



**Submission to Australian Law Reform Commission  
Inquiry into the Incarceration Rate of Aboriginal and  
Torres Strait Islander peoples**

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## About Victoria Legal Aid and our clients

Victoria Legal Aid (VLA) is an independent statutory authority that exists to assist Victorians with their legal problems.

We provide legal information, education, advice and representation to Victorians across a wide range of legal areas, including criminal matters, family separation, child protection and family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt. We have 14 offices across Victoria and, through a mix of staff and private practitioners, we assist over 90,000 clients every year. In the 2016-17 year, 4,102 VLA clients identified as Aboriginal or Torres Strait Islander.

We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are often socially and economically isolated; people with a disability or mental illness, the elderly, children, people from culturally and linguistically diverse backgrounds, or in remote areas.

We provide:

- free legal information through our website, our Legal Help line, community legal education, publications and other resources
- legal advice through our Legal Help telephone line and free clinics on specific legal issues
- grants of legal aid to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer
- support to people in the mental health system through non-legal advocates in the Independent Mental Health Advocacy service
- family dispute resolution services to help families decide family law disputes away from court
- funding to 40 community legal centres and support for the community legal sector's operation.

VLA also works to address the barriers that prevent people from accessing the justice system by participating in research and law reform, promoting the efficient running of the justice system and ensuring the actions of government agencies are held to account. We take on important cases and advocate for reforms that make the law fairer for all Victorians. In 2013 we partnered with the Victorian Aboriginal Legal Service and James Cook University in a research project investigating the civil and family law needs of Aboriginal and Torres Strait Islander Victorians. The report found that criminal and civil problems tend to occur together, suggesting the value of early intervention, holistic service delivery and improved collaboration between service providers

(<http://www.legalaid.vic.gov.au/about-us/what-we-do/research-and-analysis/indigenous-legal-needs-project>).

Under VLA's first Reconciliation Action Plan, the number of VLA staff identifying as Aboriginal or Torres Strait Islander has increased to fifteen (two percent of our staff)

(<https://www.legalaid.vic.gov.au/about-us/what-we-do/access-and-equity/reconciliation-action-plan>).

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## Executive Summary

The Australian Law Reform Commission (ALRC) is tasked with envisaging how the national shame of Indigenous overincarceration can be addressed through a range of legislative and other measures. In its Terms of Reference, it is required to consider the findings of numerous reports, inquiries, and a Royal Commission directly into this issue. Our contribution to this inquiry is not to reiterate the findings of the research and reports already produced; our role is to contribute our unique practice insights relevant to the ALRC Discussion Paper.

We make five key submissions, which reflect the distinct contribution Victoria Legal Aid can make based on its role in the Victorian community and its commitment to Aboriginal and Torres Strait Islander peoples' access to justice:

1. Legislative provisions like those of the *Bail Act 1977 (Vic)* which require the consideration of Aboriginality should be implemented nationally, and should be supported by location-specific cultural awareness training for legal system professionals.
2. The infringements and fines enforcement regime should adopt a model of justice reinvestment.
3. Governments across all jurisdictions need to work in true partnership with Aboriginal and Torres Strait Islander community controlled organisations to develop culturally appropriate programs, including diversion programs, bail programs, community-based sentence options, sentencing forums, and prison and post-release programs. We support the adoption of 'Gladue reports', and their value will be enhanced by provision of these programs.
4. Aboriginal and Torres Strait Islander legal services (including those under the banner of family violence prevention and legal services) need to be properly funded, and all Legal Aid Commissions and Community Legal Centres need to be culturally inclusive places for Aboriginal and Torres Strait Islander clients to access services.
5. All states and territories should develop protocols to prevent state out-of-home-care from accelerating contact with the criminal justice system.

We note that our submission is underpinned by the fact that in Victoria there are two Aboriginal legal services – the Victorian Aboriginal Legal Service and Family Violence Prevention and Legal Service – which combined have a history of nearly 60 years of direct legal representation and systemic advocacy. The voices of these two organisations should be held in esteem for their connection and responsibility to community and their unique placing to understand the issues for Aboriginal community controlled organisations as a service provider to, and employer of, the Aboriginal community.

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## 1. Effective use of Aboriginal-specific bail legislation requires an understanding of Aboriginality

### *Proposal 2-1*

Victoria is the only jurisdiction that specifically requires (under section 3A of the *Bail Act 1977*) that a court must take into account any issues that arise due to the person's Aboriginality. We strongly support Proposal 2-1 that other state and territory legislation should adopt similar provisions.

