FIRST PEOPLES' ASSEMBLY OF VICTORIA

# Submission to the Yoorrook Justice Commission

## Response to Critical Issues papers on the criminal justice and child protection systems

5 December 2022

## Introduction

The First Peoples' Assembly of Victoria (the Assembly) is the independent and democratically elected body that represents First Peoples of Victoria in Victoria's Treaty process.

The Assembly welcomes the opportunity to make this submission to the Yoorrook Justice Commission (Yoorrook), in response to the Critical Issues papers on systemic injustices in the criminal justice system and the child protection system.

The Assembly acknowledges Yoorrook's announcement that it will deliver a report in June 2023 on systemic injustice experienced by First Peoples in those systems, and on findings or thematic areas that should be considered as immediate priorities through the Treaty-making process.

The foundations for Treaty-making have been agreed by the Assembly and the State. The stage is now set to start negotiating a Statewide Treaty and local Traditional Owner Treaties as early as 2023.

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

Yoorrook's investigation of injustice in the criminal justice system and child protection system can highlight areas where change is needed through Treaty to deliver genuine self-determination and sustainable justice. Informed by Yoorrook's findings and recommendations, the Assembly intends to

develop the priorities for Statewide Treaty negotiations to achieve First Peoples' aspirations, working with our Community and Community-led organisations. Where previous Royal Commissions and inquiries into the criminal justice and child protection systems have had their recommendations left on the shelf, Treaty can secure action.

This submission is structured as follows:

- **Part 1: Summary and recommendations.**
- **Part 2: About the Assembly** provides an update on the Treaty process and how Treaty negotiations, including the priorities for Treaties and interim agreements reached during Treaty negotiations, will be informed by Yoorrook's findings and recommendations. Treaty negotiations could begin as early as next year.
- **Part 3: Failures of the child protection and criminal justice systems** considers evidence of systemic injustices and outlines that while there have been some positive steps towards activating self-determination, First Peoples are still not empowered to shape and make the decisions about the systems, laws, policies and programs that affect First Peoples.
- **Part 4: Structural reform is needed** explains why the Treaty process is essential to achieving genuine self-determination by shifting decision-making power to First Peoples.
- **Part 5: Urgent reforms needed now** outlines urgent priority issues and reforms where the way forward and immediate action required by government is clear. It is untenable for Government to hide behind the cloak of Treaty.
- **Part 6: Further areas for investigation** suggests further areas of investigation by Yoorrook in relation to the urgent priority issues in Part 5.

# 1 Summary and recommendations

The current justice and child protection systems continue to fail and harm First Peoples. The systemic injustices experienced by First Peoples in those systems are inextricably linked to past injustices and colonial practices. Yoorrook is uniquely positioned to investigate historic practices and their legacy, as well as more recent government decision-making and policy responses.

Our submission highlights that while positive steps towards self-determination have been made in both systems, giving effect to genuine self-determination—the power to shape and make the decisions about the systems, laws, policies and programs that affect our Communities, families and children—is necessary to address the systemic injustices and the ongoing legacy of colonisation and colonial practices. Self-determination is key to achieving positive socio-economic outcomes in a range of areas, which will reduce First Peoples' interactions with the justice and child protection systems.

Fundamentally this requires shifting decision-making power to First Peoples through Treaty.

In October 2022, the Assembly and the Victorian Government reached agreement on a strong framework for First Peoples to negotiate Treaty – Traditional Owner Treaties and a Statewide Treaty.

Treaty provides an historic opportunity to move towards a new relationship between First Peoples and the State, based on truth and justice, to make transformational changes to give effect to genuine self-determination.

Yoorrook's investigation of injustice in the criminal justice system and child protection system will reveal the extent of historical and ongoing injustices experienced by First Peoples in these systems. It will develop our shared understanding in Victoria of areas where change is needed, so that genuine and sustainable justice can be progressed in the Treaty process.

The Assembly asks Yoorrook to find that (**Part 4**):

- Issue-specific law reform in the criminal justice and child protection systems alone is not enough to address the systemic injustices faced by First Peoples. A 'whole of system' approach that gives effect to genuine self-determination is required.
- Mechanisms to shift decision-making power to First Peoples to give effect to self-determination in the criminal justice and child protection systems should be entrenched by Treaty and interim agreements reached in the Treaty process, empowering First Peoples to decide our own aspirations, priorities and path to reform and to hold government accountable.

Immediate reforms that the Victorian Government can and should implement now—and not wait for Treaty outcomes—include (**Part 5**):

1) **Raise the age of criminal responsibility from 10 to at least 14 years of age.** Yoorrook should recommend that the Victorian Government takes immediate action to raise the age of criminal responsibility to at least 14 years of age.
2) **Implement an independent and effective police accountability system.** Yoorrook should recommend that the Victorian Government takes immediate action to introduce a robust, independent and adequately resourced model of effective police oversight, aligned with VALS Reforming Police Oversight paper.
3) **Implement reforms for a public health response to public drunkenness.** Yoorrook should recommend that the Victorian Government takes immediate action towards the de-criminalisation of public drunkenness and a Community-led public health response.
4) **Implement reforms to Victoria's punitive bail law and policy.** Yoorrook should recommend that the Victorian Government takes immediate action to fix Victoria's broken bail laws to address the bail crisis in Victoria.
5) **Keep families together.** Yoorrook should recommend that the Victorian Government coordinates investment and provides proportionate resourcing for ACCOs to deliver early intervention and prevention programs and supports to keep families together.

Government must be held accountable for addressing these critical issues. Treaty—and interim agreements reached in the Treaty process—will hold governments to account.

The Assembly also identifies specific areas for Yoorrook's investigation (**Part 6**).

# 2 About the Assembly

The Assembly is the independent and democratic voice for Aboriginal and Torres Strait Islander peoples in the Victorian Treaty process.

The Assembly's 31 Members are all proud Traditional Owners of Country in Victoria. They were chosen by their communities to establish the foundations for Treaty negotiations.

The Assembly has reached agreement with the State on three key pillars for future Treaty negotiations:

- The Treaty Negotiation Framework sets the ground rules for Treaty negotiations, for Traditional Owner Treaties and a Statewide Treaty.
- The Treaty Authority will be the independent umpire to facilitate and oversee negotiations.
- The Self-Determination Fund is a First Peoples-controlled fund which will support First Peoples to negotiate Treaties on a level playing field with the State and build capacity, wealth and prosperity for future generations.

The stage is set to negotiate Treaties to achieve better outcomes for First Peoples. Both Statewide and Traditional Owner Treaty negotiations will be informed by relevant findings and recommendations of Yoorrook.[1] Yoorrook's findings and recommendations can also inform interim agreements reached during Statewide and Traditional Owner Treaty negotiations.

The Treaty Negotiation Framework allows for **interim agreements** to be reached during Treaty negotiations. Interim agreements can relate to any topic.[2]

This process for interim agreements supports the early realisation of First Peoples' rights and can bring benefits to Community during Treaty negotiations.

