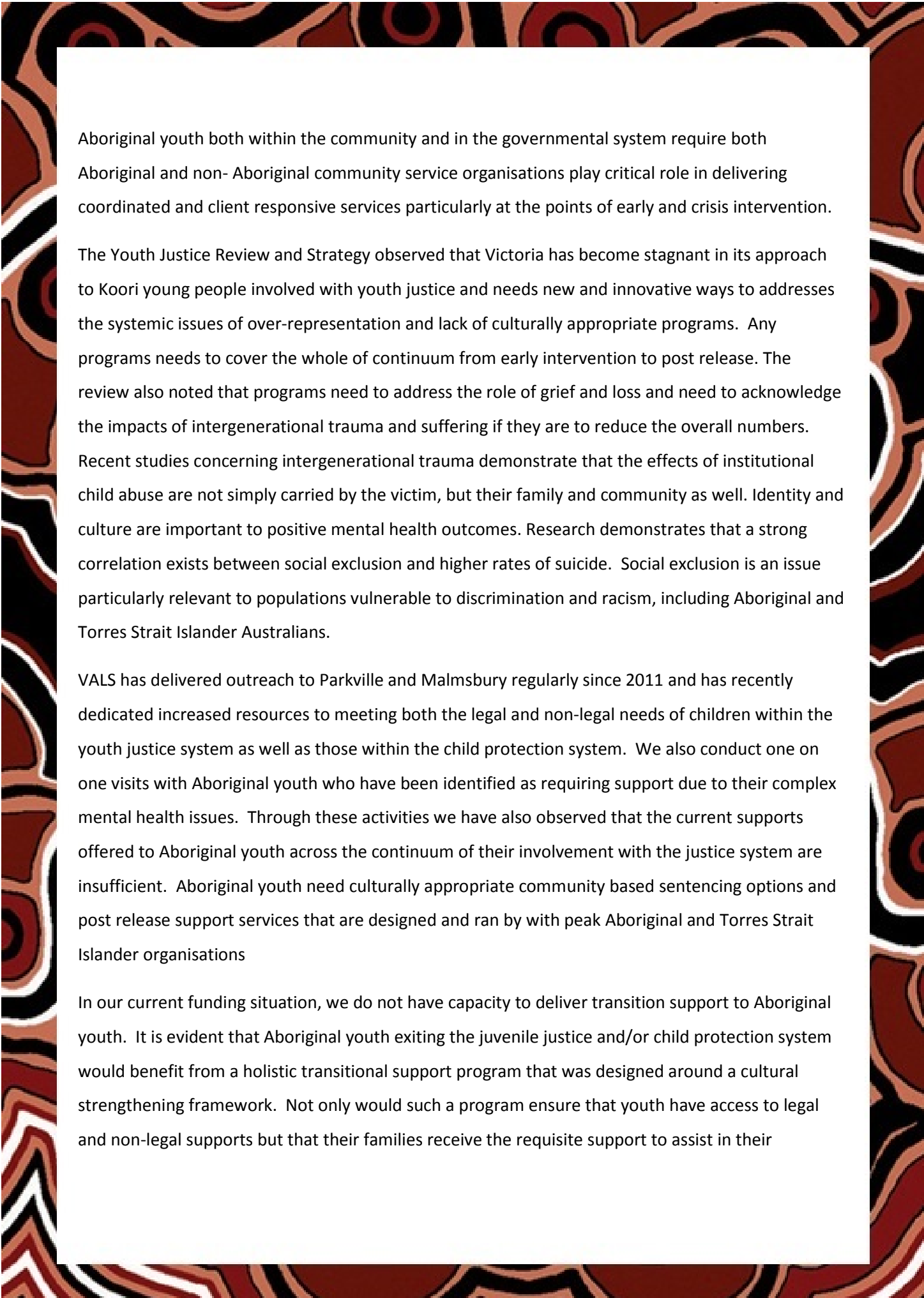
VALS supports the view that community based sentences should be utilised as alternatives to prison in any instance possible. Community based sentences should be used in instances of offending which would normally attract a short-term sentence of two years or less, and when the individual is deemed not to be a risk to the community. The test for this should be akin to that of bail provisions under s3A of the Bail Act, which also includes cultural obligations as a considering factor when determining bail.

VALS also supports the development and funding of community led and culturally appropriate programs and facilities to support Aboriginal and Torres Strait Islander people to complete community based sentences. An example of this in Victoria is Wulgunggo Ngalu Learning Place in Gippsland, a community led, culturally based centre for Aboriginal men to assist them to complete CCO's. The programs all have culture at the centre, and the program and centre overall – which people must apply to get into - is proven to have higher completion rates of CCOs for Aboriginal men and contributed to reducing recidivism.

Furthermore, VALS also supports a model of community led justice for low level offences, by way of community councils akin to those utilised in Canada. This method sees the offender present before a council of elders who prescribe the necessary community based sentence. This would ensure that the sentence is overseen by elders in the community, and that the programs and sentencing alternative can be community run. Such a scheme would also ensure that traditional ways of dispensing justice can be used by way of mediation and sentencing circles, and as has been seen with the success of elder-led and community run cultural diversion programs, and that of Wulgunggo Ngalu Learning Place, Aboriginal directed justice programs have better outcomes than those directed by non-Indigenous corrections agencies.

### **Young Offenders**

The severe disadvantage experienced by Aboriginal and Torres Strait Islander people is well documented and continues. Their over-representation in the justice system is a product of this disadvantage and the rising rates of Aboriginal youth in youth justice and child protection indicates that existing programs are not effectively breaking this cycle of disadvantage. The experiences of

