Human Rights Law Centre

Towards ending systemic injustice and transforming Victoria's criminal legal system

Submission to the Yoorrook Justice Commission on Systemic Injustice in the Criminal Legal System

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Human Rights Law Centre

The Human Rights Law Centre is an independent, not-for-profit, non-government organisation that uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia.

We partner with Aboriginal and Torres Strait Islander peoples, organisations, peak bodies and the Change the Record coalition, working in solidarity to address systemic injustices facing Aboriginal and Torres Strait Islander communities. This work is guided by partnership principles and Reconciliation Action Plan which guide how we support Aboriginal and Torres Strait Islander peoples' right to self-determination.

Key focuses of our work include removing racial injustice from the criminal legal system, ensuring Aboriginal and Torres Strait Islander children are treated fairly and equally in the criminal legal system, ending the mass-imprisonment and deaths in custody of Aboriginal and Torres Strait Islander people and challenging the lack of police accountability in Victoria and across Australia.

The Human Rights Law Centre acknowledges the people of the Kulin, Eora and Larrakia Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation.

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1. Executive Summary

1.1 The Human Rights Law Centre makes this submission to the Yoorrook Justice Commission's (**Yoorrook's**) Issues Paper on Systemic Injustice in the Criminal Legal System (**Issues Paper**).

1.2 Yoorrook's Letters Patent direct the Commission to inquire into past policies and practices relating to policing, incarceration and the criminal legal system, as well as ongoing injustices in these areas. The focus of this submission is on amplifying the calls of Aboriginal and Torres Strait Islander people, communities and organisations for urgent change in these areas.

1.3 Police and prisons – institutions borne out of invasion – continue to result in Aboriginal and Torres Strait Islander people being over-policed, overincarcerated and dying in custody. As identified in evidence already given by Elders to Yoorrook, and as set out in Yoorrook's interim report: "settlers imposed the colonial 'justice system' on communities while they refused to consider First Peoples' own legal systems of law, lore and culture. This continues to cause great harm and rather than providing justice is too often a source of injustice."[1]

1.4 Transformational change of current systems is needed, and Yoorrook's focus on systemic injustice presents an opportunity for Aboriginal and Torres Strait Islander people, communities and organisations to reimagine current systems and lead the building of new, fairer ones.

1.5 Due to the ongoing impacts of colonisation, systemic racism and discriminatory policing, the number of Aboriginal and Torres Strait Islander people in prisons has nearly tripled over the last ten years[2] and, from 30 June 2020 to 30 June 2021, there was a 6 per cent increase in the number of Aboriginal and Torres Strait Islander people in Victorian prisons.[3] This is happening within a broader context of spiralling growth in the Victorian prison population – particularly the number of people in prison in pre-trial detention – during a time period when the rates of recorded offences and criminal incidents have remained relatively flat, and even started to drop.[4]

1.6 Yoorrook presents an opportunity to reimagine the criminal legal system, and the Human Rights Law Centre supports the Victorian Aboriginal Legal Service in their calls for the Victorian government to commit to moving towards a zero-prison population. In recognition of the evidence that prisons do not make communities safer, a brave Victorian government would work towards a future without people in prisons, and this starts with raising the minimum age of criminal responsibility to at least 14 years old and fixing the state's bail laws.

1.7 Despite the clear chorus of calls for change, successive Victorian governments have failed to act. 'Tough on crime' politics has dominated the discourse, with Victorian governments increasingly using prisons to warehouse people who they themselves have failed to support – people experiencing housing insecurity, food insecurity, poor access to healthcare, family violence and systemic racism. This has been fuelled by the rise in power of The Police Association Victoria, having the cumulative impact of creating a criminal legal system that turbo-charges injustice.

1.8 This is all despite a multitude of inquiries, reviews and recommendations being made and largely ignored since the 1991 Royal Commission into Aboriginal Deaths in Custody while rates of imprisonment of Aboriginal and Torres Strait Islander people in Victoria have continued to rise.

1.9 At the outset, we acknowledge that the submissions of Aboriginal Community Controlled Organisations and Aboriginal and Torres Strait Islander people with lived experience of the criminal legal system should be given priority in this process. The recommendations made in this submission have been informed by our work alongside the Victorian Aboriginal Legal Service, and we endorse the submission made to Yoorrook by the Victorian Aboriginal Legal Service. In particular, we support the call for the Victorian government to negotiate a Justice Treaty with Aboriginal and Torres Strait Islander communities and Aboriginal Community Controlled Organisations to set a new foundation to transform the criminal legal system.[5]

[1] Yoorrook Justice Commission, *Yoorrook with Purpose: Interim Report* (2022) 43.
[2] Australian Bureau of Statistics, *Prisoners in Australia – Prisoner numbers and prisoner rates by Indigenous Status and sex, States and territories, 2006-2021 - Table 40 (*2021*).*
[3] Australian Bureau of Statistics, *Prisoners in Australia* - State/Territory - Victoria *(*2021*).*
[4] Crime Statistics Agency, Recorded Offences; Crime Statistics Agency, Recorded Criminal Incidents, 2022.
[5] Victorian Aboriginal Legal Service, Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System (November 2022) 6.

1.10 We understand that this submission will be tendered to Yoorrook alongside a bundle of materials, including submissions previously made by the Human Rights Law Centre to the recent Inquiry into Victoria's Criminal Justice System (which the Andrews government failed to respond within the time period allocated for government responses to such inquiries) and the Cultural Review of the Adult Corrections System in Victoria (the latter of which was endorsed by the Victorian Aboriginal Legal Service, FlatOut, St Kilda Legal Service and Fitzroy Legal Service).

2. Critical reform recommendations

2.1 The Issues Paper invites submissions on what ideas have already been put forward to improve the criminal legal system. In this submission, we reiterate critical reforms that would have a direct and immediate impact on reducing the number of Aboriginal and Torres Strait Islander people experiencing injustice at the hands of the Victorian criminal legal system.

Reimagining current systems

No more prisons

Yoorrook should recommend that the Victorian government work towards closing, rather than building new and expanding current, prisons. In particular, Yoorrook should hold the Victorian government to their commitment not to expand the Dame Phyllis Frost women's prison. Instead, this money should be invested in supporting people and communities to address the risk factors that lead to people being criminalised in the first place, including housing insecurity, food insecurity, poor access to healthcare, family violence and systemic racism.

No more police

Yoorrook should recommend that the Victorian government divert the excessive amount of money being allocated to policing into supporting alternatives and, as set out above, investing in people and communities to address the risk factors that lead to people being criminalised in the first place, including housing insecurity, food insecurity, poor access to healthcare, family violence and systemic racism.

Building self-determined alternatives

We endorse the recommendation made by the Victorian Aboriginal Legal Service that:

> The Victorian government should negotiate a Justice Treaty with Aboriginal Communities and Aboriginal Community Controlled Organisations (ACCOs), which sets a new foundation to transform the criminal legal system, including through progressive transfer of power, resources, data and control to allow for Aboriginal justice models.

Transforming the youth legal system

Yoorrook should recommend that the Victorian government work towards a future without youth prisons, and reimagine the youth legal system by amending section 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the age of criminal responsibility from ten to at least 14 years old.

Yoorrook should recommend that raising the age be supported by a scoping process that maps out the services that will support children under 14 in an evidence-based, therapeutic way rather than by criminalising them, and that all reform moving forward align with diverting children away from the legal system at every opportunity including a legislative presumption in favour of diversion.