It is intended that Statewide Treaty will be negotiated by the Assembly as the representative body for all First Peoples in Victoria, following the Assembly's next elections in 2023.[3]

Nothing is off the table when it comes to Treaty. The Assembly has heard consistently from Community the importance of taking back control of First Peoples' affairs through Treaties and a strong desire for changes to systems and structures of government to shift decision-making power into First Peoples hands, including in the areas of law and justice and child protection.[4]

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[1] Treaty Negotiation Framework, signed by the First Peoples' Assembly of Victoria and the State of Victoria on 20 October 2022, <https://www.firstpeoplesvic.org/reports-resources/treaty-negotiation-framework/>, section 25.2(e)(i).

[2] Treaty Negotiation Framework, sections 26.5, 27.

[3] Treaty Negotiation Framework, sections 15 and 16.

[4] See First Peoples' Assembly of Victoria, *Our Journey to Treaty: Report on Community Feedback*, 2022, <https://www.firstpeoplesvic.org/wp-content/uploads/2022/09/FPAV-Community-Engagement-Report-2022.pdf>, pp 18, 20. The Assembly has heard a preference for incorporating Aboriginal Lore and Law into the criminal justice system to

Informed by Yoorrook's findings and recommendations, the Assembly intends to develop the priorities for Statewide Treaty negotiations to achieve First Peoples' aspirations, working with our Community and Community-led organisations.

Yoorrook's inquiry recommendations are therefore critical for establishing areas of injustice which should be on the table for Treaty negotiations, as subject matters over which First Peoples should exercise decision-making power.

# 3 Failures of the child protection and criminal justice systems

Both the criminal justice system and child protection system have harmed, and continue to harm, First Peoples.

From the earliest stages of colonisation, colonists used violence and policing, and forcibly separated First Peoples' children from their families.[5] The reality for our people is that the conflict has never stopped.

Recent decades have seen the continuation and, in many cases, worsening, of key harm indicators for First Peoples involved in both systems.

Despite the focus and hard work of First Peoples' Communities and sections of government, and recent decades of reform and improvements in some areas, the separation of families continues, the removal rates of Aboriginal children from their families remain staggering and over-incarceration and deaths in custody of First Peoples remain at shameful rates.

Successive governments have allowed critical recommendations to address systemic injustices in the criminal justice and child protection systems to go unimplemented, including from the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and the Bringing them home inquiry.[6] These recommendations include to implement self-determination to improve First Peoples' well-being.[7]

There are areas of good practice, for example modern reforms within both systems that have seen the gradual implementation of some human rights standards and protections, and policy commitments to the principle of First Peoples' self-determination.

ensure cultural safety and control of First Peoples affairs in this area. The Assembly has heard that more should be done to support families before the involvement of child protection.

[5] Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [56] – [66].

[6] Human Rights and Equal Opportunity Commission, *Bringing them home: national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (1997).

[7] See e.g. Human Rights and Equal Opportunity Commission, *Bringing them home: national inquiry into the separation of* Aboriginal *and Torres Strait Islander children from their families* (1997), Chapter 26.

However, positive reforms remain limited in their effectiveness to address systemic injustice, precisely because the ability for First Peoples to design and reform structures, programs and processes remains significantly constrained – both within the justice and child protection systems, but also across a wider range of community services critical to preventing First Peoples from becoming involved with those systems.

This is government paying lip-service to the concepts of empowerment and self-determination. Government can still make policies and pass laws that cause enormous harms to First Peoples and actively undermine well-intentioned programs and reforms. Self-determination is key to achieving effective and efficient community services and systems[8] and positive socio-economic outcomes.

## 3.1 Criminal justice

### 3.1.1 Systemic injustice

Not only are First Peoples overrepresented across all stages of Victoria's criminal justice system, First Peoples are imprisoned at the highest rate of any in the world.

- Between 2011-12 and 2016-17, the rate of Aboriginal adults under justice supervision increased by 52.6 per cent (from 294.5 to 449.5 per 10,000) compared with a 34 per cent increase among non-Aboriginal adults (from 28.6 to 38.4 per 10,000).[9]
- Between 30 June 2010 and 30 June 2020, the number of incarcerated First Peoples in Victoria rose by 148%.[10]
- In 2016-17, Aboriginal adults were 11.7 times more likely than non-Aboriginal adults to be under justice supervision in Victoria.[11] In that same year, Aboriginal youth were 14 times more likely than non-Aboriginal youth to be under justice supervision in Victoria.[12]

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[8] Human Rights and Equal Opportunity Commission, *Bringing them home: national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (1997), Chapter 15.

[9] Australian Bureau of Statistics, 'Estimates and Projections, Aboriginal and Torres Strait Islander Australians 2006 – 2031, 11 July 2019, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0>.

[10] Corrections Victoria, *Profile of Aboriginal people in prison, 2021*, <https://files.corrections.vic.gov.au/2021-07/CV%20Prison%20Aboriginal%20Persons%202021%20Jul%20update.pdf>.

[11] Corrections Victoria, ABS 3238.0 Aboriginal Population Estimates and Projections, ABS 3101.1 Australian Demographic Statistics.

[12] Australian Institute of Health and Welfare, *Youth Justice 2016-17*, ABS 3238.0 Aboriginal Population Estimates and Projections, ABS 3101.1 Australian Demographic Statistics.

FIRST PEOPLES' ASSEMBLY OF VICTORIA

Systemic racism across the criminal justice system, and a lack of transparency and accountability, remain endemic, including in policing.[13] Few Aboriginal justice programs and innovations acknowledge or attempt to address institutional systemic racism across the system.[14]

The commitment to self-determination by the Victorian Government, as expressed through the Victorian Aboriginal Affairs Framework 2018-2023, the Aboriginal Justice Agreement (AJA), and subsequent policies and programs has not been enough to tackle the complex challenges.

Community-driven programs remain limited in scope, accessibility and locations. They are inadequately or inconsistently funded, piecemeal in application and are often undermined by the inaction, scepticism or bias of state officials.

Further, a number of programs and initiatives remain directed towards improving the relationship that First Peoples have with the criminal justice system rather than reform of the system itself. Despite progress regarding culturally safe practices and forms, Victorian courts remain embedded within the dominant Western legal system and ultimately enforce the laws of the settler state.

The independent cultural review of the adult custodial corrections system is currently examining cultural safety and inclusion within prisons.[15] However, this does not go towards the tackling the wider and more important questions regarding the role and nature of the prison system itself—including who makes decisions about laws, policies and resourcing.

Significantly, the RCIADIC asserted that the fundamental causes for over-representation of First People in custody were not located **within** the criminal justice system. Instead, 'the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society—socially, economically and culturally'.[16]

The criminal legal system in Victoria, as it is currently designed, is incapable of responding to socio-economic issues faced by First Peoples. Yet successive Victorian Governments have expanded and funded policing and imprisonment at the expense of vital and far more effective socio-economic reform. We need to reset the scales, through self-determination.