However, legislation that supports the consideration of an individual's Aboriginality does not exist in a vacuum, and requires understanding and skill across all involved in the determination of bail, including:

- legal advocates taking instructions from Aboriginal and Torres Strait Islander clients and appropriately advocating for additional factors to be considered alongside any other relevant public risk and safety issues
- informants and prosecutors in determining whether to oppose bail
- bail decision makers in determining whether to grant bail and, if bail is granted, determining the conditions of bail.

Extensive cultural awareness education needs to be undertaken to ensure that all involved in the determination of bail understand these issues. The Victorian legislation includes taking into consideration the person's cultural background, including the person's ties to extended family or place and other relevant cultural issues or obligations. It is vital to recognise that each individual's indigeneity will play out differently in terms of their cultural obligations and that this can differ geographically within one jurisdiction.

Victoria, New South Wales and Tasmania are all places of first contact between the local Aboriginal communities and the British. This means that these nations bore the brunt of initial waves of violence and disease, and then genocidal, removal and assimilation policies. These factors have influenced contemporary Aboriginal identity and culture. It is imperative that any cultural awareness training undertaken by lawyers, police, prosecution and the judiciary is localised, understands these issues, and understands the fact that culture is evolving.

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## 2. Fines and infringements notices should be met with justice reinvestment

### *Proposals 6-1 and 6-2*

We see significant opportunities for provisions dealing with infringements to mirror the principles of justice reinvestment, with measures responding to outstanding fines actually addressing the circumstances of the fines.

Victoria Legal Aid strongly supports proposal 6-1 that *'Fine default should not result in imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines'*. Unfortunately, in Victoria the impact of unpaid fines can be harsh and potentially lead to jail sentences. The tragic death of Ms Julieka Dhu in Western Australia who was taken into police custody for outstanding fine warrants demonstrates that no individual should be taken into prison for financial burden.

Despite recent legislative changes in Victoria which are in the course of being implemented, Victoria Legal Aid remains concerned about the growth of the infringements system, and its impact on clients and legal assistance providers. Victoria Legal Aid and community legal centres, including the Victorian Aboriginal Legal Service, are overwhelmed with clients seeking assistance with infringements. Courts are dedicating significant resources to infringement matters that reach a hearing stage. As at the end of 30 June 2015, Victorians owed over \$16 billion in outstanding infringement warrants. For our Legal Help phone service, infringements is the third most prevalent reason people contact us. From our advice and casework we know that our clients are unable to pay large fines for a variety of legitimate reasons. We also know that unpaid fines affect a large cross-section of the community, including the Aboriginal and Torres Strait Islander community, as well as those experiencing disadvantage such as disability, drug or alcohol addiction, homelessness, financial hardship and family violence. The working poor or people suffering temporary financial and personal crisis are also not immune from the pressures of the infringements system.

As of 1 July 2017, the Victorian government is operationalising a new work and development permit (WDP) scheme as part of the implementation of the Fines Reform Act 2014. Not dissimilar to the New South Wales Work and Development Order (WDO) scheme, this is an alternative for individuals dealing with fines and is particularly targeted to people experiencing certain disadvantages. WDPs allow the eligible person, at any stage before the execution of an infringements warrant, to 'work off' their outstanding infringement fines through pro-social activities such as drug and alcohol counselling. This applies only to infringement fines, not to court-ordered fines. Crucial to the scheme is that the activities are undertaken with a sponsor agency which may be a community agency, a statutory body or a health practitioner. For Aboriginal and Torres Strait Islander people, these activities could be undertaken through a sponsor agency who is an Aboriginal or Torres Strait Islander community controlled organisation, such as cooperatives or health services. If the organisation is one which the individual already uses, it means the continuing relationship in a culturally appropriate environment can result in a number of benefits:

- the client reduces or eliminates fines through the WDP scheme
- the client's individual wellbeing improves and they develop a sense of personal achievement, as a result of addressing huge fine debt
- the client's issues are being approached holistically because the underlying issues (for example, alcohol addiction) are being addressed in parallel with the legal issues.

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At numerous points in the ALRC Discussion Paper, there are proposals for state and territory governments to work closely with Aboriginal and Torres Strait Islander community controlled organisations to develop best practice approaches in a range of programs. The WDP scheme is a perfect vehicle for utilising the services already delivered by such organisations, and the relationships already in place between client and organisation.

However, the responsibility cannot be borne by the community controlled organisations alone. There must be appropriate supports for the organisations required to meet reporting requirements for monitoring participation in WDP schemes, and support for the intended increase in clients wanting to access programs from the organisations.