Yoorrook should recommend that the Victorian government amend the *Children, Youth and Families Act 2005* (Vic), *Sentencing Act 1991* (Vic) and *Bail Act 1977* (Vic) to prohibit:

- children under the age of 16 years being sentenced to, or remanded in, prison; and
- the detention of children under the age of 18 years in adult prisons (including banning the transfer to, or sentencing of, children under the age of 18 years to adult prisons).

Ending mass imprisonment

Reforming the bail laws

Yoorrook should recommend that the Victorian government reform the bail laws by:

- Repealing the reverse-onus provisions in the *Bail Act 1977* (Vic), particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and Schedules 1 and 2).
- Creating a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.
- Repealing the offences of committing an indictable offence while on bail (section 30B), breaching bail conditions (section 30A) and failure to answer bail (section 30).

Reforming the parole laws

Yoorrook should recommend that the Victorian government reform parole laws by:

- Introducing a system of automatic release for certain categories of sentences, whereby people are automatically granted parole once their non-parole period has been reached.
- For people not eligible for automatic release, creating a presumption that an application for parole will automatically be made at the earliest eligibility date.
- Repealing section 69(2) of the *Corrections Act 1986* (Vic) which currently provides that, in exercising its functions, the Parole Board is not bound by the rules of natural justice.
- Incorporating procedural fairness rights into parole processes, including the right to access legal advice and representation.
- Repealing section 77C of the *Corrections Act 1986* (Vic), which provides the Adult Parole Board with discretion to direct that some or all of the period during which a parole order that is cancelled or taken to be cancelled was in force is regarded as time served in respect of the prison sentence, and replacing it with a new section that provides time served on parole, prior to a parole order being cancelled, counts as time served.
- Repealing section 460(7) of the *Children, Youth and Families Act 2005* (Vic), which provides that in the event a child's parole is cancelled, and unless the Youth Parole Board otherwise orders, no part of the time between the person's release on parole and recommencing to serve the unexpired portion of the sentence is regarded as time served in respect of the sentence, and replacing it with a new section that provides that time served on parole, prior to the parole order being cancelled, counts as time served.

Getting public intoxication reform right

Yoorrook should recommend that the Victorian government:

- decriminalise public intoxication and replace it with a best practice, Aboriginal-led, state-wide public health response without further delay and by November 2023;
- ban in law the detention of people who present as intoxicated in public in prison cells and all other places of detention;
- ensure that Victoria Police officers, Protective Services officers and any other first responders are not granted any new powers as part of the public intoxication reform process.

Decriminalising minor offending

Yoorrook should recommend that the Victorian government review the *Summary Offences Act 1966* (Vic) with a view to decriminalising minor offending and repealing offences that disproportionality impact people experiencing mental illness or disability.

Yoorrook should recommend that the Victorian government decriminalise the use of cannabis and the possession of cannabis for personal use and replace it with a public health response.

Repealing mandatory sentencing laws

Yoorrook should recommend that the Victorian government repeal all mandatory sentencing provisions.

Holding police to account

Yoorrook should recommend that the Victorian government properly resource an effective and independent police oversight body in the form of a best practice Police Ombudsman.

Yoorrook should recommend that the Victorian government end the practice of police investigating the actions of other police in relation to deaths in their custody, and consult with the families of Aboriginal and Torres Strait Islander people who have died in custody regarding the appropriate mechanism for independent investigation of police-contact deaths.

Ending human rights abuses behind bars

Yoorrook should recommend that the Victorian government:

- ban the use of solitary confinement in law;
- ban routine strip searching in law;
- ensure equivalency of medical care for people in prison by:
    - calling for the federal government to:
        - grant an exemption under section 19(2) of the *Health Insurance Act 1973* (Cth) to allow health care providers in prisons to claim the Medicare Benefits Schedule (**Medicare**) and the Pharmaceutical Benefits Scheme (**PBS**) subsidies;
        - ensure that people in prison have access to the National Disability Insurance Scheme (**NDIS**) and are assessed for eligibility for NDIS upon entry to a prison;
    - transitioning the responsibility for delivering healthcare in prisons from Corrections Victoria to the Department of Health;
    - terminating the contract with Correct Care for provision of healthcare in Victoria's public prisons; and
    - resourcing Aboriginal Community Controlled Health Organisations to deliver culturally appropriate health services to Aboriginal and Torres Strait Islander people in prison and to facilitate continuity of care upon release.
- ensure access to family by making prison phone calls free;
- consult with civil society – including Aboriginal Community Controlled Organisations – and fund independent and best practice oversight of places of detention as part of implementing Victoria's obligations to prevent torture and cruel, inhuman or degrading treatment pursuant to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**); and
- work with the federal and other state and territory governments to ensure that the recently suspended visit of the Subcommittee on Prevention of Torture is resumed.

Strengthening the Charter

Yoorrook should recommend that the Victorian government strengthen the Charter by:

- enshrining recognition of the right to self-determination of Aboriginal people in the Charter;
- establishing a standalone right of action in the Charter, along with access to appropriate remedies;
- repealing regulation 5 of the Charter which exempts the Adult Parole Board and the Youth Parole Board from the operation of the Charter; and
- incorporating greater recognition of social and economic rights in the Charter.

3. Overcoming blocks to change

3.1 The Issues Paper invites submissions on what is stopping change or improvement from happening, and we have identified two key blocks to change that need to be overcome – the acquiescence of governments to 'tough on crime' politics and the rise of police association influence over government decision-making.

Acquiescence of governments to 'tough on crime' politics

3.2 'Tough on crime' politics is ineffective, expensive and props up a system of cruelty that destroys people's lives. Yet successive Victorian governments have committed to record spending on policing and prisons, accompanied by dangerous and discriminatory law reform, to create a criminal legal system that turbo-charges injustice.

3.3 Record spending is justified on the basis that police and prisons support 'community safety', but the Inquiry into Victoria's criminal justice system recently recommended an overhaul of the state's legal system in recognition of the fact that the current punitive approach is "not reducing crime or improving community safety".[6] This is supported by the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory finding that "[i]t is widely accepted that incarceration in youth detention is not beneficial to children and young people and does little to improve community safety through reducing recidivism."[7] This is consistent with an increasing body of international evidence, including a landmark study in America finding that: "incarceration cannot be justified on the grounds it affords public safety by decreasing recidivism".[8]

3.4 It is widely accepted that "[g]ood policy should be informed by the broad range of cases that come before our justice system, not one particular case or type of case",[9] yet knee-jerk reforms to the state's bail and parole laws in recent years have been enacted swiftly in response to specific incidents of horrific violence. There is no evidence that these changes have improved community safety and rather there is an abundance of evidence – as detailed in this submission – that those reforms have instead served to disproportionately pipeline and trap Aboriginal and Torres Strait Islander people in prisons.