**The criminal justice system has been core to the colonial project**

The Assembly anticipates that the volume of evidence gathered during Yoorrook's investigations will expose the historic role the Victorian criminal justice system played in legitimising colonial occupation, inspiring terror and deterring Aboriginal resistance, ignoring, excusing or exonerating

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[13] See further at section 6.2 below. As has been stressed by the Victorian Aboriginal Legal Service (VALS), without robust, independent scrutiny within and throughout the criminal legal system, the system will not improve. See Victorian Aboriginal Legal Service, Submission to the Inquiry into Victoria's Criminal Justice System, Sept 2021.

[14] See H Blagg, N Morgan, C Cunneen and A Ferrante, *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Criminal Justice System*, September 2005, <https://tr.uow.edu.au/uow/file/64419d5f-d183-49c2-90d9-d81c8dc44f17/1/2005-blagg-1-210.pdf>. See also Commission for Children and Young People, Our Youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system, 2021, p 430. Excessive policing of Aboriginal women was also noted in the Tanya Day Inquest. Inquest into the Death of Tanya Louise Day (COR 2017/6424), Findings, 9 April 2020.

[15] See <www.corrections.vic.gov.au/cultural-review>.

[16] Royal Commission into Aboriginal Deaths in Custody (RCIADIC), National Reports (1991) vol 1. [1.7.1].

violence by white settlers against First Peoples and maintaining racist systems into the 20th Century.[17] Frontier violence and policing were intertwined.[18]

Victoria's criminal justice system has inherited practices and philosophies from British colonial history and has been intrinsically shaped by the colonial imperative to usurp Indigenous land, complete the 'colonial project' of establishing universal colonial sovereignty, and annihilate resistance to that end.[19]

Colonial violence in Victoria, including murders and large-scale massacres, as well as practices such as detainment, forcible transfer of children, the suppression of cultural practices and languages, formed a manifest pattern of behaviour that was intended to destroy, in whole or in part, the First Peoples in Victoria as a group.[20] There is a direct line between structural conditions of colonisation, including policing practices, and the contemporary criminal justice system which continues to 'reproduce marginalised peoples as criminal sub-groups'.[21]

The nature and extent of this violence has been far from acknowledged by any Victorian government, parliament, church or state body in the many decades since.

Reform within the criminal justice and child protection systems requires the foundational crimes and atrocities to be fully acknowledged and faithfully responded to at all levels of the modern Victorian State.

Over-representation within the criminal justice system began early in the colony. Of the 26 people recorded as being in custody in Port Philip District in 1840, 11 (42%) were Aboriginal.[22]

It is telling that the first people publicly hanged in Melbourne in 1842 were two Tasmanian Aboriginal men, Tunnerminnerwait and Maulboyheener, who were engaged in what amounted to a guerrilla resistance campaign against European settlement in the Port Philip area. Their story is little known but emblematic: 'The trial and hanging in Melbourne is…significant in relation to the bid for official support of the very colonisation of the lands of the Kulin people.'[23]

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[17] For example, the *Aborigines Protection Act 1869* (Vic), *Aborigines Act 1910* (Vic), *Aborigines Act 1957* (Vic) and related and subsequent policies.

[18] For further detail see Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [56] – [63].

[19] C Cunneen and A Porter, 'Indigenous Peoples and Criminal Justice in Australia', in A Deckert and R Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (2017), pp 667-682.

[20] See L Ryan, J Debenham, M Brown and W Pascoe, *Colonial Frontier Massacres in Australia 1788-1930* (Newcastle: University of Newcastle, 2017); Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [19].

[21] Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [63] citing Chris Cunneen, "Postcolonial Perspectives for Criminology", (2011) *UNSWLRS* 6, <http://classic.austlii.edu.au/au/journals/UNSWLRS/2011/6.html>. See Royal Commission into Aboriginal Deaths in Custody, National Report (April 1991), Vol 2, Pt C.

[22] C Land, Tunnerminnerwait and Maulboyheenner: The involvement of Aboriginal people from Tasmania in key events of early Melbourne (City of Melbourne, 2014), p 14.

[23] C Land, Tunnerminnerwait and Maulboyheenner: The involvement of Aboriginal people from Tasmania in key events of early Melbourne (City of Melbourne, 2014), p 14.

### 3.1.2 Steps in the right direction but criminal justice system continues to harm First Peoples

The AJA, now in its fourth phase – *Burra Lotjpa Dunguludja*,[24] has guided efforts to address First Peoples overrepresentation across the justice system and improve justice outcomes for First Peoples since 2000. Framed as a partnership between the Aboriginal community and the Victorian Government, the AJA has attempted to enact the core principles that the RCIADIC asserted of self-determination and self-management, and arrest and imprisonment as sanctions of last resort.

The AJA has seen the expansion of community-based justice programs and services, community designed and led approaches to reduce Aboriginal involvement in the justice system. These include the Koori Youth Justice program to target over-representation in Victoria's youth justice system, Statewide Indigenous Arts in Prisons and Community Program and a range of court-based initiatives. The AJA introduced overarching goals, a set of key principles, the identification of specific strategic areas (such as justice diversionary alternatives and the development of non-custodial sentencing options), and initiatives to achieve outcomes within each strategic sphere.

In parallel to the AJA, Victoria Police, corrections, youth justice, and other government departments have developed strategic plans for working with or responding to First Peoples over recent decades, some in partnership with First Peoples' Communities in line with principles of self-determination.

Court Services Victoria now proudly leads efforts in building 'Koori-led design and services' and providing 'culturally safe' court services. The Koori Court program in the County, Magistrates' and Children's Courts sees over 100 Elders and Respected persons working with magistrates and judges to provide cultural counsel and support to the accused coming before the Koori Court. The Children's Court now holds Koori family hearing day as part of the Marram-Ngala Ganbu program aimed at improving outcomes for Koori children involved in Child Protection proceedings.

All of these have been necessary and welcome reforms. However, the profound limitations, reach, lack of funding faced by these programs and initiatives, as well as the continuation and, in many cases, worsening, of key harm indicators, leave no doubt that the current system continues to fail and harm First Peoples.

The Aboriginal Justice Caucus has identified its long-term aspiration for self-determination within the justice system expressed in *Burra Lotjpa Dunguludja* to 'eventually see the Aboriginal community set the agenda in relation to providing a culturally responsive justice system for Aboriginal people'. It describes that 'this relates to the aspiration of the Aboriginal community to:

- Determine goals and aspirations for that system as it applies to Aboriginal people
- Set the direction for government policy and programs as they apply to Aboriginal people's interaction with the justice system
- Hold governments to account against benchmarks set by the Aboriginal community
- Establish justice institutions to exercise self-determination.'[25]

The potential for Treaty to secure the structural reforms required to give effect to these aspirations is discussed below in Part 4.