The New South Wales experience strongly evidences a need for a dedicated and community-based WDP service to ensure the successful take-up of the WDP scheme. Sponsor agencies are pivotal to the scheme as they deliver the services, and can accredit to issue permits paying off fines by clients undertaking those services. Without sponsors, there is no scheme, however they do not receive additional funding to accredit to become a sponsor, deliver the services or report on a person's compliance.

The first two years of the New South Wales Work and Development Order (WDO) scheme saw a very slow uptake by potential sponsor agencies. The evaluation after a two-year pilot recommended the funding of a WDO Service, comprised of the NSW Aboriginal Legal Service and NSW Legal Aid. With the support of that service the number of agencies accredited to deliver WDOs increased from 220 to around 1500 participating in the scheme today.

A support service demonstrates to potential sponsor agencies the added benefits of accrediting to issue permits, provides a link between clients and the agencies, and provides ongoing support to the agencies. The scheme requires behaviour change, from both the individual client and an organisation developing the activities suitable for the scheme. A WDP service can foster that cultural change, particularly in the early stages of establishment. Potential sponsor agencies are otherwise likely to have little or incidental awareness of WDP schemes and how they work.

The impact of a WDP program is demonstrated in the evaluation of the New South Wales WDO scheme which was conducted in 2015 and showed:

- 95% of sponsors agreed that WDOs helped reduce the level of stress and anxiety their clients felt about their debt
- 87% of sponsors agreed that WDOs had enabled clients to address factors that made it hard for them to pay or manage fine debts in the first place
- WDOs had organisational outcomes for sponsors as it created an incentive for clients to attend their programs
- WDOs helped clients reduce reoffending by providing services addressing underlying causes, and helped reduce secondary offending (such as driving while suspended, as participating in WDOs prevented licence suspension).

Further, 20% of people on the WDO scheme are Aboriginal, which demonstrates the success of using Aboriginal community controlled organisations. By directing resources away from punishing individuals for outstanding fines and into addressing the issues which saw the individual incur the fine, WDP and WDO programs are justice reinvestment in action and demonstrate a legislative framework for the criminal law to address low-level offending relating to issues around drug and alcohol abuse, unaddressed mental health needs and other personal circumstances. In recognition of the strain unpaid fines place on the ability of inmates to rehabilitate on their release from prison,

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Victoria Legal Aid welcomes the reforms in Victoria which allow prisoners to apply to have their outstanding fines waived upon their release.

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### 3. Utilising the expertise of Aboriginal and Torres Strait Islander Community Controlled Organisations

*Proposals 2-2, 4-1, 11-1*

There are a number of proposals in the ALRC Discussion Paper which highlight state and territory jurisdictions working with Aboriginal community controlled organisations and community to inform measures (whether they be specific bail or diversionary programs, community based sentencing options, or in-prison and post-release programs). Victoria Legal Aid strongly supports positive working relationships between government and these organisations. We also support the expertise these organisations have to inform culturally safe and appropriate programs to address offending which focusses on building an individual's identity, skills and connection to community. It is important to recognise that many Aboriginal community controlled organisations offer a range of services that deal holistically with an individual's issues and their family, assisting with 'cradle to grave' needs from maternal and child health, general health services, justice programs, after school and sporting supports, to community services, transport and aged care.

Proper resourcing of Aboriginal and Torres Strait Islander community controlled organisations is required to support the delivery of these services in partnership with government departments and agencies to ensure reach of services and address post code injustice. We discussed above the critical importance of Aboriginal and Torres Strait Islander community controlled organisations as sponsor agencies for WDP schemes to enable Aboriginal and Torres Strait Islander people to take up these schemes.

Of particular note, as raised in the Discussion Paper, is the interface between Aboriginal women as victims of family violence and the offending patterns of these women, and the rapid increase in Aboriginal women's offending in general. Family Violence Prevention and Legal Service in Victoria (along with the other organisations who make up the National Family Violence Prevention Legal Services) have prevention and education programs and legal services that focus closely on victims of family violence and associated legal matters. This organisation should be involved as a driver for developing culturally appropriate bail, diversion and post release programs for Aboriginal women.

In the context of criminal law and this inquiry, community controlled organisations could also have a crucial role in coordinating an equivalent of the 'Gladue reports' used in Canada for Aboriginal people. We understand that the Victorian Aboriginal Legal Service will be making a submission that proposes their direct involvement, similar to the Aboriginal Legal Service of Toronto, to trial the use of Gladue reports and will note a number of considerations and a potential framework for this. Victoria Legal Aid supports the Victorian Aboriginal Legal Service's role in this, and would be keen to collaborate in any future use of Gladue reports where we represent Aboriginal clients.