3.5 In particular, changes to Victoria's bail laws echo a national pattern of "an increasingly politicised environment around bail reform" and the use of the bail regime "to send a 'tough on crime' message".[10] There has been a distinct, significant shift from viewing bail decision-making as a procedural mechanism for ensuring attendance at trial to viewing refusal of bail as a crime prevention tool,[11] with bail decision-making increasingly representing "a moment where accusation, guilt and punishment are conflated".[12]

3.6 Reforms to bail and parole laws highlight current government priorities, with looking 'tough on crime' prioritised at the expense of addressing systemic racism in the criminal legal system. A clear example of this, from this year, was the Victoria government prioritising the passing the 'grossly offensive conduct offence' (another reform enacted in response to one particular case, and despite objections raised by Aboriginal Community Controlled Organisations)[13] instead of actioning the myriad of reforms that could reduce the number of Aboriginal and Torres Strait Islander people being pipelined in prisons and placed at risk of dying in custody. The crisis of Aboriginal deaths in custody is never treated as such, as demonstrated by the Victorian government delaying the

[6] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 641.
[7] Northern Territory Royal Commission, Royal Commission into the Protection and Detention of Children in the Northern Territory, (2017) Volume 2B, 209.
[8] Damon Petrich, Travis Pratt, Cheryl Jonson, and Francis Cullen, Custodial Sanctions and Reoffending: A Meta-Analytic Review, Crime and Justice Volume 50, Number 1 2021.
[9] Victorian Law Reform Commission, Review of the Bail Act: Final Report (10 October 2007), 21.
[10] Lorana Bartels, Karen Gelb, Caroline Spiranovic, Rick Sarre, Shannon Dodd, 'Bail, Risk and Law Reform: A Review of Bail Legislation across Australia', Criminal Law Journal, Vol. 42, No. 2, 2018, 91–107.
[11] David Brown, 'Looking Behind the Increase in Custodial Remand', International Journal for Crime, Justice and Social Democracy, Vol. 2, No. 2, 2013, 80–99, 85.
[12] David Brown and Julia Quilter, 'Speaking Too Soon: The Sabotage of Bail Reform in New South Wales', International Journal for Crime, Justice and Social Democracy, Vol. 3, No. 3, 2014, 73–97.
[13] Victorian Aboriginal Legal Service, *The Government must stop prioritising criminal responses and invest in much-needed reforms* (Media release, 24 June 2022).

deadline to implement long overdue public intoxication reform in the same legislation that introduced expanded police powers in the form of the 'grossly offensive conduct offence'.

3.7 'Tough on crime' politics also obfuscates failures by successive governments to support people and their communities by investing in social housing and services. Prisons are increasingly serving as warehouses for people that governments have left to languish at the margins – Aboriginal and Torres Strait Islander people, victim/survivors of family violence, unhoused people, people with disability, people experiencing drug dependency and people experiencing mental illness.

3.8 A criminal legal system free from systemic injustice requires long overdue political courage from all sides of government in order to reimagine current systems. Entrenched and systemic issues like those identified in this submission will not be addressed by tinkering at the edges of the criminal legal system, and require a commitment from the Victorian government to forge a new path.

Influence of the police association over government decision-making

3.9 Victoria has become one of the most heavily policed states in Australia[14] after a two-decade 'tough on crime' rivalry between Labor and Coalition governments. This has been fuelled by the rise in power of The Police Association Victoria (**the Association**) which now regularly exerts its influence to shape public policy and thwart criminal legal system reform.[15]

3.10 While most trade unions play an integral role in a healthy democracy and serve as an important mechanism to help workers exercise their right to safe and fair work conditions, unlike other unions, police unions represent workers with the state-sanctioned power to use deadly force.

3.11 The rise in police association power in Victoria is reflective of a broader trend across Australia and the world. The rise of police union power has gained renewed attention in the United States following the murder of George Floyd, with recent studies suggesting that police union power has enabled disciplinary systems so weak that they have increased police abuses.[16] For example, a study of the hundred largest American cities found that the extent of protections in police contracts was directly and positively correlated with police violence and other abuses.[17]

3.12 Governments appear to be increasingly beholden to towing the 'blue line' and trying to avoid conflict with the Association, which is often at odds with calls from Aboriginal and Torres Strait Islander, legal and human rights organisations on the need for criminal legal system reform. Examples of this include the Association's opposition to raising the age of criminal responsibility from ten to at 14 years old,[18] reforming bail laws (despite most government departments supporting bail reform),[19] implementing best practice public intoxication reform[20] and ending the practice of police investigating police (which has been opposed since as early as 1976).[21]

3.13 In Victoria, the Secretary of the Association has publicly made misleading statements that fuel the 'tough on crime' political agenda, with the impact of reforms like those sought by this submission often misstated in circumstances where there is no evidence to support the Association's claims. For example, on the need for bail reform, the Secretary of the Association has said that "keeping our community safe does come at a price" and that "if laws are wound back to once again let violent criminals like sex offenders and drug traffickers act with impunity, the cost to community safety will be far greater."[22] Claims like this invoke fear as a basis to resist any winding back of

[14] Chris Vedelago and Royce Millar, *Thick blue line: Victoria builds the country's biggest police force,* The Age, 13 November 2021.
[15] John Silvester, *Is the Police Association Victoria's most powerful union?,* The Age, 9 June 2017.
[16] See, eg, Samantha Michaels, "The Infuriating History of Why Police Unions Have So Much Power", Mother Jones, September/ October 2020; Stephen Rushin, "Police Union Contracts" (2017) 66 *Duke Law Journal* 6.
[17] Stephen Rushin, "Police Union Contracts" (2017) 66 *Duke Law Journal* 6.
[18] Michael Fowler and Sumeyya Ilanbey, *'Detention damages these children': New push to raise age of criminal responsibility above 10*, The Age, 18 May 2021.
[19] Tammy Mills, Royce Millar and Chris Vedelago, *Keep tough bail laws, says police union, as Greens try to wind them back*, The Age, 17 May 2021.
[20] Zach Hope, *'Dangerous virtue signalling': Police union fury at public drunkenness laws putting 'the cart before the horse'*, The Age, 29 November 2020. See also Brendan Roberts, The Police Association of Victoria Journal, *Policy Hangover: the missing details in Victoria's public drunkenness plan*, April 2021.
[21] The Police Association Victoria, Submission to the IBAC Committee Inquiry into the external oversight and investigation of police corruption and misconduct, 2017; Australian Associated Press, *Calls for more scrutiny of Victoria's cops,* SBS News, 19 February 2018. See also Office of Police Integrity, Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct, 2007, 49.
[22] Tammy Mills, Royce Millar and Chris Vedelago, *Keep tough bail laws, says police union, as Greens try to wind them back*, The Age, 17 May 2021.

police powers, and stoke spurious narratives about the drivers of, and ways to effectively reduce, crime. The bail reform proposed in this submission will not have this impact, particularly if the police do their job and accurately identify and prove that particular people pose a specific and immediate risk to the physical safety of another person.

3.14 The Association boasts of representing 98 per cent of the entire sworn staff of Victoria Police, compared to trade union membership being 14 per cent in the wider workforce[23] and misleading statements like this serve the Association's own interests. Despite record investment in policing in recent years, the Association continues to push for more funding and more police officers.[24] Increasing numbers of police in turn makes the Association more powerful and boosts their revenue from membership.[25] In the 2022-23 budget, the Victorian government committed more funding for additional police officers, which will again see the Association's revenue increase.[26]

3.15 A criminal legal system free from systemic injustice requires bravery from all sides of government to reduce the grip that the Association has over discussions on criminal legal system reform. Permitting the Association to continue to block reform aimed at tackling systemic injustice significantly undermines the ability for governments to reimagine current systems. A starting point is for the Victorian government to decrease spending on policing and invest that money instead in supporting alternatives that actually work to reduce crime.

4. Reimagining current systems

4.1 To transform the criminal legal system in a way that truly addresses systemic injustice, there needs to be a reimagining of current systems, particularly prisons and policing, and the building of truly self-determined alternatives in their place.

No more prisons

4.2 There is an urgent need to end the mass imprisonment crisis in Victoria, and the overincarceration of Aboriginal and Torres Strait Islander people. Yet the Victorian government continues to spend billions of dollars on prisons, with a current $2.1 billion commitment to prison construction and expansion. As highlighted above, this spending is justified on the basis that prisons support 'community safety', but this approach is inconsistent with and increasingly out of step with evidence from Australia and around the world that indicates that prisons actually undermine community safety. Yet unfair laws – like the bail and parole laws – continue to funnel and trap disproportionate numbers of Aboriginal and Torres Strait Islander people into prisons, while new or expanded prisons enable this to happen at higher rates.