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[24] *Burra Lotjpa Dunguludja – AJA Phase 4*, <www.aboriginaljustice.vic.gov.au/the-agreement>.

[25] AJC Co-Chairs' Foreword in *Burra Lotjpa Dunguludja*, p 9. It describes that this vision for an Aboriginal community-controlled justice system fits in with the broader movement towards self-determination and Treaty work underway.

## 3.2 Child protection

### 3.2.1 Systemic injustice

Yoorrook will hear evidence from our Community-controlled organisations, First Peoples with direct experience and experts of the ongoing harm caused to First Peoples in the child protection system.

This will include evidence on the key issues identified in Issues Paper 2—which include the connection between Colonisation and contemporary systemic injustice, the high rates of First Peoples child removal, the vast overrepresentation of First Peoples children in child protection and care, the disconnection from community and culture for First Peoples children in the system, the criminalisation of First Peoples children in care—and more.

Progress towards the *National Agreement on Closing the Gap's* Target 12—to reduce the overrepresentation of First Peoples children in out-of-home care by 45% by 2031—is worsening nationally.[26]

The 2022 report of the Family Matters campaign, led by the Secretariat of National Aboriginal and Islander Childcare (SNAICC) (the Family Matters Report 2022), reports on the current national picture, which includes that:[27]

- 22,243 Aboriginal and Torres Strait Islander children were in out-of-home care as at 30 June 2021, which represents one in every 15.2 Aboriginal and Torres Strait Islander children living in Australia.
- Aboriginal and Torres Strait Islander children were 10.4 times more likely than non-Indigenous children to be in out-of-home care, 'an over-representation that has increased consistently over the last 10 years' in every jurisdiction (up from 10 times more likely in 2019-20).
- In 2020-21, 21% of Aboriginal and Torres Strait Islander children removed into out-of-home care nationally were under the age of 1 and were removed at ten times the rate of non-Indigenous infants.
- The number of First Peoples children living in out-of-home care is projected to increase by 50% over the next decade (compared to an increase of 13.5% for non-Indigenous children), if the current trajectory is not interrupted by profound and wholesale changes across legislation, policy and practice.

This national picture is replicated in Victoria. The Victorian Government reported that in 2020-21 almost 30% of children in the out-of-home care system in Victoria are First Peoples, despite First

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[26] The Productivity Commission reports that nationally in 2021, the rate of First Peoples children aged 0-17 years in out-of-home care was 57.6 per 1000 children in the population. This is an increase from 54.2 per 1000 children in 2019. See Productivity Commission, *Dashboard for Socioeconomic outcome area 12 – Aboriginal and Torres Strait Islander children are not overrepresented in the child protection system*, <https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area12>.

[27] *Family Matters Report 2022*, <https://www.familymatters.org.au/wp-content/uploads/2022/11/20221123-Family-Matters-Report-2022-1.pdf>.

Peoples representing less than 1% of the Victorian population, meaning that 'Aboriginal children are 20.1 times more likely to be removed from their families and placed in the child protection system compared to their non-Aboriginal peers.'[28]

In his witness statement to Yoorrook in April 2022, Assembly Co-Chair Marcus Stewart outlined that reasons for the over-representation of First Peoples children in the out-of-home care system include that 'a history of separation from Community, family, land and culture has left a legacy of disempowerment and trauma, which has produced corresponding negative impacts on family stability, early childhood health, education and wellbeing.'[29]

He stated that, 'despite numerous initiatives intended to redress the effect of harmful historical child protection practices on First Peoples... progress has been slow and inadequate' and 'without a genuine shift in control and decision-making power, the same outcomes for First Peoples can be expected.'[30]

The same point is made in the 2022 Family Matters Report, that the data demonstrates 'the failure of legislative and policy settings to resolve the injustices faced by First Peoples children in child protection systems across all jurisdictions' and that the *Closing the Gap's* Target 12 'will not be met without substantial transformation of these systems'.[31] The report states that what is required is 'a comprehensive approach to address the drivers of child protection intervention and create a new system of child protection and service supports that are grounded in the strengths of culture and led by Aboriginal and Torres Strait Islander peoples.'[32]

### 3.2.2 Steps in the right direction but the child protection system continues to harm First Peoples

The Victorian Government has committed to eliminating the overrepresentation of First Peoples children in care and progressing self-determination in child protection, including through the transfer of responsibility for First Peoples children to First Peoples organisations.

These commitments are expressed in the Victorian Aboriginal Affairs Framework 2018-2023, the Victorian Closing the Gap Implementation Plan 2021-2023, *Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017–2027*,[33] *Wungurrilwil Gapgapduir: Aboriginal Children and*

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[28] *Victorian Government, Aboriginal Affairs Report 2021*, <https://www.firstpeoplesrelations.vic.gov.au/victorian-government-aboriginal-affairs-report-2021/children-family-and-home>, Measure 2.1.1.

[29] Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [104], available at https://yoorrookjusticecommission.org.au/wp-content/uploads/2022/05/20220429-Yoorrook-JC-Statement-of-M-Stewart-FINAL.pdf.. The statement references the CCYP's report of its investigation into the circumstances of Aboriginal children in out-of-home care in 2016—*Always was, always will be Koori Children*—which made 77 recommendations to reduce overrepresentation.

[30] Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [107].

[31] *Family Matters Report 2022*, p 22.

[32] *Family Matters Report 2022*, pp 12, 22.

[33] The overarching framework for action to advance Aboriginal self-determination and improve outcomes in health, wellbeing and safety, <https://www.health.vic.gov.au/health-strategies/korin-korin-balit-djak-aboriginal-health-wellbeing-and-safety-strategic-plan-2017>.

*Families Agreement*,[34] and subsequent strategies including *Roadmap for Reform: Strong Families, Safe Children*.[35]

Aligned with these commitments, there have been important initiatives and steps taken towards self-determination in key areas of the system, however their effectiveness requires resourcing and a genuine shift in control and decision-making power to First Peoples.

An example is the important Aboriginal Children in Aboriginal Care program, which involves the Secretary of the Department of Families, Fairness and Housing (DFFH) transferring guardianship of First Peoples children on Children's Court care and protection orders to the CEO of an ACCO under section 18 of the *Children, Youth and Families Act 2005*.

The Family Matters Report 2022 reports that the outcomes of 'delegated authority' approaches such as the Aboriginal Children in Aboriginal Care program 'have been remarkable and demonstrate the significant and positive outcomes that can be achieved when ACCOs exercise authority in child protection decision-making.' However, and crucially, despite the transfer of legal jurisdiction in such programs, it reports that the program:

> 'must not be conflated with an achievement of full self-determination. ACCOs do not have control over the systems and the laws that are delegated to them and face ongoing difficulties in securing funding to run these programs. ... a process by which an ACCO needs to provide ongoing justification for management and funding of essential community-led services is not self-determination.'[36]

### Aboriginal Children in Aboriginal Care program

When section 18 came into effect in 2017, VACCA was the first agency to take on the guardianship role through its Nugel program, followed by the Bendigo and District Aboriginal Co-operative (BDAC). Through the program, VACCA provides case planning and cultural planning, support for out-of-home care arrangements, case management, legal services, referrals, and support for family reunification. The program has recently expanded to Ballarat & District Aboriginal Cooperative and Njernda Aboriginal Corporation, as well as VACCA's Inner Gippsland region.