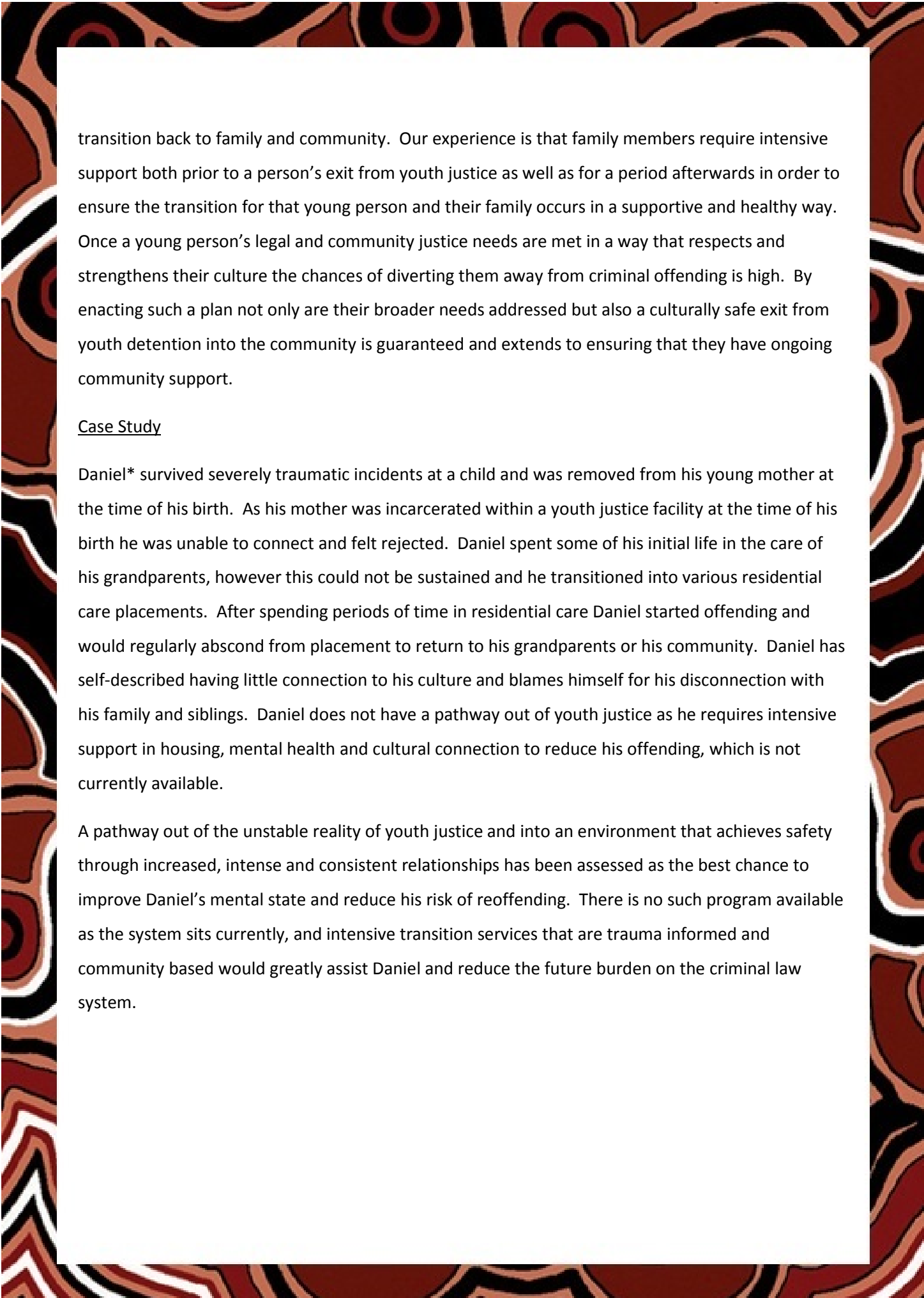


Aboriginal youth both within the community and in the governmental system require both Aboriginal and non- Aboriginal community service organisations play critical role in delivering coordinated and client responsive services particularly at the points of early and crisis intervention.

The Youth Justice Review and Strategy observed that Victoria has become stagnant in its approach to Koori young people involved with youth justice and needs new and innovative ways to addresses the systemic issues of over-representation and lack of culturally appropriate programs. Any programs needs to cover the whole of continuum from early intervention to post release. The review also noted that programs need to address the role of grief and loss and need to acknowledge the impacts of intergenerational trauma and suffering if they are to reduce the overall numbers. Recent studies concerning intergenerational trauma demonstrate that the effects of institutional child abuse are not simply carried by the victim, but their family and community as well. Identity and culture are important to positive mental health outcomes. Research demonstrates that a strong correlation exists between social exclusion and higher rates of suicide. Social exclusion is an issue particularly relevant to populations vulnerable to discrimination and racism, including Aboriginal and Torres Strait Islander Australians.

VALS has delivered outreach to Parkville and Malmsbury regularly since 2011 and has recently dedicated increased resources to meeting both the legal and non-legal needs of children within the youth justice system as well as those within the child protection system. We also conduct one on one visits with Aboriginal youth who have been identified as requiring support due to their complex mental health issues. Through these activities we have also observed that the current supports offered to Aboriginal youth across the continuum of their involvement with the justice system are insufficient. Aboriginal youth need culturally appropriate community based sentencing options and post release support services that are designed and ran by with peak Aboriginal and Torres Strait Islander organisations

In our current funding situation, we do not have capacity to deliver transition support to Aboriginal youth. It is evident that Aboriginal youth exiting the juvenile justice and/or child protection system would benefit from a holistic transitional support program that was designed around a cultural strengthening framework. Not only would such a program ensure that youth have access to legal and non-legal supports but that their families receive the requisite support to assist in their



transition back to family and community. Our experience is that family members require intensive support both prior to a person's exit from youth justice as well as for a period afterwards in order to ensure the transition for that young person and their family occurs in a supportive and healthy way. Once a young person's legal and community justice needs are met in a way that respects and strengthens their culture the chances of diverting them away from criminal offending is high. By enacting such a plan not only are their broader needs addressed but also a culturally safe exit from youth detention into the community is guaranteed and extends to ensuring that they have ongoing community support.

#### Case Study

Daniel\* survived severely traumatic incidents at a child and was removed from his young mother at the time of his birth. As his mother was incarcerated within a youth justice facility at the time of his birth he was unable to connect and felt rejected. Daniel spent some of his initial life in the care of his grandparents, however this could not be sustained and he transitioned into various residential care placements. After spending periods of time in residential care Daniel started offending and would regularly abscond from placement to return to his grandparents or his community. Daniel has self-described having little connection to his culture and blames himself for his disconnection with his family and siblings. Daniel does not have a pathway out of youth justice as he requires intensive support in housing, mental health and cultural connection to reduce his offending, which is not currently available.

A pathway out of the unstable reality of youth justice and into an environment that achieves safety through increased, intense and consistent relationships has been assessed as the best chance to improve Daniel's mental state and reduce his risk of reoffending. There is no such program available as the system sits currently, and intensive transition services that are trauma informed and community based would greatly assist Daniel and reduce the future burden on the criminal law system.



## *Alcohol*

*Question 8–1 Noting the link between alcohol abuse and offending, how might state and territory governments facilitate Aboriginal and Torres Strait Islander communities, that wish to do so, to:*

*(a) develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example through such things as minimum pricing, trading hours and range restriction;*

*(b) develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?*

*Question 8–2 In what ways do banned drinkers' registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?*

Given that the legislation referred to in questions 8-1 and 8-2 is based in jurisdictions other than Victoria, VALS supports the recommendations made in the NATSILS paper.

## FEMALE OFFENDERS

*Question 9–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?*

Aboriginal and Torres Strait Islander women are the fastest growing prisoner population in Australia. Since the landmark Royal Commission into Aboriginal Deaths in Custody, the rate of Aboriginal and Torres Strait Islander women's imprisonment has grown 248% and there is no indication that the rate is declining. Sadly, Aboriginal and Torres Strait Islander women comprise 34% of women in

prison and many more are in and out of courts and police cells on a daily basis. Often these women enter into the criminal justice system due to socio economic disadvantage, being a victim of physical and social violence, lack of stable housing, mental illness, disability and the effects of trauma, not to mention the discrimination laws and policies they face each day. The current criminal justice processes do more to punish and entrench disadvantage rather than assisting Aboriginal and Torres Strait Islander women to break the cycle of disadvantage and take a path towards healing.

VALS is of the view that there are a number of reforms required to strengthen diversionary options and improve the criminal justice process for Aboriginal and Torres Strait Islander women. It is time that we take advantage of an opportunity to prioritise preventative and diversionary approaches that are geared towards addressing the underlying causes of offending rather than focusing on a tough law and order approach. It is important that we take this step now as around 80% of Aboriginal and Torres Strait Islander women in prisons are mothers and when they enter prison these children too often end up in the care of the state which breaks down family and community structures and contributes not only to the disintegration of culture but to increased demand on child protection and youth justice systems. Solutions need to be holistic rather than simply responding the consequences of offending and need to be designed and implemented in genuine partnership with Aboriginal Community Controlled Organisations and communities.