4.3 Prisons have been death traps for more than 500 Aboriginal and Torres Strait Islander people who have died in custody since the Royal Commission into Aboriginal Deaths in Custody handed down its final report in 1991. Earlier this year, two more Aboriginal men died within weeks of each other in Victorian prisons. Gunditjmara and Wiradjuri man, Clinton Austin,[27] died in Loddon prison, while a 32-year-old Aboriginal man died in Port Phillip prison.[28]

4.4 Each of these deaths leaves behind grieving families and communities forced to demand systemic change amidst the pain of their loss. As documented in Yoorrook's interim report, Elders have spoken of the reverberating impacts of each death and the frustration at the lack of accountability for deaths in custody since the Royal Commission into Aboriginal Deaths in Custody.[29]

4.5 Rather than governments proactively acting on the evidence and taking active steps to address mass imprisonment, too often Aboriginal and Torres Strait Islander people, communities and organisations are forced to respond to tragic events like deaths in custody to try and force governments to create change. This has been the case with Aunty Tanya Day's family advocating for public intoxication reform, and Veronica Nelson's family fighting for bail reform.

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[23] Australian Bureau of Statistics, *Trade union membership,* August 2022.
[24] See, eg, Stephanie Chalkley-Rhoden and Yvette Gray, *Victoria Police needs more frontline officers, fewer special taskforces, Police Association says*, ABC News, 9 September 2018.
[25] John Silvester, *Is the Police Association Victoria's most powerful union?,* The Age, 9 June 2017.
[26] State of Victoria, Department of Finance and Treasury, Victorian Budget 2022/23 - Service Delivery, Budget Paper No. 3, 2022.
[27] David Estcourt, *Aboriginal man dies in custody, the second in Victoria in just over a month,* The Age, 13 September 2022.
[28] Erin Pearson, *Aboriginal man dies in custody in Melbourne prison,* The Age, 11 August 2022.
[29] Yoorrook Justice Commission, *Yoorrook with Purpose: Interim Report* (2022) 67.

4.6 For the people who survive prisons, they do not remedy disadvantage; they compound inequality.

4.7 We support the Victorian Aboriginal Legal Service in their calls for the Victorian government to commit to moving towards a zero-prison population.[30] The evidence is clear that keeping people out of prison by providing strong supports is the most effective way to make communities safe.

4.8 Along with the Victorian Aboriginal Legal Service, the Human Rights Law Centre is part of the Homes not Prisons campaign (currently led by Flat Out).[31] The campaign recently received communications from Corrections Victoria that the Dame Phyllis Frost women's prison will no longer be expanded, and we support their ongoing calls for the Victorian government to stay true to this commitment.

4.9 Instead of building new and expanding current prisons, the Victorian government should be halting prison expansion plans and reducing the number of people in prisons by enacting the reforms recommended by this submission.

Recommendation:

Yoorrook should recommend that the Victorian Government work towards closing, rather than building new and expanding current, prisons. In particular, Yoorrook should hold the Victorian government to their commitment not to expand the Dame Phyllis Frost women's prison. Instead, this money should be invested in supporting people and communities to address the risk factors that lead to people being criminalised in the first place, including housing insecurity, food insecurity, poor access to healthcare, family violence and systemic racism.

No more police

4.10 Alongside the abovementioned commitment to prison expansion, the Victorian government has committed to record spending on policing in recent years, despite a mounting body of evidence showing that more police do not reduce crime. Victoria Police themselves have been unable to measure whether the introduction of thousands of police officers since 2016 has reduced harm or improved the effectiveness of law enforcement in the state.[32]

4.11 This is in circumstances where a mounting body of evidence – particularly from the United States in the wake of George Floyd's murder and the rise of the Black Lives Matter movement – reiterate that over policing exacerbates the risk of excessive use of force, deaths in custody and is a significant driver of mass imprisonment, with governments deploying more and more police to increasingly respond to social issues rather than investing in alternative solutions.[33]

4.12 As set out in Yoorrook's interim report, community members have explained to Yoorrook that police racial profiling and targeting of Aboriginal and Torres Strait Islander people, particularly children, makes it hard work for Aboriginal people to avoid the police and the 'justice system'.[34]

4.13 The death of Yorta Yorta woman Aunty Tanya Day in police custody highlights the lethal consequences of the over-policing.[35] Aunty Tanya died on 22 December 2017 after she sustained a serious head injury in police custody. Aunty Tanya was arrested after she fell asleep on a regional train. Despite causing no disturbance, she was targeted for being an Aboriginal woman and then detained for being drunk in a public place in circumstances where the Coroner later found that police should have taken her to hospital or sought urgent medical advice. When locked up in a concrete police cell in the Castlemaine police station, Aunty Tanya fell and hit her head on the wall, and she was left lying on the cell floor for over three hours. Despite the requirement that she be physically checked every 30 minutes, this did not happen. Police only checked on her through the cell door twice for a matter of seconds. The Coroner found that the checks the police officers conducted on Aunty Tanya were inadequate and that the police officers had failed to take proper care for her safety, security, health and welfare as required by the Victoria Police guidelines. The Coroner found that had the checks been conducted in accordance with the relevant requirements, Aunty Tanya's deterioration may well have been identified and treated appropriately earlier. While the Coroner cannot determine guilt in relation to criminal offending, the Coroner found that the

[30] Victorian Aboriginal Legal Service, *A Plan for Aboriginal Justice in Victoria*, 2022.
[31] See the Homes Not Prisons website.
[32] Victorian Auditor-General's Office, *The Effectiveness of Victoria Police's Staff Allocation*, (September 2022), 9.
[33] Alex Vitale, The Guardian, The answer to police violence is not 'reform'. It's defunding. Here's why, 31 May 2020.
[34] Yoorrook Justice Commission, *Yoorrook with Purpose: Interim Report* (2022) 47.
[35] See Inquest into the death of Tanya Louise Day (COR 2017/6424), Findings, Coroner English, 9 April 2020.

totality of the evidence supported a belief that an indictable offence may have been committed and directed that the Director of Public Prosecutions be notified.

4.14 In decision-making that speaks volumes about systemic racism, the Director of Public Prosecutions did not prosecute the two police officers involved in Aunty Tanya's death. The fact that none of the police officers involved in Aunty Tanya's death were held accountable for their actions underscores how the current system is not working.

4.15 It is time to reimagine the role that police play in the Victorian community. This starts with less spending on policing, and greater investment in supporting people and communities to address the risk factors that lead to people being criminalised in the first place, including housing insecurity, food insecurity, poor access to healthcare, family violence and systemic racism.

Recommendation:

Yoorrook should recommend that the Victorian Government divert the excessive amount of money being allocated to policing into supporting alternatives and, as set out above, investing in people and communities to address the risk factors that lead to people being criminalised in the first place, including housing insecurity, poor access to healthcare, family violence and systemic racism.

Building self-determined alternatives

4.16 The sovereignty of Aboriginal and Torres Strait Islander people has never been ceded and, as explained by the Victorian Aboriginal Legal Service, Aboriginal and Torres Strait Islander self-determination has been denied since colonisation, and continues to be denied today.[36]

4.17 International human rights law provides that Aboriginal and Torres Strait Islander people have the right to self-determination,[37] alongside the right to participate in decision-making in matters that affect their rights.[38] Governments have an obligation to obtain the free, prior and informed consent of Aboriginal peoples before adopting and implementing laws that may affect them.[39]

4.18 While governments talk of commitment to self-determination, their actions (or lack thereof) tend to speak otherwise. Too often, Aboriginal Community Controlled Organisations are 'consulted' on reforms that disproportionately impact and harm Aboriginal and Torres Strait Islander people as an afterthought, with feedback sought within short timeframes, and with input often disregarded. This is compounded by short-term and precarious funding arrangements that undermine the ability of organisations to engage in these processes and progress self-determined solutions.