Under the Canadian Federal Criminal Code, section 718.2(e) requires the court take into account the unique and severe impact of colonisation on Indigenous peoples when sentencing. The legislation specifically states:

*All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.*

This 1996 amendment directed the judiciary to specifically turn their mind to the correlation between colonisation and the over-representation of Canada's Indigenous peoples in the criminal justice system, and over-incarceration of these peoples.

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In the 1999 case of *R v Gladue*, it was argued successfully that the defendant's low socio-economic background was a result of colonisation and this was central to the commission of the offence. The resulting Gladue process and subsequently Gladue reports are the means by which information is gathered about the individual defendant to assist the judge to better understand the unique impact of colonisation on the Indigenous community and the individual person, and potential sentencing options. The success of the Gladue report processes is underpinned by the involvement of Aboriginal community organisations – the Aboriginal Legal Service of Toronto prepares Gladue reports with Gladue writers, trained Aboriginal people who are able to engage with individuals, community and services to get a complete picture of the individual person.

Many of the experiences of Canada's Indigenous peoples are mirrored by the experiences of Aboriginal and Torres Strait Islander people. The contemporary issues faced by First Nations people in both countries also run in parallel and are not limited to over-incarceration rates.

Victoria Legal Aid strongly supports the introduction of coordinated information gathering, similar to a Gladue process and report, that could be implemented, at least initially, within the existing framework of the Koori Court system. Koori Courts are conducted with the assistance of Elders and Respected Persons, working with a Magistrate or Judge to assist their understanding of the cultural issues faced by Aboriginal defendants. The ultimate sentencing decision remains with the Magistrate or Judge, but the decision-making process could be specifically aided by a Gladue type report. Further, Gladue reports would benefit the continuous learning of the judiciary in understanding how the impact of colonisation manifests in contemporary cultural issues and socio-economic disadvantage.

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## 4. Appropriately accessible and coordinated legal services from all legal service providers

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

It is essential that the Victorian Aboriginal Legal Service and the Family Violence Prevention and Legal Service are properly funded to deliver their services across the state. Victoria Legal Aid is a strong advocate for this and committed to working in partnership with these organisations.

Alongside this proper resourcing for Aboriginal legal services, all Legal Aid Commissions across the country, as well as community legal centres, must provide culturally safe and inclusive environments for Aboriginal and Torres Strait Islander people to access responsive legal services.

In 2013, the Victorian Auditor General released the report 'Accessibility of Mainstream Services for Aboriginal People' (<https://www.audit.vic.gov.au/report/accessibility-mainstream-services-aboriginal-victorians>) which identified that racism and cultural inappropriateness in service delivery were the main drivers for Aboriginal people to not trust and ultimately not use non-Aboriginal organisations. Not all Aboriginal people will use Aboriginal community controlled organisations for services. These may simply not be available in the area a person is living, or they may simply choose not to use these services. For legal services, even if an Aboriginal or Torres Strait Islander person wishes to use an Aboriginal legal service, conflict of interest may prevent that service from assisting. For Aboriginal women, this was often the case if they had a family dispute but their male partner may have already been serviced by the Aboriginal legal service, and therefore she was conflicted out.

Over the past three years, Victoria Legal Aid has renewed its efforts to support Aboriginal and Torres Strait Islander people to access legal services from all our offices across criminal, civil and family law areas. Only 5% of our services currently go to Aboriginal and Torres Strait Islander people so we need to improve how we collaborate with community and Aboriginal and Torres Strait Islander community controlled organisations so that individuals can access services earlier rather than later. The start of this was the launch of our first Reconciliation Action Plan in 2015 and a number of actions to encourage Aboriginal and Torres Strait Islander people to use our services, Aboriginal and Torres Strait Islander community controlled organisations to work with us, and Aboriginal and Torres Strait Islander people to work as part of our staff.

### **Victoria Legal Aid's Aboriginal Community Engagement Officers**

Aboriginal Community Engagement Officers (ACEO) are a new initiative of Victoria Legal Aid, based on learnings from Aboriginal and Torres Strait Islander legal services, and from the health sector, where specific roles for Aboriginal and Torres Strait Islander people within an organisation provide a vital link between the individual client and their lawyer (or doctor in the health context), and also between community and the organisation.