Investment needs to be made into communities rather than prisons and needs to be focused on strengthening communities to address the underlying causes of offending in a way that will achieve long lasting outcomes and generational change. Redirecting funding from prisons to community-based prevention and early-intervention measures is commonly referred to as 'justice reinvestment' and is being trialled most prominently in Bourke, New South Wales and Ceduna, South Australia. It is based on evidence that demonstrates that strong and healthy communities are most effective in preventing crime and promoting safety. Experience from overseas shows that justice reinvestment initiatives can reduce crime and imprisonment rates, cut government spending on prisons and strengthen communities.<sup>61</sup> Any approach must ensure that Aboriginal and Torres Strait Islander

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<sup>61</sup> See, eg, Justice Center, Council of State Governments, *Justice Reinvestment in Kansas* (2007) 2; Nancy LaVigne et al, *Justice Reinvestment Initiative State Assessment Report* (Urban Institute, 2014) 3-4.

women are at the heart of the design, implantation and evaluation process and have the ability to inform how the programs proceed.

The following considerations should be borne in mind when reforming existing diversionary and criminal justice process:

1. Homelessness and poverty increase the chances of individuals entering the criminal justice system.<sup>[1]</sup> A lack of stable accommodation renders individuals more likely to breach community based orders, parole and bail.<sup>[2]</sup> Indirectly discriminatory laws mean that homelessness and low socio-economic status, which render compliance with fines and court orders difficult, are contributing factors to the disproportionate number of Aboriginal and Torres Strait Islander women in prison. An inability to secure stable accommodation also contributes to Aboriginal and Torres Strait Islander women being denied diversion opportunities through bail and instead being placed into prison on remand. All of these factors impose a cycle of incarceration on Aboriginal and Torres Strait Islander female offenders.
2. Disconnection from country and culture, and the inter-generational effects of historic treatment of indigenous people, plays a role in the over-representation of Aboriginal and Torres Strait Islander people in prison.
3. Drug and alcohol abuse are detrimental to individuals and to entire communities, and require health-focused responses rather than punitive treatment.<sup>[3]</sup>
4. A substantial number of Aboriginal and Torres Strait Islander women are entering the criminal justice system with an undetected disability. As acknowledged in the Discussion Paper, Aboriginal and Torres Strait Islander women with cognitive impairment have some of the highest rates of the criminal justice system of any social group, and are significantly overrepresented compared to men.<sup>[4]</sup> Mental health conditions can contribute to incarceration rates, and are also relevant to the effects of incarceration on individuals.<sup>[5]</sup>
5. Family violence and domestic violence is linked to offending and incarceration. The combination of family violence, removal of children and overrepresentation of Aboriginal and Torres Strait Islander women in prison necessitates immediate action to provide culturally competent and accessible family violence legal services.

### ***Diversiory options are preferable to incarceration***

Community based prevention and early intervention measures can help to reduce the overrepresentation of Aboriginal and Torres Strait Islander women in the criminal justice system. Diversiory options, including treatment, healing, family support, education and training programs, reduce the likelihood of reoffending, and are the most cost-effective option for dealing with minor offences. In general, Aboriginal people are often wary of receiving services from non-Aboriginal organisations. This can be anything from overt racism and being made to feel uncomfortable going to mainstream organisations, to simply feeling that, whilst good intentioned, non-Aboriginal service providers do not understand the cultural and social factors that impact upon and have very specific outcomes for Aboriginal people. This feeling is multiplied when interacting with complex systems in criminal, civil and family law.

Immediate and prompt responses are more likely to be successful when dealing with vulnerable Aboriginal and Torres Strait Islander women. Aboriginal and Torres Strait Islander clients are less likely to engage with services if they do not receive a quick response or if they feel that the culturally specific issues that affect them are not adequately understood. They are more inclined to let the matter go thinking that it is going to take considerable time to achieve progress or leave thinking that given the lack of understanding of their history and the issues affecting them there is no point to trying to engage. Therefore, any early intervention or diversiory programs for Aboriginal and Torres Strait Islander women should take place within Aboriginal communities and should be ran by Aboriginal Community Controlled Organisations to encourage meaningful engagement and promote long lasting change.

### ***Sentencing and bail laws should be amended***

VALS supports amendments to bail laws that disproportionately affect Aboriginal and Torres Strait Islander women. This includes:

1. Amendments to current bail legislation which would allow for the imposition of appropriate and reasonable conditions on bail; and

2. Amendments to current sentencing laws, including community based orders, to address the underlying causes of offending behaviour.

#### *Bail and Homelessness*

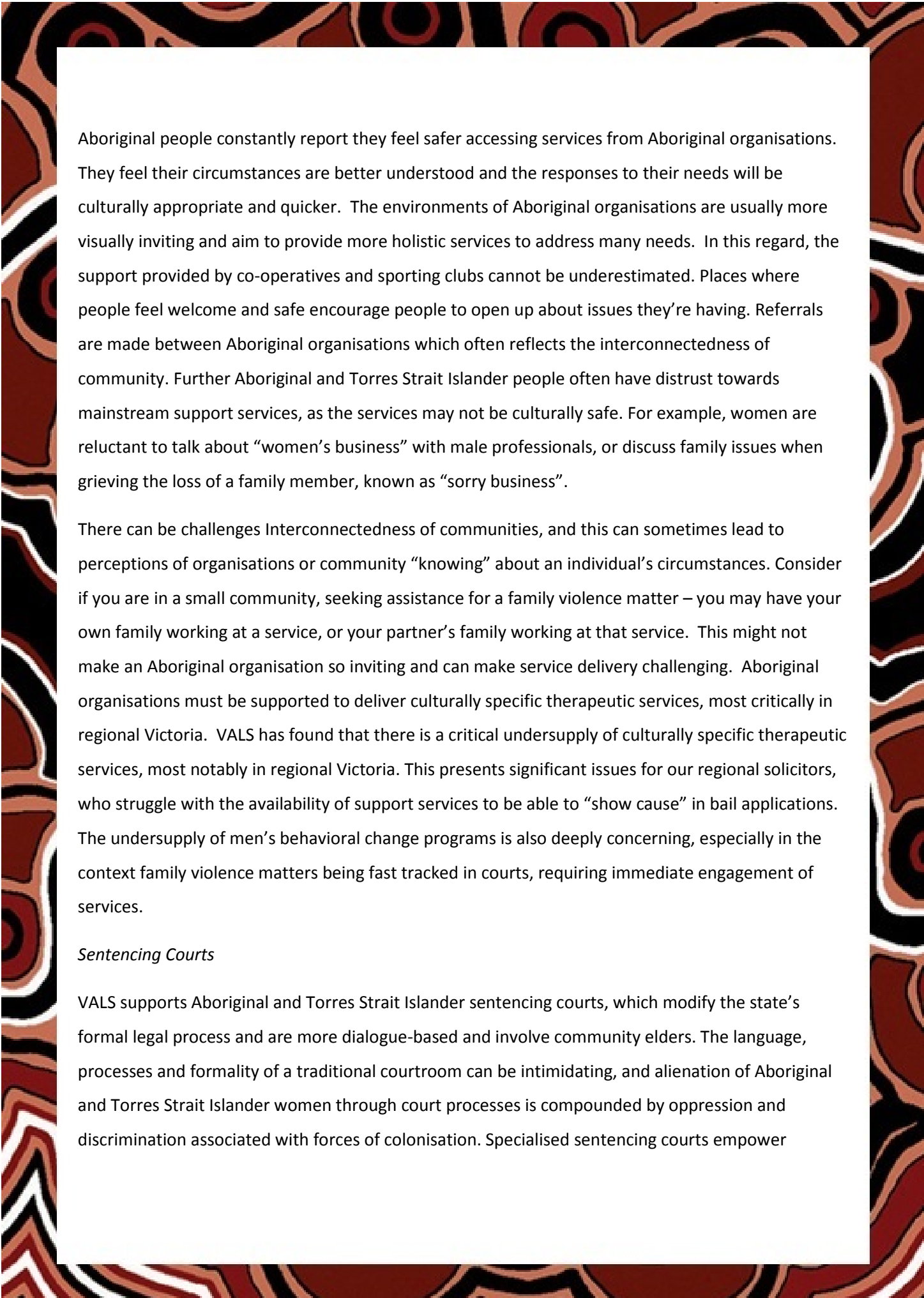
Aboriginal people are regularly placed on bail at the first instance due to a lack of housing, transience and/or criminal history. This means that they are more susceptible to being charged with bail offences which carries significant imprisonment sentences. Police often choose to initiate proceedings by way of bail, as opposed to summons, due to the requirement of a summons having to be personally served on the accused pursuant to s 16 of the *Criminal Procedure Act 2009 (CPA)*. If there are any doubts about the accused person's residency, police will ordinarily adopt bailing the accused on his or her own undertaking whilst the accused is at the police station. This then obviates the pressure of the informant having to locate the accused for personal service and adhere to the requirements set out in s 19 of the CPA.<sup>62</sup>