VACCA and VACYPA report on the continued success of the program and positive outcomes for the children involved, [37] including higher rates of reunification of children with their families.[38]

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[34] A partnership between government, Aboriginal community and the child and family services sector, launched in 2018 to give strategic direction to reduce the number of Aboriginal children in out-of-home care by building connection to culture, Country and community.

[35] A strategy to transform the child and family system, focused on earlier intervention and prevention to reduce vulnerability and equip children and young people to reach their full potential.

[36] *Family Matters Report 2022*, pp 89, 90. The report argues that an essential element of self-determination is that commissioning processes need to be developed, managed and reviewed by ACCOs: see 'Aboriginal and Torres Strait Islander Community-led commissioning' at p 90.

[37] 'Community voices – provided by VACCA and VACYPA' in *Family Matters Report 2022*, p 79.

[38] VACCA has found that the Nugel Program has contributed to a higher rate of reunification of children with their families – the Department's rate of reunification is between 12-15%, whilst VACCA's is between 22-25%: Statement of VACCA CEO

However, resourcing to implement section 18 is insufficient and '*little has changed at the government program, practice and operational levels in the systems over which ACCOs have little control.*'[39]

VACCA and VACYPA have noted that while the funding of the program as a whole is ongoing, the quantum of funding for each ACCO is not guaranteed, *'as it is driven by DFFH targets for the number of children to be authorised to ACCOs in each region. These targets create limitations on the numbers of children that ACCOs can nominate for authorisation under ACAC, rather than being able to set their own targets (as the experts in their local communities) and be resourced accordingly.'*[40]

VACCA and VACYPA also note barriers from some non-Indigenous NGOs in the transfer of case management to ACCOs under the program, *'which displays a colonial mindset – one that is contrary to the principle of self-determination and is further reinforced by DFFH initiating a project on 'Building ACCOs' Aspirations', situating the problem within ACCOs and their capabilities viewed as deficits rather than holding the rest of the sector accountable.'*[41]

The potential for Treaty to secure the genuine shift in control and decision-making power to First Peoples in the child protection system is discussed in the following section.

# 4 Structural reform is needed – through Treaty

The Treaty process is about moving beyond the policy statements, targets, and milestones that have failed to prevent or halt systemic injustices. It provides the potential to activate genuine self-determination—to make transformational changes to shift decision-making power to Victoria's First Peoples, so that First Peoples are making the decisions about the systems that impact our communities. This is what we call 'structural reform'.

The Treaty Negotiation Framework contemplates that the subject matters for negotiation in a Statewide Treaty will include whether a First Peoples' representative decision-making body should be created, a First Peoples' authoritative Voice to Parliament or other forms of institutional oversight by First Peoples for the benefit of First Peoples.[42]

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Muriel Bamblett to the Commission of Inquiry into the Tasmanian Government Responses to Child Sexual Abuse in Institutional Settings, [71].

39 *Family Matters Report 2020*, p 28.

40 'Community voices – provided by VACCA and VACYPA' in *Family Matters Report 2022*, p 79.

41 'Community voices – provided by VACCA and VACYPA' in *Family Matters Report 2022*, p 79.

42 Treaty Negotiation Framework, section 25.3.

The participation of First Peoples representative decision-making bodies plays a vital role in addressing systemic injustices and improving outcomes for First Peoples in the justice system.[43]

For example, scholars have highlighted that the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) as the national representative body in 2005, and the limited number of state and territory Indigenous representative bodies in existence, have significantly impacted the ability of state and territory governments and communities to work together to address issues relating to Indigenous over-representation in the criminal justice system.[44]

The Assembly expects that Yoorrook will make recommendations in its Critical Issues report and future reports about areas of systemic injustice which require holistic systems-level change, recognising that these systems and issues cannot be considered in isolation. We need to empower First Peoples in order to improve outcomes and break the cycles of First Peoples' involvement with the justice and child protection systems.

It is clear from previous reform attempts that system change will not be effective if unilaterally imposed by governments, without any genuine shift in decision-making power. First Peoples must be empowered to re-shape systems in which genuine self-determination is embedded.

The Assembly asks Yoorrook to find that:

- Issue-specific law reform in the criminal justice and child protection systems alone is not enough to address the systemic injustices faced by First Peoples. A 'whole of system' approach that gives effect to genuine self-determination is required.
- Mechanisms to shift decision-making power to First Peoples to give effect to self-determination in the criminal justice and child protection systems should be entrenched by Treaty and interim agreements reached in the Treaty process, empowering First Peoples to decide our own aspirations, priorities and path to reform and to hold government accountable.

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[43] F Allison and C Cunneen, 'The role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People' (2010) 32(4) *Sydney Law Review* 645.

[44] In their 2010 paper, Allison and Cunneen highlight the discussion on the Indigenous right to participate in decision-making through representative bodies, see Human Rights and Equal Opportunity Commission, *Building a Sustainable National Indigenous Representative Body —Issues for Consideration* (2008); *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda to the Expert Mechanism on the Rights of Indigenous Peoples — Item 3: The Right to Participate in Decision-Making* (12–16 July 2010).

# 5 Urgent reforms needed now

The Assembly joins with the advocacy of First Peoples communities, ACCOs, and other community organisations in calling for specific reforms on a number of priority issues to be addressed by the Victorian Government as a matter of urgency.

In raising these issues as urgent reforms, the Assembly refers Yoorrook to the extensive knowledge and research of First Peoples Community-led organisations that have dedicated expertise and play a lead role in addressing systemic injustices. Those organisations, along with First Peoples communities, have been calling for specific reforms on each of these issues for many years. The way forward is clear. Urgent reforms on these issues can happen now: it is untenable for the Government to hide behind the cloak of Treaty.

The Assembly also refers to and repeats evidence to Yoorrook on those issues by Assembly Co-Chair Marcus Stewart on behalf of the Assembly in April 2022.[45]

Systemic injustices, as they are experienced by First Peoples in the criminal justice system and within the child protection system, represent a continuation of hostilities that began at the onset of colonisation in Victoria in 1835 and continued through generations of discriminatory practices and policies.[46]

Addressed below are a number of these hostilities that must effectively cease if the level of safety, trust and community confidence, the preconditions of effective, modern Treaty-making, are to exist before formal Treaty negotiations between First Peoples and the State commence.