4.19 For systems like the criminal legal system to be built in a way that is truly self-determined, transfer of decision-making power and resources from government to community must be central.

Recommendation:

We endorse the recommendation made by the Victorian Aboriginal Legal Service that:

> The Victorian government should negotiate a Justice Treaty with Aboriginal Communities and Aboriginal Community Controlled Organisations (ACCOs), which sets a new foundation to transform the criminal legal system, including through progressive transfer of power, resources, data and control to allow for Aboriginal justice models.[40]

5. Transforming the youth legal system

5.1 No child belongs in prison and it is time for the Victorian government to start working towards a future without youth prisons. Children continue to be funnelled into Victorian prisons at alarming rates, and Aboriginal and Torres Strait Islander children continue to be over-represented. Between July 2020 and June 2021, 9.6 per cent of children under youth justice supervision in Victoria were

[36] See Victorian Aboriginal Legal Service, Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System (November 2022).
[37] United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295, Article 3.
[38] United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295, Article 18.
[39] United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295, Article 19.
[40] Victorian Aboriginal Legal Service, Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System (November 2022) 6.

Aboriginal and Torres Strait Islander children,[41] in circumstances where they comprise under 2 per cent per cent of the Victorian population aged ten to 23 years.[42]

5.2 As highlighted by the Commissioner for Aboriginal Children and Young People:

> Over-representation does not reflect the criminality of Aboriginal children and young people in the youth justice system. Rather, it is the result of structural racism produced by the structures, policies and practices that underpin our social institutions and determine how they operate. This applies not only to the youth justice system, but also to its interrelationship with other systems, including the child protection, health, housing and education systems.[43]

Raising the minimum age of criminal responsibility

5.3 Every child should be free to go to school, have a safe home to live in and be supported to learn from their mistakes. But right now, children as young as ten years old can be locked away in Victorian prisons. There is an urgent need to reimagine the youth legal system and this starts with raising the age of criminal responsibility from ten to at least 14 years old.

5.4 Victoria's current, very low age of criminal responsibility contributes to the over-representation of Aboriginal and Torres Strait Islander children in youth prisons and has been described by the Commission for Children and Young People as having "devastating consequences for Aboriginal children and their families."[44] Raising the age would have an immediate impact on reducing the number of Aboriginal and Torres Strait Islander children being pipelined into prisons, and Victoria's ability to meet its Closing the Gap, Victorian Aboriginal Justice Agreement and Wirkara Kulpa Aboriginal Youth Justice Strategy targets.

5.5 Every day a child spends in prison can cause lifelong harm to that child's development. Engagement with the youth legal system compounds disadvantage, trauma and the evidence shows that the earlier a child is forced into the criminal legal system, the more likely they are to reoffend.[45]

5.6 The medical evidence is also clear. Children who are arrested by police, sent to court or locked away, are more likely to develop mental illness, disengage from school, become homeless and even die prematurely. Research also shows that children's brains are still developing throughout these formative years where they have limited capacity.[46]

5.7 International human rights law is also clear, with the United Nations Committee on the Rights of the Child has confirming that the minimum age should be set no lower than 14 years old.[47] The Committee Against Torture has called on Australian governments to raise the age as recently as November 2022,[48] with the current, low age of criminal responsibility being out-of-step with international standards, and with the median age of legal responsibility worldwide of 14 years old.[49]

5.8 Raising the age of criminal responsibility is a straightforward reform to implement with the backing of the service provision and legal sector, with data from 2021 showing that 29 primary-school aged children were locked away in Victorian prisons the year prior.[50] Polling shows that raising the age has broad public support,[51] and in August 2022, the National Raise the Age

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[41] Australian Government Productivity Commission, R*eport on Government Services 2022, Part F, Section 17: Youth justice services*, 25 January 2022.
[42] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians,* 29 September 2022.
[43] 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* (9 June 2021) 39.
[44] 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* (9 June 2021) 24.
[45] Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (December 2016), 31.
[46] Judge Andrew Becroft, '*From Little Things, Big Things Grow' Emerging Youth Justice Themes in the South Pacific*, 5 referring to Sir Peter Gluckman, *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (2011) Wellington, Office of the Prime Minister's Science Advisory Committee, 24.
[47] Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).
[48] Committee Against Torture, *Concluding observations on the sixth periodic report of Australia* (CAT/C/AUS/CO/6).
[49] Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).
[50] Australian Institute of Health and Welfare, Youth Justice in Australia 2020-2021, 31 March 2022.
[51] Sophie Trevitt and Bill Browne, Raising the age of criminal responsibility – discussion paper, The Australia Institute, July 2020.

coalition delivered a petition to the Federal Attorney-General and the Minister for Indigenous Affairs, which had over 211,760 signatories, including over 65,000 Victorian residents.[52]

5.9 Consistent with the indication made in Yoorrook's interim report that the Commission "lends its voice and authority to… calls for the Victorian Government to raise the age of criminal responsibility without delay",[53] Yoorrook should recommend that the Victorian government follow the lead of the ACT, commit to raise the age to at least 14 years old and implement a scoping process that maps out the services that will support children under 14 in an evidence-based, therapeutic way rather than by criminalising them.

5.10 This approach is consistent with the recommendation made in the bipartisan report from the recent Inquiry into Victoria's criminal legal system: "That the Victorian Government raise the minimum age of criminal responsibility" alongside an expansion of the many community-based support services already successfully operating to support children in Victoria.[54]

Establishing a minimum age of incarceration

5.11 Prisons are unsafe and harmful environments for Aboriginal and Torres Strait Islander children and "current laws [that allow] children to be remanded in, or sentenced to, youth justice custody disproportionately harm Aboriginal children."[55] This is because "custody removes Aboriginal children and young people from their families, communities and culture, often compounding the trauma and disconnection experienced by Aboriginal communities as a result of longstanding child removal practices and intergenerational incarceration."[56]

5.12 There is no evidence that children spending time in prison reduces offending,[57] and in fact time in custody often results in a cycle of reoffending, remand and custodial sentences that is underpinned by the current system's failure to meet children's underlying needs.[58]

5.13 The United Nations Committee on the Rights of the Child has recommended that laws be changed to ensure that children under the age of 16 years "may not legally be deprived of their liberty".[59] They have also encouraged "State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age."[60]

Prohibiting children being detained in adult prisons

5.14 Children do not belong in prison, and they should certainty never be detained in adult prisons. The Convention on the Rights of the Child and the Beijing Rules explicitly provide that "every child deprived of liberty shall be treated… in a manner which takes into account the needs of persons of his or her age" and that "in particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so."

5.15 Following the *Certain Children* litigation – a series of cases concerning lawfulness of the Victorian government's decision to declare the Grevillea Unit in Barwon Prison (a maximum-security adult prison) as a youth justice centre where the Victorian government was ultimately found to have acted unlawfully pursuant to the Victorian Charter of Human Rights – the Victorian government has stopped designating parts of adult prisons as youth justice centres.[61]

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[52] Victorian Aboriginal Legal Service, *More than 65,700 Victorian residents call on the Andrews government to raise the age* (Media release, 16 August 2022).
[53] Yoorrook Justice Commission, *Yoorrook with Purpose: Interim Report* (2022) 69.
[54] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) Recommendation 10 and 11.
[55] 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* (9 June 2021) 166.
[56] 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* (9 June 2021) 166.
[57] Penny Armytage and James Ogloff, *Meeting needs and reducing offending: Youth justice review and strategy* (2017) State Government of Victoria, 15.
[58] Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (December 2016).
[59] Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).
[60] Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).
[61] See *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* (2016) 51 VR 473 (21 December 2016); *Minister for Families and Children v Certain Children (By Their Litigation Guardian Sister Arthur)*

5.16 Despite this, children can and still are detained in adult prisons in Victoria. Transfers of children to, and the detention of children in, adult prisons still occur due to powers the Youth Parole Board has to permit the transfers of children to adult prisons, and for courts to sentence children to adult prisons, in certain cases.