In doing so, police bail at the first instance fails to consider the social and cultural challenges Aboriginal people face due to severely limited and overcrowded conditions of public Aboriginal housing, Aboriginal displacement, and Aboriginal kinship ties to their country, which may require the person to travel to their homeland. It is also well established that Aboriginal and Torres Strait Islander people have been and continue to be over-represented within the criminal justice system. Accordingly, they are more likely to be placed on bail at the first instance than non-Aboriginal people when criminal histories are scrutinized. VALS believes that homelessness or transience must not be a relevant consideration for placing a person on bail at the first instance. VALS also believes that time limits should be introduced for which a person's criminal history can be taken into consideration when determining bail. We call for transparency in this regard and a review mechanism, so that the police decision to proceed by bail can be judicially scrutinized.

#### *Therapeutic Services*

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<sup>62</sup> We are also aware that Victoria Police's internal administrative processes of bailing the accused is less onerous on the informant than that of proceeding with a charge and summons (i.e. extra faxing requirements when proceeding by way of summons), which further provides a disincentive for the informant to proceed by way of an immediate summons.



Aboriginal people constantly report they feel safer accessing services from Aboriginal organisations. They feel their circumstances are better understood and the responses to their needs will be culturally appropriate and quicker. The environments of Aboriginal organisations are usually more visually inviting and aim to provide more holistic services to address many needs. In this regard, the support provided by co-operatives and sporting clubs cannot be underestimated. Places where people feel welcome and safe encourage people to open up about issues they're having. Referrals are made between Aboriginal organisations which often reflects the interconnectedness of community. Further Aboriginal and Torres Strait Islander people often have distrust towards mainstream support services, as the services may not be culturally safe. For example, women are reluctant to talk about "women's business" with male professionals, or discuss family issues when grieving the loss of a family member, known as "sorry business".

There can be challenges Interconnectedness of communities, and this can sometimes lead to perceptions of organisations or community "knowing" about an individual's circumstances. Consider if you are in a small community, seeking assistance for a family violence matter – you may have your own family working at a service, or your partner's family working at that service. This might not make an Aboriginal organisation so inviting and can make service delivery challenging. Aboriginal organisations must be supported to deliver culturally specific therapeutic services, most critically in regional Victoria. VALS has found that there is a critical undersupply of culturally specific therapeutic services, most notably in regional Victoria. This presents significant issues for our regional solicitors, who struggle with the availability of support services to be able to "show cause" in bail applications. The undersupply of men's behavioral change programs is also deeply concerning, especially in the context family violence matters being fast tracked in courts, requiring immediate engagement of services.

### *Sentencing Courts*

VALS supports Aboriginal and Torres Strait Islander sentencing courts, which modify the state's formal legal process and are more dialogue-based and involve community elders. The language, processes and formality of a traditional courtroom can be intimidating, and alienation of Aboriginal and Torres Strait Islander women through court processes is compounded by oppression and discrimination associated with forces of colonisation. Specialised sentencing courts empower

communities to take greater ownership of an element of the criminal justice process, provide a more culturally relevant sentencing process and encourage consideration of the wider circumstances of the lives of offenders and victims.<sup>[8]</sup>

### **Other reforms to criminal justice processes**

#### *Custody notification laws should be introduced*

VALS supports the introduction of a legislated custody notification system as it will increase the likelihood that Aboriginal and Torres Strait Islander people receive adequate legal support, and will help protect their welfare whilst in custody. When someone is arrested and detained they are at an elevated risk to life-threatening levels of anxiety, this is increased tenfold for Aboriginal and Torres Strait Islander people. In order to ensure the CNS is effective Aboriginal and Torres Strait Islander legal service must be adequately resourced to provide essential training to its employees in order for them to provide not only necessary legal support but to be able to identify suicidal ideation, deescalate anxiety, and provide a reassuring presence.

#### New South Wales

Under NSW legislation the police must contact the Aboriginal Legal Service whenever they detain an Aboriginal or Torres Strait Islander person. The detainee is subsequently provided with support, with early legal, health and welfare advice. This system has saved lives, and – because anxiety levels have been reduced – has also led to fewer Aboriginal and Torres Strait Islanders convicted in NSW when compared with other states where there is no CNS. Since the CNS was implemented in NSW in 2000, there had not been a single death of an Aboriginal or Torres Strait Islander person in a police watch house until recently. On 19 July 2016, 36-year-old Rebecca Maher died in the Maitland police watch house after the police had failed to contact the ALS advocate.

#### *Dedicated family violence courts should hear matters involving family violence*

VALS supports the development of dedicated family violence courts which employ a therapeutic approach to addressing cases of offending, accompanied by culturally competent programs and services.

*Access to legal representation for victims and alleged perpetrators of family violence should be improved*

VALS considers that there should be an increase in access to legal representation for victims and alleged perpetrators of family violence, noting the links between family violence and over-representation of women in prisons. This is critical because of the complex and interrelated legal issues associated with family violence, and the need for two streams of legal assistance to ensure multiple parties can access different legal services.<sup>[11]</sup> Further, responding to an incident of family violence should never be used as an opportunity to act upon an outstanding warrant against the victim, as this practice discourages victims to call the police or report violence.<sup>[12]</sup>

*Culturally competent, community controlled ADR services should be available as an alternative to litigation*

VALS supports alternative dispute resolution services which are culturally competent and community controlled as an alternative to litigation. This should include the establishment of indigenous-specific community controlled family dispute mediation services to better incorporate Aboriginal and Torres Strait Islander notions of child-rearing, kinship and family that are flexible when it comes to non-party attendance and are able to be conducted more than once to take account of the changing needs of Aboriginal families.

VALS also supports restorative justice approaches which enable victims to be part of the process if they wish. This approach takes into account the unique needs and culture of different Aboriginal and Torres Strait Islander communities, and may involve a series of mediations to address not only the individual harm that has been caused but also the collective harm to the community and the need to address the causes of the behaviour before progress can be made.

*Increasing the availability of prison programs for incarcerated female offenders*

There are limited programs available to incarcerated Aboriginal and Torres Strait Islander women and the programs that are available to them are not culturally specific nor do they adequately address some of the issues behind their offending, such as cultural loss and intergenerational trauma. VALS supports the development and implementation of specialised culturally safe programs



in prison to support Aboriginal and Torres Strait Islander women to commence the journey to healing whilst incarcerated. In order to build on any progress made within a culturally specific prison program VALS supports the development and implementation of specialised transition programs for Aboriginal and Torres Strait Islander women which target the risk of further offending while holistically addressing the needs of a client and their family to effect long lasting change.