## 5.1 Raise the age of criminal responsibility

In its Inquiry into the over-representation of Indigenous children and young people in the Victorian youth justice system, the Commission for Children and Young People stated that:

> 'Aboriginal children and young people and their communities have been targeted by the state in an unbroken chain of harmful interventions since early colonisation. For many Aboriginal people, these state-inflicted interventions have directly caused generations of trauma and broken connection to Country and community.'[47]

It remains an everyday reality that Aboriginal children and young people in Victoria are disproportionately targeted by the police, sentenced by the courts, and removed from their families and communities.

[45] Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022.

[46] For example, *Aborigines Protection Act 1869* (Vic), *Aborigines Act 1910* (Vic) and *Aborigines Act 1957* (Vic), related and subsequent policies.

[47] Commission for Children and Young People, *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations*, 2021, 8, available at https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Summary-Final-090621.pdf.

In Victoria, the age of criminal responsibility is 10 years old.[48] Given the over-representation of our children in custody, the low age of criminal responsibility disproportionately affects our Community. Our children shouldn't graduate from primary school to prison.[49]

First Peoples communities have been strong and clear in calling on the Victorian Government to raise the age to at least 14 years old for years. First Peoples have been met with inaction by the Victorian Government.[50]

The Assembly refers to:

- the chronic over-representation of First Peoples children and young people in Victoria's Youth Justice system
- the impact of the current minimum age of criminal responsibility on First Peoples children in remand and prison
- the call by the UN Committee on the Rights of the Child and the UN Committee against Torture that countries should be working towards a minimum age of criminal responsibility of 14 years or older[51]
- extensive development science research on children and their neuropsychological and social development which points to the merits of raising the minimum age of criminal responsibility[52]
- the global median age of criminality being 14 years old[53]
- consistent calls by multiple Australian legal, human rights, child welfare and Aboriginal legal services that all State and Territory Governments raise the minimum age of criminal responsibility to at least 14 in their jurisdictions
- the goals of *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022-2032* in preventing Aboriginal and Torres Strait Islander Children entering the youth justice system and addressing over-representation.

The Assembly joins the calls of First Peoples organisations and communities to raise the age of criminal responsibility.[54]

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[48] *Children, Youth and Families Act 2005* (Vic), section 344.

[49] See Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [141] – [142].

[50] G Tobin and P Begley, Four Corners, November 2022, referenced at <https://www.abc.net.au/news/2022-11-15/buried-report-on-youth-detention-raising-the-age/101635706>.

[51] Committee on the Rights of the Child, *General comment No. 10 Children's rights in juvenile justice* (2007), CRC/C/GC/10, <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>, p 11; Committee Against Torture, Concluding observations on the sixth periodic report of Australia, 75th Sess, CAT/C/AUS/CO/6 (November 2022), [38].

[52] E Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6(2) *Journal of Children's Services* 86 and C Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Comparative Youth Penalty Project Research Report, University of New South Wales, 2017), p 5.

[53] Australian Human Rights Commission, *Children's Rights Report* (2016), p 187.

[54] Raise the Age Campaign, <https://raisetheage.org.au/>.

Yoorrook should recommend that the Victorian Government takes immediate action to raise the age of criminal responsibility to at least 14 years of age.

We note words of Justin Mohamed, the then Commissioner for Aboriginal Children and Young People, who said in the *Our Youth, our way* report:

> 'We know the very real harm we inflict when we choose to lock up children as young as 10 and then watch them cycle back into the system again and again. The evidence is in, and it is heartbreaking.'[55]

Raising the minimum age of criminal responsibility would greatly assist in curbing the mass incarceration of First Peoples children, as it would prevent young Aboriginal and Torres Strait Islander children from encountering the criminal justice system, at least until the age of 14. It would encourage and support the funding and support for diversionary methods or reinvestment projects, and access to therapeutic, age-appropriate healthcare services and prevention programs to address the issues faced by children.

## 5.2 Implement an independent police accountability system

There is a lack of effective redress or meaningful accountability for police violence in Victoria. Misconduct by police officers is investigated by other police—and we need to stop pretending that this is acceptable.[56]

The failure of the Victorian Government to provide an effective system of police accountability currently impedes First Peoples achieving justice and equality. It results in the continuation of distrust and suspicion of Victoria Police among First Peoples, which has not adequately addressed the consequences of colonial policing models on First Peoples communities.[57]

The historical basis for distrust by First Peoples towards Victoria Police, has been described as follows:

> 'Many [Aboriginal people] see police in a historic continuity where they started off as armed agents of invaders who in many areas sought to exterminate them, and everywhere to deprive them of their land and means of livelihood ... Police have always been called on to do the dirty work associated with government policies in relation to Aboriginals, including the dispersal of

[55] Commission for Children and Young People, *Our youth, our way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system* (2021), p 3 <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Final-090621.pdf>.

[56] The inherent structural flaws in Victoria's complaint system was explored in Tamar Hopkins', 'When Police Complaints Mechanisms Fail, The use of civil litigation' (2011) 36 *Alternative Law Journal* 101. See also, IBAC Committee, *Inquiry into the external oversight of police corruptions and misconduct in Victoria* (2018) <https://www.parliament.vic.gov.au/file_uploads/IBACC_58-06_Text_WEB_2wVYTGrf.pdf>. See also Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [143] – [154].

[57] Assembly Co-Chair Marcus Stewart's witness statement to Yoorrook, April 2022, [63].

camps which offended local residents and even today the suppression of Aboriginal lifestyles that offend middle class propriety...' [58]

The Assembly refers to:

- the finding of the Colonial Frontier Massacres Digital Map Project that half of the massacres of Aboriginal people on the Australian frontier were carried out by government forces, including police[59]
- the role of Victoria Police in the removal of Aboriginal children from their families
- the role of Victoria Police in the discriminatory enforcement of legislation such as public intoxication laws, both historically and in ongoing practice
- the ongoing suspicion and distrust First Peoples hold regarding Victoria Police, including surrounding police-contact deaths or deaths in custody.

The context in Victoria has similarities to the colonial, post-conflict environment existing in Northern Ireland that prompted the establishment of the independent Police Ombudsman Northern Ireland.[60] We note that nothing short of a similarly robust, independent, and adequately resourced model of police oversight will serve to build the trust and confidence of First Peoples in Victoria.

The Assembly joins the calls of First Peoples organisations and Communities for the establishment of an independent police accountability system. These are set out in the Victorian Aboriginal Legal Service (VALS) paper 'Reforming Police Oversight in Victoria' (VALS Reforming Police Oversight paper).[61]

Yoorrook should recommend that the Victorian Government takes immediate action to introduce a robust, independent and adequately resourced model of effective police oversight which aligns with the VALS Reforming Police Oversight paper.

## 5.3 Public health response to public drunkenness

The Victorian Government has acknowledged the unacceptable and disproportionate impact that Victoria's current public drunkenness laws have had on First Peoples.[62] Delays in the decriminalisation of public drunkenness and the implementation of critical public health reforms to

[58] The Hon JH Wootten QC, Commissioner, 'Deaths in custody', Paper delivered at a public seminar entitled *Coronial Inquiries*, convened by the Institute of Criminology at Sydney University Law School, 10 October 1990, p 59.