Our ACEO have a focus on family (including federal family law, child protection and family violence) and civil law for very specific reasons:

- The Indigenous Legal Needs Project identified these areas of largely unmet legal needs, requiring greater work with community to help people recognise when personal issues become legal, and where to get legal help;
- By addressing individual needs around family issues and civil issues such as housing, fines, financial difficulty and mental health, we can work to support stable personal arrangements which are likely to keep people away from the criminal justice system; and

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- Civil law, federal family law and the application for family violence intervention orders are all areas of law that require initiative to be taken by the individual, to make the initial application, and then sustained energy to endure the processes involved. As the ALRC Discussion Paper recognises, law has been used against Aboriginal and Torres Strait Islander people to their disadvantage. Whether this be criminal law (from bail through to sentencing), or laws around dispossession of land and break up of family, the legal system has had a negative impact on Aboriginal and Torres Strait Islander people.. To understand the law in a proactive way that might advance an individual's circumstances is an unfamiliar experience, and Aboriginal and Torres Strait Islander people need to be supported through this.

We have ACEO roles based in Morwell and Mildura (focussing on family and civil law) and in our Melbourne-based state-wide Civil Justice Program. These roles are integral to the individual client and the broader community, and support our legal staff to understand the skills required to work effectively with Aboriginal and Torres Strait Islander clients and community. As well as focusing on clients, these roles also engage in establishing stakeholder relationships for effective information sharing and community legal education to raise awareness of issues and possible systemic responses.

Our ACEOs work closely with staff from the Victorian Aboriginal Legal Service and the Family Violence Prevention and Legal Service to support the warm referral of clients between services.

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*How our Aboriginal Community Engagement Officers work:*

*A Victoria Legal Aid Aboriginal Community Engagement Officer in country Victoria had a call from a woman facing a range of criminal charges, including for breach of an intervention order. In referring the client to a criminal lawyer, the ACEO was able to talk with the client about her other circumstances, which included a recent eviction notice and Centrelink debt. In addition to receiving criminal law services from a lawyer, the woman also received civil law advice and wrap-around support from the ACEO, which facilitated the negotiation of lesser charges and a better outcome.*

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## 5. Reducing the incarceration of people who have been in state care

*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?*

We appreciate that the ALRC Discussion Paper is focussed on incarceration of adult Aboriginal and Torres Strait Islander people, and we acknowledge the suggestion (at pages 23-25 of the Discussion Paper) that a national review of care and protection laws would be timely, recognising the trajectory which many Aboriginal people follow from being placed in out of home care as children, first time offending whilst under the protection of the Department of Health and Human Services (Victoria), and on to continued offending into adulthood.

The Armytage and Ogloff 'Youth Justice Review and Strategy' found that approximately 27% of young offenders have been removed from the care of their families and are under the guardianship or custody of the Department of Health and Human Services in Victoria. This means that contact with child protection systems is by far the biggest accelerator for a cohort into the youth criminal justice system. Then, the progression to adult crime is sadly all too familiar. Our analyses of our client data have repeatedly shown this to be true for our clients: if they come to us as Aboriginal children in the care of the state, they are more likely than others to return to us as adult clients (<http://www.legalaid.vic.gov.au/about-us/what-we-do/research-and-analysis/client-profiles>).

If Closing the Gap targets are to recognise that imprisonment prevents progress on the more positive existing targets, equally it must be recognised that out-of-home-care is often a contributing factor to imprisonment.

Victoria Legal Aid's report '[Care not Custody](#)' analysed an aspect of this more closely. We analysed data between 2011 and 2016 and found that of those aged 11–17 who are placed in out-of-home care, almost one in three young people later returns to us for assistance with a criminal matter. Nine percent of our clients who moved from child protection to youth justice were Aboriginal.

The problem appears to be particularly acute for children placed in residential care, and is linked in part to criminal damage charges in residential care. Our report shows 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. These practices are entrenching children, often from a very young age, in a cycle of involvement with the police and the courts.

We welcome recommendation 7.5 of the July 2017 [Armytage and Ogloff Youth Justice Review and Strategy: Meeting needs and reducing reoffending](#):

*"Address the specific challenges presented by children in out-of-home care who are offending by establishing a taskforce to respond to, and decriminalise, the challenging behaviour and offending of children in out-of-home care and residential care. The taskforce should work to design an early intervention program with police, Commission for Children and Young People commissioners and out-of-home care service delivery partners."*

Whether in the context of Closing the Gap or otherwise, a measured reduction in the criminalisation of children's behaviour in residential care throughout the country could be expected to benefit Aboriginal children as Aboriginal children are placed in out-of-home care in disproportionately high numbers. Reducing the contact that Aboriginal children have with the youth justice system will in turn reduce adult incarceration.