### **Reforms to substantive criminal laws**

*Laws and policies which indirectly discriminate against Aboriginal and Torres Strait Islander women should be reviewed*

Laws and policies which unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women should be reviewed, with specific amendments including:

- decriminalising minor offences that are more appropriately dealt with in non-punitive ways (for example public drinking and offensive language);
- implementing alternative non-punitive responses to low-level offending and public drunkenness;
- abolishing laws that lead to imprisonment for failure to pay fines;
- abolishing paperless arrest laws; and
- amending the consequences of breaches of bail conditions to not constitute an offence.

*Consequences for fine defaults and minor offences should be reviewed with an aim of avoiding incarceration*

As recognised in the Discussion Paper, fine default laws have a disproportionate impact on the rate of imprisonment of Aboriginal and Torres Strait Islander women.<sup>[14]</sup>

Fine defaults have escalating consequences, and the detrimental effects of fines for minor offences are magnified when offenders are suffering from poverty. For example, the inability to pay a fine may eventually result in the disqualification of a drivers' licence. Many Aboriginal and Torres Strait Islander women have family responsibilities which require them to drive, for example caring for children, so the impact of losing a drivers' licence may lead to further offences (for example driving

without a licence). The escalating consequences of a fine default therefore may eventually lead to incarceration.

Consequences for minor offences (for example, speeding or offensive language) often consist of short prison sentences. Short sentences are especially problematic, as prison can mirror past trauma and abuse, and reinforce themes of powerlessness, lack of control, and vulnerability.<sup>[15]</sup> Culturally competent support and mental health treatments that may be afforded to prisoners serving longer sentences is often not accessible during short sentences. Short prison sentences also have other, life-altering effects. They present difficulties to families where the female is the primary caretaker, can lead to a loss of housing and employment, and often cause disconnections from family and community.

### ABORIGINAL JUSTICE AGREEMENTS

*Proposal 10–1 Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.*

VALS agrees that where not currently operating, State and Territory government should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements. In 2000, the Victorian Government commenced its staged approach to the Aboriginal Justice Agreement which first commenced with developing key infrastructure to facilitate collaboration between government and the Aboriginal community and then moved to developing key justice targets. The Aboriginal Justice Agreement was evaluated in 2012 and it was found to have delivered ‘significant improvements in justice outcomes for Kooris in Victoria’ and even though Aboriginal and Torres Strait Islander over- representation had increased, the increase was less than would have been expected. Aboriginal Justice Agreements are an important mechanism for collaboration between governments and Aboriginal communities, and whilst they may be unable to meet some challenges within the justice system with the right investment and collaborative approach much can be achieved.

*Question 10–1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?*

VALS supports the development and implementation of criminal justice targets as part of the Closing the Gap policy review. VALS echo's the recommendations made by Reconciliation Australia in the "Change the Record"<sup>63</sup> Blueprint for Change and by the human Rights Law Centre in its report "Overrepresented and Overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over imprisonment"<sup>64</sup>.

### ACCESS TO JUSTICE ISSUES

*Proposal 11–1 Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.*

The Victorian Aboriginal Legal Service supports funding programs for interpreter services for Aboriginal and Torres Strait Islander peoples across the country and takes the view that this is also an opportunity for employment and training for people within the community to act in those roles.

VALS also is of the view that Aboriginal and Torres Strait Islander support workers are provided even in areas in which languages other than English are spoken, but where there is a disconnect in understanding about the legal process, and assistance is required to navigate the court system.

Such a service may assist the accused and their family members to better understand the legal system, their rights, and what is required of them by courts and/or corrections' services. This would assist in reducing breaches and also assist peoples' understanding of the justice system and provide legal education for the community.

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<sup>63</sup> <https://changetherecord.org.au/policy-framework-blueprint-for-change>

<sup>64</sup> <https://www.hrlc.org.au/news/2017/5/10/over-represented-overlooked-report>

*Question 11–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?*

VALS supports the introduction of legislation which would mandate alternate sentencing regimes to be explored in the case of Aboriginal and Torres Strait Islander peoples. Currently, Victoria operates specialist courts such as the Koori Courts, Drug Court, Assessment Referral Court (ARC) for mental health issues, and special circumstances courts for civil matters.

VALS strongly supports the expansion of such courts both in Victoria and in other jurisdictions, as a way to tackle the underlying causes of offending, and with supported legislation as per the Canadian Criminal Code section 718.2(e), and concurrent Gladue-style reporting, would assist in recognising and addressing the underlying causes of offending. If introduced in Australian jurisdictions, such legislation would provide a platform by which the disadvantaged background of Aboriginal and Torres Strait peoples could be investigated via Gladue-style reports, and alternative options to sentencing found. The Gladue-style reports, if implemented, would also demonstrate the need for alternative sentencing measures and diversionary options that would address the underlying causes of offending. Specifically, low level offences should be considered for specialist sentencing courts if not diversion, especially when mental health or drug and alcohol issues are a contributing factor.

VALS supports the inclusion of reparations and/or restoration as sentencing principles in legislation in every jurisdiction. Such principles would allow room for consideration of alternative sentencing measures, and also allow room for alternative sentencing procedures to also exist.

*Proposal 11–2 Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.*

VALS agrees with the above proposition.

*Question 11–2 In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?*

### **Self-determination as a guiding principle**

VALS is guided by the principle that Aboriginal people have a right to self-determination and therefore, as an Aboriginal community controlled organisation, considers that it or FVPLS should be the legal providers of first choice for the community.

VALS is very happy to work with and collaborate with non-Aboriginal legal service providers. We support the whole Victorian community taking responsibility for the socio-legal problems in the community, however it can be frustrating to discover that non-Aboriginal organisations at times receive funding in preference to VALS to provide legal services to the Aboriginal community, often to “fill a gap” that VALS does not have the funding to respond to.

### **Funding for a holistic legal response**

Greater funding and early engagement is vital to advancing the socio-economic prospects of Aboriginal people. Addressing the funding shortfall identified by the Commission would go some way towards VALS providing a service which could make a material difference to the wellbeing of the Aboriginal community in Victoria, and towards “closing the gap”.

VALS believes that adequate funding for the following programs could make a real difference to addressing the chronic disadvantage in the Aboriginal community:

- Properly funded civil, family and criminal legal assistance provided by and for the Aboriginal community through ATSILS services such as VALS and FVPLS
- Incentives such as funding incentives for non-Aboriginal legal services to work with VALS and Aboriginal communities where VALS is not an option, does not have specialisation or is not preferred by the client.

To date, Aboriginal legal services have focussed on crisis response, such as criminal law, and, more recently, family violence response and child protection services. Even these services are under supported and VALS struggles to meet the demand. However, a lack of capacity to provide legal

services to provide comprehensive legal services, such as civil and family law services, and to provide associated holistic support from community members and social support workers, means that too frequently, unaddressed civil issues quickly compound to escalate into crisis. Such services include resisting evictions, negotiating employment disputes. There is also a notable lack of support for families of persons who are the subject of a Coronial Inquiry.

### **Funding for policy work**

VALS is in the unusual position where our funding is largely provided by the Commonwealth but demand for services is largely driven by State government laws and policies. VALS would like to see contributions from the Victorian Government in order to ensure that there is some accountability for the impacts on state law on Aboriginal Victorians. VALS would also like to see the State government provide support for funding policy response and involvement. The Commonwealth Attorney-General has made it clear that funding should be targeted at front-line services. However, the State Government and other agencies are clamouring for VALS to be at the table in numerous policy and law reform forums. VALS considers that if the State Government wants the voice of the Aboriginal community to be heard in law reform efforts, it should properly fund a policy role at VALS. The lack of capacity to provide a voice in the policy space has a significant impact on the justice outcomes for Aboriginal Victorians.