[59] L Ryan, J Debenham, M Brown and W Pascoe, *Colonial Frontier Massacres in Australia 1788-1930* (Newcastle: University of Newcastle, 2017).

[60] J McCulloch and M Maguire, 'Reforming police oversight in Victoria: lessons from Northern Ireland (2022) 34(1) *Current Issues in Criminal Justice* 38.

[61] VALS, *VALS Policy Brief: Reforming Police Oversight in Victoria* (2022) <https://www.vals.org.au/wp-content/uploads/2022/07/Policy-Paper-Reforming-Police-Oversight.pdf>.

[62] The Victorian Government's response to The Report of the Expert Reference Group on Public Drunkenness, <https://www.justice.vic.gov.au/public-drunkenness>.

support successful decriminalisation pose a current and unacceptable risk to the life, health and wellbeing of First Peoples.[63]

As stated by the Expert Reference Group on Decriminalising Public Drunkenness:

> ‘there will continue to be devastating human impacts unless and until Victoria’s current criminal justice approach to public intoxication is discarded and replaced with a health-based response that ensures the safety and wellbeing of individuals who require support.’[64]

The Assembly refers to:

- the tragic and unnecessary death of proud Yorta Yorta woman, mother and grandmother, Aunty Tanya Day, as a result of being in the custody of Victoria Police while intoxicated
- the power of police to detain people for public drunkenness under protective custody laws[65] which disproportionately effects Aboriginal people[66]
- the findings of the RCIADIC that a high proportion of deaths in custody were due to being detained by police for public intoxication[67]
- the continued failure to implement the RCIADIC recommendation that the criminal offence of public drunkenness be abolished[68]
- the continued failure to implement the RCIADIC recommendation that States establish, and police must use, non-custodial facilities for the care and treatment of intoxicated persons[69]
- the Victorian Government’s delay in introducing a health-based response and delaying the date that the repeal of public drunkenness laws comes into effect until November 2023.[70]

Self-determination must underpin the development and implementation of health responses, to ensure cultural safety and that health responses meet the needs of Community. Insufficient funding for these services must not be used as an excuse to justify the involvement of police and/or more extensive police powers.[71]

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[63] See Assembly Co-Chair Marcus Stewart’s witness statement to Yoorrook, April 2022, [140].

[64] Expert Working Group on Decriminalising Public Drunkenness, *Seeing the Clear Light of Day: Report of the Expert Reference Group on Public Drunkenness* (August 2020), p 18.

[65] Police have the power to detain an individual for “their own protection” or the “protection of others” VALS, *Community Factsheet: decriminalising public intoxication* (2022), https://www.vals.org.au/wp-content/uploads/2022/03/Community-fact-sheet-Decriminalisation-of-public-intoxication.pdf, p 3.

[66] In the Northern Territory, 92% of people who are detained for public intoxication are Aboriginal: *Seeing the Clear Light of Day: Report of the Expert Reference Group on Public Drunkenness* (August 2020), p 34.

[67] VALS, *Community Factsheet: decriminalising public intoxication* (2022), <https://www.vals.org.au/wp-content/uploads/2022/03/Community-fact-sheet-Decriminalisation-of-public-intoxication.pdf>, p 1.

[68] Royal Commission into Aboriginal Deaths in Custody (1991), Recommendation 79.

[69] Royal Commission into Aboriginal Deaths in Custody (1991), Recommendation 80 & 81.

[70] VALS, *Community Factsheet: decriminalising public intoxication* (2022), <https://www.vals.org.au/wp-content/uploads/2022/03/Community-fact-sheet-Decriminalisation-of-public-intoxication.pdf>, p 9.

[71] VALS, *Community Factsheet: decriminalising public intoxication* (2022), <https://www.vals.org.au/wp-content/uploads/2022/03/Community-fact-sheet-Decriminalisation-of-public-intoxication.pdf>, p 6.

The Assembly joins the calls of First Peoples organisations and Communities to implement a community-led and health-based response to the decriminalisation of public drunkenness laws without further delay.[72]

**Yoorrook should recommend that the Victorian Government takes immediate action towards the de-criminalisation of public drunkenness and a Community-led public health response.**

## 5.4 Increase access to bail

In 2017, the Victorian Government made it harder for people to access bail in a wide range of offences.[73] That means more people are in jail who have not been found guilty of an offence.

As stated by the Victorian Aboriginal Legal Service:

> 'The Royal Commission in[to] Aboriginal Deaths in Custody recommended increasing access to bail as a crucial measure to reduce preventable deaths in custody.
>
> The Andrews Government has been restricting access to bail.'[74]

The Assembly refers to:

- the recommendations of RCADIC to increase access to bail and only use prison 'as a sanction of last resort'[75]
- the doubling of the Aboriginal prison population in Victoria between 2011 and 2021, and the growth of Victoria's overall prison population[76]
- the high percentage of people in Victoria's prisons who have not yet been found guilty[77]
- the evidence that Aboriginal women are the fastest growing demographic in Victoria's prisons and that half of them are in prison because they were denied bail[78]
- the harmful impact of this upon the children of Aboriginal women
- the harmful impact that punitive bail laws have on lives, families, and communities

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[72] See VALS, *Submission to the Inquiry into Victoria's Criminal Justice System* (September 2021), <http://www.vals.org.au/wp-content/uploads/2022/02/139._VALS_Eastern_Australian_Aboriginal_Justice_Services_Ltd_Redacted.pdf>.

[73] *Bail Amendment (Stage One) Act 2017* (Vic).

[74] VALS, *Policy Brief - Fixing Victoria's Broken Bail Laws* (2021), <https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf>, p 2.

[75] Royal Commission into Aboriginal Deaths in Custody (1991), Recommendation 87a.

[76] Sentencing Advisory Council, Victoria's Indigenous Imprisonment Rates, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates> and Corrections Victoria, *Profile of Aboriginal people in prison, 2021*, <https://files.corrections.vic.gov.au/2021-07/CV%20Prison%20Aboriginal%20Persons%202021%20Jul%20update.pdf>.

[77] *VALS, Policy Brief - Fixing Victoria's Broken Bail Laws* (2021), <https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf>, p 2.

[78] *VALS, Policy Brief - Fixing Victoria's Broken Bail Laws* (2021), <https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf>, p 8.

- the Victorian Government's decisions to ignore expert advice and warnings from ACCOs[79]
- the consistent calls by over fifty Victorian human rights, legal, and community organisations for urgent bail reform.[80]

Despite clear commitments under *Burra Lotjpa Dunguludja* (AJA4) to reduce the number of Aboriginal people on remand, as well as the National Closing the Gap Agreement to reduce Aboriginal incarceration rates, the Victorian Government has refused to address the bail crisis. This is a manufactured crisis, which the bail laws have created.