5.17 In each of the 2019-2020 and 2020-2021 years, two children were transferred to the private, maximum security Port Phillip Prison pursuant to section 467 of the *Children, Youth and Families Act 2005* (Vic) which provides power for the Youth Parole Board to transfer a child from youth justice to an adult prison.[62]

5.18 At least one child has been sentenced to serve a period of imprisonment in an adult prison this year, despite a Victorian Supreme Court judge warning that if the child were not given a chance at rehabilitation it could mean their "life would become a disaster" and strongly recommending that that they were an "appropriate candidate for transfer to a youth justice centre until [reaching] the age of 21 years" pursuant to section 471 of the *Children, Youth and Families Act 2005* (Vic).[63]

Recommendations:

Yoorrook should recommend that the Victorian government work towards a future without youth prisons, and reimagine the youth legal system by amending section 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the age of criminal responsibility from ten to at least 14 years old.

Yoorrook should recommend that raising the age be supported by a scoping process that maps out the services that will support children under 14 in an evidence-based, therapeutic way rather than by criminalising them, and that all reform moving forward align with diverting children away from the legal system at every opportunity including a legislative presumption in favour of diversion.

Yoorrook should recommend that the Victorian government amend the *Children, Youth and Families Act 2005* (Vic), *Sentencing Act 1991* (Vic) and *Bail Act 1977* (Vic) to prohibit:

- children under the age of 16 years being sentenced to, or remanded in, prison; and
- the detention of children under the age of 18 years in adult prisons (including banning the transfer to, or sentencing of, children under the age of 18 years to adult prisons).

6. Ending mass imprisonment

Reforming bail laws

The issue

6.1 Victoria's bail laws are some of the most dangerous and discriminatory in the country. This is, in part, due to the bail reforms introduced by the Victorian government between 2016-2018. The reforms were intended to target the violent actions of one man, but as confirmed by the Inquiry into Victoria's criminal justice system: "Women, particularly Aboriginal women and women experiencing poverty, are disproportionately remanded under current bail legislation."[64]

6.2 This is because of:

(a) The reverse onus provisions, which require a person to show that 'compelling reasons' or 'exceptional circumstances' exist for them to be released on bail. If a person is unable to meet the applicable legal test, then bail must be refused.

(b) The broad range of offending captured by these reverse onus provisions. Previously, the 'exceptional circumstances' test applied only to the most serious offences. Now, if people engage in repeat, low-level wrongdoing – like shoplifting – they can be held to the same standard as people accused of the most violent and dangerous crimes.

(2016) 51 VR 597 (29 December 2016); *Certain Children v Minister for Families and Children* (No 2) (2017) 52 VR 441 (11 May 2017).

[62] Commission for Children and Young People, Annual Report 2019-2020, 4; Commission for Children and Young People, Annual Report 2020-21, 59.

[63] *DPP v DJ* (a pseudonym) [2022] VSC 358; Nino Bucci, *'Dying is normal in this jail': teenager held in Port Phillip prison for four months*, The Guardian, 9 October 2022.

[64] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 449.

6.3 Alarmingly, the reverse onus provisions in the bail laws also apply to children.

How did we get here?

6.4 The Coghlan Review of Victoria's bail laws (**the Coghlan Review**) was commissioned following the Bourke Street tragedy where six people were killed and at least 30 were injured by James Gargasoulas a few days after he was released on bail. The first tranche of reforms recommended by the Coghlan Review have been implemented, but none of the second tranche have been actioned.

6.5 The impact of the reforms has made an already unfair system for granting bail even more punitive. The reforms were intended to make it harder for people to get bail where they were applying for consecutive bails and recommended that reverse onus provisions apply to a broader range of offending. A new category of Schedule 2 Offences was created, and it now also includes allegedly committing an indictable offence whilst on bail (or on summons, a community corrections order or parole for another indictable offence).[65] Schedule 2 Offences also include offences against the *Bail Act 1977*, including failure to answer bail and contravening bail conditions.

6.6 The result of these reforms is that people who are accused of engaging in repeat, low-level wrongdoing can be held to the same bail standard as people accused of the most violent crimes. The current bail system makes it challenging for people in these circumstances to be granted bail and so they are needlessly detained on remand, even though they are unlikely to receive a prison sentence if they are found guilty of the underlying offences.

6.7 This raises concerns, as identified by the Sentencing Advisory Council, about whether the increasing likelihood of receiving a time served prison sentence is inappropriately encouraging people to plead guilty in the hope of being released earlier than if they proceeded to trial.[66]

6.8 More people – particularly women – are being denied bail, not because they pose a risk to the community, but because they themselves are at risk – of family violence, homelessness, economic disadvantage and mental illness.[67] Intersecting forms of disadvantage make it harder for women to put forward a case in favour of bail, which often makes time behind bars the default setting.[68]

6.9 As identified by the Inquiry into Victoria's criminal justice system, Victoria's criminal legal system does not currently appropriately or fairly "balance the maintenance of community safety with the presumption of innocence for people accused of an offence".[69]

6.10 Compounding this, the treatment of breaches of bail conditions means people can quickly escalate to far harder bail tests even though breaches are minor or technical in nature and result from people's disadvantage.

Impact on Aboriginal and Torres Strait Islander people

6.11 Aboriginal and Torres Strait Islander people are disproportionately represented in remand rates. In 2020, 44 per cent of all Aboriginal and Torres Strait Islander people in prison were on remand — up from 20 per cent in 2010 — compared with 35 per cent of the general prison population.[70]

6.12 This was confirmed in a 2017 review of the *Bail Act 1977* (Vic) where the Victorian Law Reform Commission observed that reverse onus provisions create particular difficulty for Aboriginal and Torres Strait Islander people and children."[71]

6.13 While section 3A of the *Bail Act 1977* requires that a person's 'Aboriginality' - including their cultural background, ties to extended family or place and other relevant cultural issues or obligations - be considered when making a decision about bail, this does not appear to have had the impact of reducing the number of Aboriginal and Torres Strait Islander people detained on remand. Since the introduction of the provision in 2010, the percentage and number of Aboriginal

[65] *Bail Act 1977* (Vic), section 30A.
[66] Sentencing Advisory Council, *Time served prison sentences in Victoria* (February 2020) 13.
[67] Russell et al., *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria* (2020) Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society: Melbourne.
[68] Ibid.
[69] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 459.
[70] Corrections Victoria, Profile of people in prison, 2020; Corrections Victoria, Profile of Aboriginal people in prison, 2020.
[71] Victorian Law Reform Commission, Review of the Bail Act: Final Report, 10 October 2007, 39.

and Torres Strait Islander people on remand has continued to rise. According to the Australian Law Reform Commission, section 3A is not well understood and is underutilised and this has been reiterated by the recent Inquiry into Victoria's criminal justice system.[72] As highlighted by the Victorian Aboriginal Legal Service, there is a lack of understanding regarding the scope and content of this obligation and it appears that the obligation is either not being complied with, or if it is, a person's Aboriginality is regularly being considered as a deficit rather than a strength.[73]