### **Courts, Tribunals and other public accountability mechanisms**

Victoria has been the flagship state for a number of innovations in courts, including Koori Court and Aboriginal Hearing Days, as well as specialist lists such as in the Victims of Crime Assistance Tribunal, all of which have been very successful programs. However, much more can be done to improve dispute resolution outcomes and improve trust and engagement with courts. This includes designing courts to improve engagement around high legal need such as tenancy lists at VCAT, or offering Aboriginal alternative dispute resolution services. It may also mean fostering indigenous knowledge of dispute resolution and providing culturally safe environments to resolve disputes in communities, especially in regional communities.

In addition, public accountability mechanisms such as IBAC and Ombudsman services should have specialist units designed to improve the response to Aboriginal communities. VALS workers should

be working in partnership with all these organisations, to further strengthen the connection and engagement with the Aboriginal community.

#### **Private profession and pro bono support**

In addition, VALS would like to see a much greater investment by the private profession in Victoria in local Aboriginal legal services. To date, we have had very patchy engagement by private firms to assist us. While we are invited to celebrate the development of Reconciliation Action Plans, we regularly discover that private firms are sending lawyers to the Northern Territory rather than assisting us down here. Sometimes it feels like it is a “badge of honour” for a Victorian firm or lawyer to have spent time at NAAJA, yet we struggle to engage private firms to provide lawyers on secondment, support our programs or take pro bono clients. VALS would like to see more support to develop partnerships and memoranda of understanding with local law firms, including secondments and advocacy support.

#### **Cultural awareness in the legal community**

VALS is in a unique position to foster cultural awareness of Aboriginal, history, social and legal issues and client needs within the mainstream legal system. VALS would like to see and supervise the rollout of an accreditation program targeted at the legal community, including judges, barristers, lawyers and paralegal workers. VALS is regularly asked whether we can develop and run this kind of program by a wide range of stakeholders.

Seed funding for such a program would mean that this could get off the ground and substantially assist understanding of Aboriginal people throughout the justice system. Currently other providers are providing training, and it is not closely matched to the legal needs of the community.

*Proposal 11–3 State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.*

VALS currently has a Custody Notification System which is informed by a memorandum of understanding with Victoria Police. In the instance of any Aboriginal or Torres Strait Islander person who is arrested, Victoria Police will notify VALS. We have a 24/7 phone line with Client Services Officers (“CSO”) who will take the call and ascertain the wellbeing of the arrestee and who then has the option to speak with a VALS lawyer, who is also on 24/7 availability.

This ensures that the wellbeing of the person can be assessed as well as provide the necessary legal advice. If required, a Client Services Officer will visit the arrestee and ensure their safety and wellbeing. For this, we have CSOs in each of the major Victorian regions as well as in metro Melbourne. The CNS scheme has proven to ensure the safety of Aboriginal and Torres Strait Islander people and considerably reduce deaths in custody.

**Background:**

VALS employs four [4] CSO’s at its head office in the Melbourne suburb of Preston. VALS also employs CSOs in regional centres in the State, namely:

1. Morwell;
2. Bairnsdale;
3. Shepparton;
4. Swan Hill;
5. Mildura;
6. Ballarat; and
7. Heywood.

As part of their duties, these CSOs are required to participate in the “On-call Roster” which operates from 1700 to 0900 and on a twenty-four basis on the weekends and Public Holidays. At 1700, Monday to Friday, the main telephone line is diverted to the On-call CSO’s mobile phone and all incoming calls are responded to by the CSO.



### The Notification System:

When a person is taken into custody, for any reason and at any police station in the State of Victoria, at the Attendance Register stage and after completing all the personal details of the person, the police officers are required to ask that person the compulsory ethnicity question – “Are you of Aboriginal or Torres Strait Islander descent?”

If the person identifies as an Aboriginal or Torres Strait Islander, the police officer making the entry on the Attendance Register then ticks a box which will then automatically generate two emails, which are known as the E\*Justice Notification:

1. One is sent to VALS; and
2. The other is sent to VicPol’s Records Services Branch.

The email to VALS is received at three [3] points:

1. CEO’s Office;
2. Metropolitan CSO’s Office; and
3. Filing Clerk’s office.

Each and every email is checked in order to ascertain whether the requirements of the Victoria Police Manual have been complied with. The Victoria Police Manual at VPM Instruction, 113-1: Taking a person into custody, states at 4.3.5:

#### *4.3.5           Aboriginals and Torres Strait Islanders*

*Where a person who identifies as being of Aboriginal or Torres Strait Islander descent is taken into custody for any reason the police member responsible must:*

- *complete the Attendance Module as required. This should be done within 60 minutes of arrival at a police station. This will create a notification to the Victorian Aboriginal Legal Service (VALS).*

- *In certain circumstances where you do not return to the Police Station with the suspect or where exceptional circumstances delay the creation of the E\*Justice Record and a VALS notification is required, contact Record Services Branch who will advise VALS.*
- *notify the local Aboriginal Community Justice Panel (ACJP). The ACJP roles is to:*
  - *advise on any known medical or behavioural background that may be relevant to the person's health, safety or well-being while in custody*
  - *take custody of persons for minor offences, before and after arrest where appropriate*
  - *speak with the person and assist in welfare matters, such as arranging bail and providing with relevant information*
  - *arrange legal assistance, if necessary*
  - *notify relatives and friends*
  - *liaise with police regarding problems existing within or confronting the Aboriginal or Torres Strait Islander community*
- *notify the local Sobering Up centre if arrested for drunk*
- *provide assistance to VALS or ACJP as necessary.*

The E\*Justice Notification records, *inter alia*, the following information:

1. Date and time taken into custody
2. Date and time of arrival at the police station
3. Date and time of creation of the computer record

If the time between the arrival at the police station and the creation of the computer record is greater than sixty minutes, as provided for the 113-1 of the VPM, an email is forwarded to the Aboriginal Advisory Unit at the Victoria Police Centre and the officers in the AAU conduct a follow-up regarding the delay and advise the VALS' CEO accordingly.

Irrespective of the time of the day or night, the staff of the RSD will follow up with a telephone call to VALS and the call will be taken by either the Receptionist, CSO on day duty or the On-call CSO. The CSOs will then follow up with a phone call to the respective police station to check on the person's welfare and provide basic advice in respect to the right to a "no comment" interview. The CSO will also ascertain from the Informant whether the person will be:

1. Remanded in custody;
2. Released on bail;
3. Released on summons;
4. Released without charge; or
5. Released pending further inquiries.

The CSO will also ascertain if there is a Court date and which particular Court. All of the person's particulars and other information are recorded by the CSO on what is known as a D24 Form, a copy of which is provided herewith. If the person has been arrested for a serious matter or remanded in custody, the CSO will then contact the On-call Solicitor and advise him/her of the matter. The Solicitor will have carriage of the matter from that point onwards.

VALS' Solicitors in the criminal law section participate in the On-call Roster system from Friday to Friday. They are on-call for a week and on the Friday afternoon, take delivery of the on-call solicitor's mobile phone which they then divert to their mobile phone. The solicitors are on-call one [1] week in eight [8].

In some instances, an Aboriginal or Torres Strait Islander person taken into custody at a non-metropolitan police station will request the attendance a CSO. If a CSO is stationed in that particular region, the metropolitan CSO will phone the CSO and request his or her attendance. However, it is not always possible to have the CSO in attendance and the metropolitan CSO will speak to the person in custody by phone.