Victorian Aboriginal Legal Service has provided detailed recommendations on the legislative and policy reforms that are needed to fix Victoria's failing bail regime, in its 2021 Policy Brief, *Fixing Victoria's Broken Bail Laws*.[81]

The Assembly joins the calls of First Peoples organisations and communities for the urgent reform of bail laws focused on reducing incarceration and preventable deaths in custody. These reforms cannot wait until the start of Treaty negotiations.

Yoorrook should recommend that the Victorian Government takes immediate action to fix Victoria's broken bail laws to address the bail crisis in Victoria.

## 5.5 Keep families together

It is clear, as has been highlighted by VACCA and others, that the Closing the Gap Target 12 to reduce overrepresentation (and the Victorian Government's target to eliminate overrepresentation in child protection) cannot be met without the coordinated prioritisation of early intervention and family support.

VACCA and VACYP report that Government investment in ACCOs continues to lag, with only 17% of budgeted 2021-22 prevention and care services expenditure going to ACCOs despite a policy commitment of proportionate funding.[82]

The Commissioner for Aboriginal Children and Young People has identified a lack of coordinated investment to support families earlier, and that reducing over-representation requires a whole-of

[79] L Carter and L Lachsz, 'Victoria's bail laws are harming Aboriginal women and Aboriginal families', *National Indigenous Times* (October 2021).

[80] VALS petition 'Fix Victoria's Broken Bail Laws', <https://www.vals.org.au/fix-victorias-bail-laws/>.

[81] VALS, *Policy Brief - Fixing Victoria's Broken Bail Laws* (2021), <https://www.vals.org.au/wp-content/uploads/2022/05/Fixing-Victorias-Broken-Bail-Laws.pdf>.

[82] *Family Matters Report 2022*, <https://www.familymatters.org.au/wp-content/uploads/2022/11/20221123-Family-Matters-Report-2022-1.pdf>, p 78.

government response centred on self-determination.[83] VACCA has called on proportional funding for ACCOs to deliver early intervention and prevention programs.[84]

The Assembly supports calls from ACCOs and others that Government must invest in keeping families together through coordinated investment and proportionate resourcing for ACCOs work to deliver early intervention and prevention programs and supports.

# 6 Further areas for investigation

The systemic injustices experienced by First Peoples in the criminal justice and child protection systems have historic origins.

As the Victorian Aboriginal Legal Service (VALS) has powerfully articulated:

> 'Acknowledging how this country's colonial history has created and shaped structures and institutions characterised by racism, which so often fail to deliver true justice for Aboriginal people, is crucial. The legal system is built on a foundation of violence and dispossession, denial of sovereignty (and of course, humanity), with the colonial project continuing through policies of protection and assimilation. *Today's injustices are inextricably linked to the injustices of the past and achieving a collective understanding of Victoria's colonial legacy can help guide the reforms necessary for realising a truly equitable legal system*.'[85]

In relation to the urgent priority reforms set out in Part 5 above, the Assembly considers it is important to investigate government decision-making and policy responses.

The historic significance of this investigation cannot be underplayed. Generations of First Peoples reformers and advocates who have fought against discriminatory laws, practices and policies in this State, against deaths in custody, the forced removal of children and for fundamental civil rights, never had the power of a truth and justice commission behind them.

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[83] *Family Matters Report 2022*, <https://www.familymatters.org.au/wp-content/uploads/2022/11/20221123-Family-Matters-Report-2022-1.pdf>, p 80.

[84] See VACCA, Submission to the 2022 Victorian State Government Budget (January 2022), <https://treasury.gov.au/sites/default/files/2022-03/258735_victorian_aboriginal_child_care_agency.pdf>. See also VACCA, 'Response to the Inquiry into Victoria's Criminal Justice System' (September 2021), http://www.vacca.org/content/Document/VACCA_Submission_Inquiry_into_Victoria's_CJS_17Sept21.pdf, p 13.

[85] VALS, Building Back Better: VALS COVID-19 Recovery Plan (2021), <https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19- Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf>, p 99 (emphasis added).

The Assembly suggests investigation by Yoorrook on the following topics:

**Policing**

1) Analysis of colonial policing, imprisonment and Aboriginal Protectorate policies and practices from the onset of British colonial occupation, the establishment of the Port Phillip District, and throughout the Colony of Victoria.
2) The role of Victoria Police and its pre-1853 antecedents in historical and contemporary colonial violence.
3) The role of Victoria Police in enforcing racially discriminatory legislation such as the *Aborigines Protection Act 1869* (Vic), the *Aborigines Act 1910* (Vic) and the *Aborigines Act 1957* (Vic), related and subsequent policies as well as the discriminatory or racialised enforcement of other Victorian legislation.
4) Any culture of impunity for Victoria Police members.

The Assembly suggests that Yoorrook call upon current and former Victoria Police Chief Commissioners, Victorian Police Ministers, The Police Association Victoria Secretaries, historians, criminologists, and other expert witnesses to give evidence regarding the above.

**Youth justice**

5) The historic colonial origins of the youth justice system in Victoria, including the impacts of state-inflicted interventions, such as generations of trauma, broken connection to Country and community, inequalities in life experiences, educational attainment, earning, housing security, health outcomes and mortality.
6) The links between colonial violence and the prevailing culture of over-policing and surveillance, criminalisation, forced removal of children from their families. disproportionate youth justice system outcomes and adverse experiences.
7) The failures of the youth justice and child protection systems to support Aboriginal children and young people in areas such as housing, family violence, health and trauma, and their continued involvement in the youth justice system.
8) The level and extent of institutional racism within each element of the youth justice system, including via analysis of Victoria Police, stop, search and cautioning data, Youth Justice court orders, bail decisions and outcomes, court sentencing and decisions around child protection involvement.

The Assembly suggests that Yoorrook call upon current and former Ministers for Youth Justice, Attorneys General, Department of Justice and Community Safety secretaries, Commissioners for Aboriginal Children and Young People and other witness to give evidence on the above.

**Bail**

9) The use of protective custody laws to detain Aboriginal people in Victoria.

10) The Victorian Government decision-making processes that led to the Bail Act reforms in 2017,[86] including:

a) to what extent expert advice regarding the potential impact upon Aboriginal and Torres Strait Islanders was considered or rejected; and
b) The total budgetary costs of increased imprisonment and prison expansion required as a result of the reforms to the Bail Act.

11) The Assembly suggests that Yoorrook compel testimony from current and former government Ministers, senior Department of Justice bureaucrats and executives, and government and private prison operators as to the level of knowledge of the harmful impact of punitive bail laws upon First Peoples.

**Decriminalisation of public drunkenness**

12) The causes of Victorian Government delays in implementing a public health model to support decriminalisation of public drunkenness.

[86] *Bail Amendment (Stage One) Act 2017* (Vic).