Experiences of Aboriginal and Torres Strait Islander women

6.14 The number of Aboriginal and Torres Strait Islander women in Victorian prisons continues to increase and a staggering 89.2 per cent of Aboriginal and Torres Strait Islander women entering prisons are unsentenced on reception.[74]

6.15 One of these women was proud Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Marie Nelson who died in custody at the Dame Phyllis Frost women's prison in January 2020 after being arrested for minor shoplifting-related offences and being refused bail.[75]

6.16 For women experiencing family violence, their disadvantage is compounded because the bail laws punish rather than help address their circumstances. In a review of their case files, the Women's Legal Service in Victoria found almost 60 per cent of their clients who were named as the respondents to police intervention orders had been incorrectly identified as the perpetrator.[76]

6.17 Djirra, the Aboriginal community-controlled specialist family violence service in Victoria, considers that the rate of misidentification for Aboriginal and Torres Strait Islander women is likely to be higher.[77] This is consistent with a recent study by Australia's National Research Organisation for Women's Safety, which highlighted that perpetrators of family violence against Aboriginal and Torres Strait Islander women, in particular, "regularly engage" in systems abuse, which includes seeking out protection orders against their victims as a form of manipulation.[78]

6.18 Schedule 2 Offences include Family Violence Intervention Order (**FVIO**) contraventions. In practice, this means that FVIO contravention charges are assessed by reference to, at least, 'compelling reasons'. Second and subsequent FVIO breaches (or a less serious crime in the context of a previous FVIO breach) may trigger the 'exceptional circumstances' test. If women are being misidentified as perpetrators in FVIO matters and then being subsequently charged with breaches of orders, they can be quickly exposed to escalating bail thresholds.

Experiences of Aboriginal and Torres Strait Islander children

6.19 The number of unsentenced children in Victorian prisons doubled between 2011 and 2012 and, on an average day in 2020-21, more than half the children in prison were unsentenced.[79]Aboriginal and Torres Strait Islander children are overrepresented in this cohort - not because they commit more crimes, but because discriminatory laws - like the bail laws - result in Aboriginal and Torres Strait Islander children being targeted by police, harmed by contact with the criminal legal system and denied culturally appropriate supports.

6.20 Children should never be subject to reverse onus bail provisions which can make time behind bars the default setting. This is especially the case given that children who are refused bail are exposed to the harm of the prison environment in circumstances where, overwhelmingly, they will ultimately not receive a custodial sentence.[80]

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[72] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 450.
[73] Victorian Aboriginal Legal Service, Submission to the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, August 2022.
[74] Corrections Victoria, Annual Prison Statistical Profile 2019-2020, (2021) State Government of Victoria, Table 2.3: Aboriginal and Torres Strait Islander Prisoner Receptions, By Sex and Legal Status on Reception, accessible: Annual Prisoner Statistical Profile 2009-10 to 2019-20.
[75] Victorian Aboriginal Legal Service, *Coronial Inquest into the death of Victoria Marie Nelson to examine healthcare in Victorian prisons and bail laws,* Media release (29 March 2021).
[76] Emma Younger, *When police misjudge domestic violence, victims are slapped with intervention order applications,* ABC News, (15 August 2018).
[77] Djirra, Submission to the Parliamentary Inquiry into Family, Domestic and Sexual Violence, July 2020, 29.
[78] Marcia Langton and Kristen Smith et al., *Improving family violence legal and support services for Aboriginal and Torres Strait Islander women*, Australia's National Research Organisation for Women's Safety (December 2020) 69.
[79] Australian Institute of Health and Welfare, *Youth Justice in Australia: 2011-2012,* 30 April 2013*;* Australian Institute of Health and Welfare, *Youth Justice in Australia: 2020-2021,* 21 March 2022.
[80] Sentencing Advisory Council, *Children held on remand in Victoria* (29 September 2020) 42.

6.21 Children should only ever be subject to detention as a method of last resort; this means that children should not be detained in custody on remand unless there is no other option. There should always be another option for children, and the current bail laws operate inconsistently with this approach by presuming that a child, in certain circumstances, will be detained in prison on remand unless the child can satisfy the court to release them on bail.

6.22 There is no evidence that reverse onus provisions reduce youth crime, but rather there is an abundance of evidence that such provisions mean more children are funnelled into prisons – and harmed by that experience – for behaviour that a court has not yet found them guilty of.

Recommendations:

Yoorrook should recommend that the Victorian government reform bail laws by:

- Repealing the reverse-onus provisions in the *Bail Act 1977* (Vic), particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and Schedules 1 and 2).
- Creating a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.
- Repealing the offences of committing an indictable offence while on bail (section 30B), breaching bail conditions (section 30A) and failure to answer bail (section 30).

Reforming parole laws

The issue

6.23 The parole laws in Victoria have made it increasingly difficult for people to access parole and fulfil their parole conditions. This is, in part, due to the reforms following the Callinan review of the parole system in Victoria (**the Callinan Review**). Like the bail reforms, the parole reforms were designed to ensure that people who had committed very serious crimes were subject to a closer scrutiny before being granted parole.

6.24 The current parole system is resulting in fewer people being released on parole, meaning that more people are serving their full sentence and being released from prison with no support services.[81] Between 2009–10 and 2019–20 the proportion of incarcerated people released from prison on parole declined from 30 per cent to 6 per cent. As confirmed by the Inquiry into Victoria's criminal justice system: "This may mean that more people are being released straight from prison back into the community with limited or no support and supervision."[82]

6.25 Current parole laws make it hard for people to access parole because:

- People in prison must make an application to be considered for release on parole. There is no automatic date where release on parole may be considered, the onus rests with the individual.
- To be eligible for parole, people must complete certain programs while in prison. There has, however, been limited availability of pre-parole programs.
- People must also demonstrate that they have access to stable and secure housing if released on parole. This punishes people without access to housing instead of supporting people to find a safe and secure home.

6.26 People who are released on parole also need to meet a number of parole conditions and face disproportionate punishment if they do not meet those conditions. This is problematic because:

- Strict parole conditions set people up to fail. Inflexible parole conditions can be hard to meet and increase the likelihood of people committing technical breaches, detracting from their ability to engage with the rehabilitative functions of parole.
- People face overly punitive and harsh punishment for parole breaches, which can see them funnelled back into prison to serve sentences longer than what they were sentenced to.

[81] Victorian Auditor-General's Office, *Administration of Parole,* 2016.
[82] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 691.

How did we get here?

6.27 The Callinan Review was commissioned by the Victorian Government after the rape and murder of Jill Meagher by Adrian Bayley, who was on parole at the time of this offending. The Callinan Review called for reforms to make it more difficult to secure parole, particularly for "potentially dangerous parolees."[83] The reforms that followed made it more difficult for all people to access parole.

6.28 The Callinan Review made 23 recommendations about Victoria's parole system. A 2016 review by the Victorian Auditor-General's Office found that 22 of the 23 recommendations had been responded to with reforms, and the one other recommendation had partly been responded to with reforms.[84]

6.29 Following the Callinan Review, the onus for making an application for parole has been placed onto the individual applicant. Previously, the Parole Board would initiate consideration for parole, even for "serious offenders".[85] This places the burden on the individual person to navigate the parole laws and, in effect, has abrogated the state's responsibility for advance planning and preparation for parole applications.

6.30 Compounding this, people in Victorian prisons have no right to legal representation in parole matters. In other jurisdictions – notably NSW and Queensland – Legal Aid NSW and the Prisoner's Legal Service provide legal assistance in parole matters.