In the case of remands in the non-metropolitan centres, solicitor agents or the local office of Victoria Legal Aid<sup>65</sup> (“VLA”) are contacted to do the bail application. The majority of remands in the metropolitan area are attended to by VALS’ solicitors but if a solicitor is not available the, VLA Duty Solicitor or solicitor agent attends to the matter on VALS’ behalf.

Some regional centres in the State have an Aboriginal Community Justice Panel (“ACJP”) operating. The ACJPs are manned by volunteers from the Aboriginal Community and attend the Police Station when an Aboriginal or Torres Strait Islander person is taken into custody. In some instances, the ACJPs operate in centres where the VALS’ CSOs are stationed and the CSO will more often than not, be a member of the ACJP. This will involve participation in the ‘call out’ system and attending the police station after-hours.

### POLICE ACCOUNTABILITY

*Question 12–1 How can police work better with Aboriginal and Torres Strait Islander communities to reduce family violence?*

Indigenous definitions of the nature and forms of family violence are broader and more encompassing than those used in the mainstream. The Victorian Indigenous Family Violence Task Force defined family violence as:

*‘An issue focused around a wide range of physical, emotional, sexual, social, spiritual, cultural, psychological and economic abuses that occur within families, intimate relationships, extended families, kinship networks and communities. It extends to one-on-one fighting, abuse of Indigenous community workers as well as self-harm, injury and suicide.’<sup>66</sup>*

Indigenous family violence encompasses a range of acts that are criminal, such as physical and sexual assault, and non-criminal, such as emotional and spiritual abuse. Community violence, or violence within the Indigenous community (often between Indigenous families), is also an emerging concern for local areas in Victoria. This violence contributes to overall levels of violence reported by

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<sup>65</sup> VALS and VLA have a Memorandum of Understanding

<sup>66</sup> *Victorian Indigenous Family Violence Taskforce Final Report* December 2003, p. 123

Indigenous people and the trauma experienced within families and kinship networks. Family violence includes intergenerational violence and abuse, affects extended families and kinship networks. An individual can be both a perpetrator and a victim of family violence.<sup>67</sup>

The continuing impact of the Stolen Generation means the reporting of family violence is particularly difficult for many victims, or those witnessing family violence. Given the relationship between Aboriginal people and authority organisations such as the police or government welfare departments, it is understandable that Aboriginal people are wary of making reports that, whilst may have the immediate impact of safety, have the longer term of impact of breaking up a family, putting children into out of home care, sending someone into custody, becoming homeless or other impacts. There are significant issues of trust between Aboriginal people, the police and government services. Whether it's a lack of follow up shown when reporting an instance of family violence, or a heavy-handed response from a government agency when a family seeks help, Aboriginal people find they are either facing a lack of support in the most serious of cases, but excessive interventions in other situations.

Police need to be less confrontational in their approach to taking out intervention orders on behalf of family violence victims. It is the approach taken with clients that presents an adversarial position. Police need to better understand the complexities of Aboriginal communities when dealing with family violence. Spending some time to practically support both the victim/offender when applying for an order may be received with less hostility. Engaging other services to support family violence victims during this period is crucial. Not just any services, preferably Aboriginal services or explore with the client and family which services have previously worked or if there are any particular support workers they victim/family would prefer to engage. The presence of Aboriginal Community Liaison Officers (“**ACLOs**”) in some police stations is a step forward, but there should be more ACLOs across the state to support the relationships between police and the Aboriginal community.

VALS submits that police can work better with Aboriginal and Torres Strait Islander communities to reduce family violence in the following ways:

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<sup>67</sup> *‘Strong Culture, Strong Peoples, Strong Families: Towards a safer future for Indigenous families and communities: 10 Year Plan’* (2008)

- adopting a less confrontational approach to applying for intervention orders on behalf of victims to improve rapport and appease hostility;
- improving their understanding and awareness of the complexities of family violence in Aboriginal and Torres Strait Islander communities, preferably undertaken by Aboriginal organisations with expertise in assisting Aboriginal and Torres Strait Islander victims of family violence;
- improving their responsiveness to reports of family violence to improve community faith in law enforcement agencies;
- strengthening relationships with Aboriginal and Torres Strait Islander support services to provide crucial support to victims;
- increasing the number of Aboriginal Community Liaison Officers at police stations to strengthen relationships between the police and the community; and
- implementing data collection training to ensure appropriate collection of data on the ethnicity of victims and provision of appropriate pathways.

*Question 12–2 How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of, and be better equipped to respond to, the needs of that community?*

Aboriginal and Torres Strait Islander people are over-policed as perpetrators of crime, however they are also under-policed and under-served by the justice system as victims of crime.<sup>68</sup> A lack of trust in police and governmental agencies is one of the major factors why an Aboriginal and Torres Strait Islander person is more likely to be charged and convicted than a non-Indigenous person. The distrust and fear of police often relates to concerns that police will assist child protection authorities to remove children if a family violence incident is reported or any other crime. Further the trauma

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<sup>68</sup> See, e.g., Victorian Equal Opportunity and Human Rights Commission, above n 6, 42; see also Hannah McGlade, 'Justice Denied, Indigenous Women and Children Still Face a Legal System Stacked Against Them', *ABC News* (online), 22 September 2016, <<http://www.abc.net.au/news/2016-09-22/hannah-mcglade-indigenous-women-access-to-justice/7860762>> and Chris Cunneen, 'Policing and Aboriginal Communities: Is the Concept of Over-Policing Useful?' in Chris Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (Sydney University Institute of Criminology, 1992) 76.

of repeated victimisation combined with deep distrust of police can shape the way that people behave when police do intervene, it can either be an inability to engage or a violent and visceral response.

Poor police responses and institutionalised racial bias in the use of discretion leave Aboriginal and Torres Strait Islander people at greater risk of harm. Change the Record has called for changes in the way that police interact with Aboriginal people and communities, including improved cultural awareness, with the aim of building trust, promoting safety and reducing crime. Addressing institutionalised patterns of behaviour is not simple nor will it be immediate but if police are required to engage and consult with local Aboriginal communities, attend community events, undertake cross cultural training on a regular and consistent basis as well as receiving ongoing and location specific cultural competency training they will become more aware of the needs of the Aboriginal community and better able to respond in a non-threatening and violent manner.

*Question 12–3 Is there value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?*

VALS submits there is value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities, particularly those designed to prevent offending behaviours. To design effective prevention, early intervention and diversion measures, we must know more about Aboriginal and Torres Strait Islander people who come into contact with the criminal justice system.

*Question 12–4 Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcomes evaluations; and put succession planning in place to ensure continuity of the programs?*

VALS submits that police who are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities document programs, undertake outcome evaluations and ensure succession planning is in place.

*Question 12–5 Should police be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia, where they have not already done so?*

VALS submits that police should be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia as they strengthen relationships, promote awareness of Aboriginal and Torres Strait Islander issues, provide Aboriginal and Torres Strait Islanders with great opportunities, promote transparent and open engagement with Aboriginal and Torres Strait Islander communities.

*Question 12–6 Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?*

VALS submits that police should be required to resource and support Aboriginal and Torres Strait Islander employment strategies as increased employment of Aboriginal and Torres Strait Islander people within the police force improves engagement with Aboriginal communities, fosters the understanding of issues unique to Aboriginal communities, builds co-operation and trust leading to better outcomes for Aboriginal and Torres Strait Islander victims and offenders.

## JUSTICE REINVESTMENT

*Question 13–1 What laws or legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?*

VALS advocates that legislation similar to s718.2(e) of the Canadian Criminal Code be statutorily introduced in order to provide a legal basis to divert Aboriginal and Torres Strait Islander peoples away from prison and into programs and community-led responses to sentencing. Although this



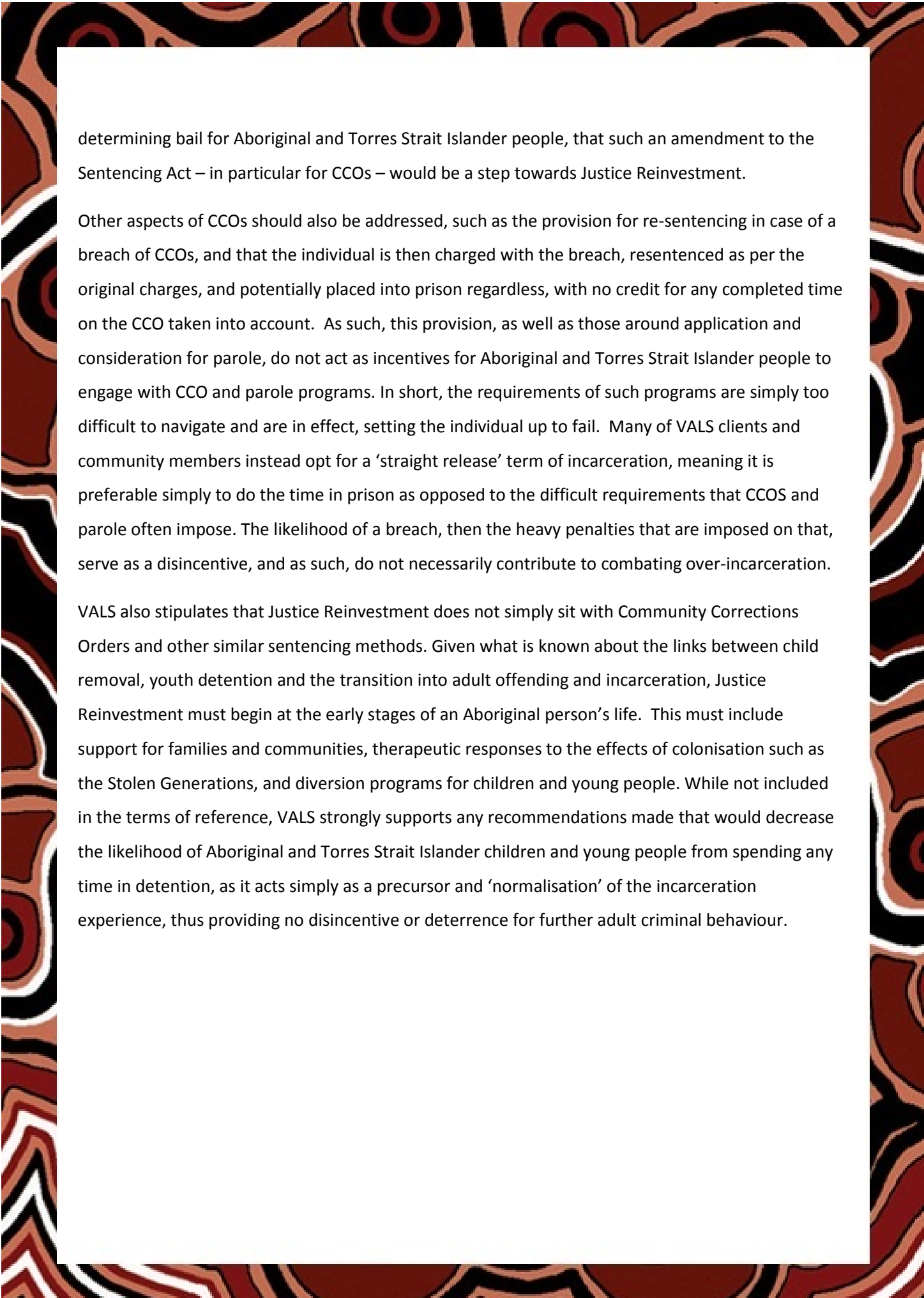
would apply to convicted offenders, it is envisioned that such legislation would prompt a more concerted requirement for alternatives to prison to be introduced in each jurisdiction.

Noting this, however, VALS also advocates for a re-direction of funding away from incarceration, and invested into metropolitan, regional and remote programs and initiatives which divert offenders who would normally attract a short-term prison sentence – for example, 1 year or less – into appropriate, community led and culturally appropriate orders. VALS also notes that it is imperative that diversion programs be driven by local Aboriginal and Torres Strait Islander communities, as these are proven to have far greater rates of success.

VALS also notes that there are few, if any, current community orders which are based in Aboriginal and Torres Strait Islander cultural values. While VALS supports orders which address a person's drug or alcohol dependency, or mental health responses, VALS also advocates for the need for culturally based programs. This would address studies that demonstrate that the engagement of culturally based programs – such as those at Wulgango Ngalu – also achieve high success rates, especially given the evidence that cultural revitalisation and re-connection – especially within highly colonised areas such as Victoria – can play a role in rehabilitation.

Furthermore, VALS advocates for greater resources for post-sentence support for exiting prisoners. Currently VALS implements a post-release support service (“**Re-Connect**”) which aims to assist exiting prisoners with support to access fundamental services which have proven to be determinants for recidivism, such as housing, mental health and wellbeing support and employment. However, such programs remain underfunded, and as such, do not have as great an impact as could be if adequately funded. VALS notes the legislation that oversees Community Corrections Orders in Victoria, which are alternative, community based sentencing options as opposed to short terms of incarcerations (for example, up to 2 years).

VALS strongly advocates for community led cultural programs to be funded and made available for Aboriginal and Torres Strait Islander people sentenced to CCOs. Currently, however there is no provision made in legislation for this to be a mandatory consideration. VALS notes that concurrent with section 3A of the Bail Act by which magistrates must consider cultural obligations as a factor in



determining bail for Aboriginal and Torres Strait Islander people, that such an amendment to the Sentencing Act – in particular for CCOs – would be a step towards Justice Reinvestment.

Other aspects of CCOs should also be addressed, such as the provision for re-sentencing in case of a breach of CCOs, and that the individual is then charged with the breach, resentenced as per the original charges, and potentially placed into prison regardless, with no credit for any completed time on the CCO taken into account. As such, this provision, as well as those around application and consideration for parole, do not act as incentives for Aboriginal and Torres Strait Islander people to engage with CCO and parole programs. In short, the requirements of such programs are simply too difficult to navigate and are in effect, setting the individual up to fail. Many of VALS clients and community members instead opt for a ‘straight release’ term of incarceration, meaning it is preferable simply to do the time in prison as opposed to the difficult requirements that CCOs and parole often impose. The likelihood of a breach, then the heavy penalties that are imposed on that, serve as a disincentive, and as such, do not necessarily contribute to combating over-incarceration.

VALS also stipulates that Justice Reinvestment does not simply sit with Community Corrections Orders and other similar sentencing methods. Given what is known about the links between child removal, youth detention and the transition into adult offending and incarceration, Justice Reinvestment must begin at the early stages of an Aboriginal person’s life. This must include support for families and communities, therapeutic responses to the effects of colonisation such as the Stolen Generations, and diversion programs for children and young people. While not included in the terms of reference, VALS strongly supports any recommendations made that would decrease the likelihood of Aboriginal and Torres Strait Islander children and young people from spending any time in detention, as it acts simply as a precursor and ‘normalisation’ of the incarceration experience, thus providing no disincentive or deterrence for further adult criminal behaviour.