6.31 Further, people who are granted parole are often faced with a strict set of parole conditions. Just prior to the release of the Callinan Review, the Victorian Government passed legislation to make the breach of parole conditions a criminal offence. Victoria Police can now arrest, detain and charge people who breach parole, with a penalty of up to three months imprisonment.[86] This results in people being funnelled back to prison for what can be technical breaches of their parole, and with people being charged with another separate criminal offence. A technical breach could include something as minor as missing curfew by an hour, not reporting to Community Corrections or not attending a medical assessment.

6.32 Notably, if the Adult Parole Board cancels a person's parole, none of the time that the person spent on parole is counted as part of their sentence, unless the Board directs otherwise.[87] This means that people who have their parole cancelled have to re-serve that time in prison, as well as whatever time remains on their sentence. Alarmingly, 51 per cent of people who had their parole cancelled did not have their time spent on parole counted towards their sentence, in circumstances where drug use was at least one of the factors in 62 per cent of all parole cancellations.[88] Instead of helping and supporting people who experience issues with substance use, people are being sent to prison to serve more time than they were originally sentenced.

6.33 This is not the case in Queensland, where time spent on parole is generally counted as time served in circumstances where a person's parole is later cancelled (see section 211 of the *Corrective Services Act 2006* (Qld)).

6.34 Parole reform needs to be complemented by adopting a 'throughcare' model to help people exiting prison transition back into the post-prison world. The throughcare model provides for the coordinated provision of support and services to a person, during their time in prison and continuing for a substantial time as they reintegrate back into the community.[89]

Impact on Aboriginal and Torres Strait Islander people

6.35 There are particular barriers for Aboriginal and Torres Strait Islander people engaging with the current parole system. Only 5 per cent of the total number of people on parole are Aboriginal and

[83] Ian Callinan AC, *Review of the Parole System in Victoria* (2013) Department of Justice, Corrections Victoria, see measure 7.
[84] Victorian Auditor-General's Office, *Administration of Parole* (February 2016), Appendix B1.
[85] Parliamentary Library Research Service*, Research Brief: Corrections Amendment (Parole Reform) Bill 2013*, (2013) Parliament of Victoria.
[86] Corrections Victoria, *Victoria's parole system* (2020) State Government of Victoria.
[87] Adult Parole Board, *Annual Report 2020-2021* (2021) State Government of Victoria, 30.
[88] Ibid, 29.
[89] See, eg, the North Australian Aboriginal Justice Agency's (NAAJA) Throughcare Program in the Northern Territory which aims to reduce repeat offending by providing strength-based case management and referral services to help people access the support and services they need to help them stay out of prison.

Torres Strait Islander people,[90] despite Aboriginal and Torres Strait Islander people making up 12 per cent of the Victorian prison population.[91] Aboriginal and Torres Strait Islander people are less likely to apply for parole than non-Indigenous people and are also less likely to be released on parole when they do apply.[92]

6.36 Aboriginal and Torres Strait Islander women are particularly impacted by the current parole system because they experience greater difficulty accessing pre-release programs that are necessary to be eligible for parole. This is because there is a lack of culturally appropriate programs and also because Aboriginal and Torres Strait Islander women tend to serve shorter sentences or are more likely to be on remand, which disqualifies them from accessing programs.[93]

6.37 Reform of Victoria's parole laws must therefore be accompanied by a requirement that, when mandated programs have not been completed due to their unavailability in prison, this cannot be a bar to parole being granted.

6.38 Aboriginal and Torres Strait Islander people are also disproportionately impacted by strict parole conditions and are often given a greater number of, and more stringent, parole conditions which lead to a greater chance of conditions being breached.[94] This is especially the case for Aboriginal and Torres Strait Islander women, where overly strict parole conditions that do not consider their intersectional experiences make their pathway to success on parole much harder.[95]

Recommendations:

Yoorrook should recommend that the Victorian government reform parole laws by:

- Introducing a system of automatic release for certain categories of sentences, whereby people are automatically granted parole once their non-parole period has been reached.
- For people not eligible for automatic release, creating a presumption that an application for parole will automatically be made at the earliest eligibility date.
- Repealing section 69(2) of the *Corrections Act 1986* (Vic) which currently provides that, in exercising its functions, the Parole Board is not bound by the rules of natural justice.
- Incorporating procedural fairness rights into parole processes, including the right to access legal advice and representation.
- Repealing section 77C of the *Corrections Act 1986* (Vic), which provides the Adult Parole Board with discretion to direct that some or all of the period during which a parole order that is cancelled or taken to be cancelled was in force is regarded as time served in respect of the prison sentence, and replacing it with a new section that provides time served on parole, prior to a parole order being cancelled, counts as time served.
- Repealing section 460(7) of the *Children, Youth and Families Act 2005* (Vic), which provides that in the event a child's parole is cancelled, and unless the Youth Parole Board otherwise orders, no part of the time between the person's release on parole and recommencing to serve the unexpired portion of the sentence is regarded as time served in respect of the sentence, and replacing it with a new section that provides that time served on parole, prior to the parole order being cancelled, counts as time served.

Getting public intoxication reform right

6.39 Due to the tireless advocacy of the Day family, the Coroner who presided over the inquest into the death of proud Yorta Yorta woman Aunty Tanya Day first foreshadowed that she would recommend that the Victorian government decriminalise public intoxication in December 2018, and the Victorian government committed to do this in August 2019.

[90] Adult Parole Board, *Annual Report 2019-2020* (2020) State Government of Victoria, 26.
[91] Australian Bureau of Statics, *Prisoners in Australia, Prison characteristics, States and Territories* (2021).
[92] Nous Group, Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report (2012) [10.2.5]; Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2019) 268-269.
[93] State Government of Victoria, Chapter 9: Prison Programs and Parole, Australian Government, 292.
[94] Rachel Hew and Tanya Sinha, *Barriers to Parole for Aboriginal and Torres Strait Islander people in Australia* (2013) The University of Queensland Australia, 15.
[95] Ibid, 22-23.

6.40 As set out above, Aunty Tanya Day died after being arrested for being drunk in a public place after she fell asleep on a train. At the time of her death, Aboriginal women were 10 times more likely to be targeted by police for being drunk in a public place than non-Indigenous women.[96]

6.41 The reforms were originally due to come into effect in November 2022 in order to provide time for a transition away from the current criminal law-based response to a best practice, Aboriginal-led, public health response.[97] It was deeply disappointing that the Victorian government delayed the implementation of these long overdue reforms, which are now due to come into effect in November 2023. There can be no further delays - the decriminalisation of public intoxication was a recommendation made by the Royal Commission into Aboriginal Deaths in Custody over 30 years ago. The Royal Commission into Aboriginal Deaths in Custody examined the circumstances of Aunty Tanya's uncle, the late Harrison Day, death in custody in 1982 from an epileptic fit in an Echuca police cell after he was arrested for an unpaid $10 fine for public drunkenness.

6.42 Calls for decriminalisation have been repeated on numerous occasions over the years in multiple reports including the Victorian Parliament's Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody[98] and Drugs and Crime Prevention Committee's Inquiry into Public Drunkenness.[99]

6.43 Consistent with the calls of the Day family and the Victorian Aboriginal Legal Service, Victoria Police officers should not be involved in the public health response and responding to incidents of people being drunk in public places. This is in recognition of the fact that public intoxication is a health issue that requires a health-based response, and because once Victoria Police are involved in an incident, there will always be a risk of escalation and up-charging.

6.44 A police cell is never a safe place for an intoxicated person and there is no scope for a protective custody regime in Victoria. Victoria Police and Protective Services officers must not – in any circumstances – have legislative powers to detain people, transport people to and/or lock people up in police cells for being drunk in a public place. This is of paramount importance. In jurisdictions that have decriminalised public intoxication but also enacted protective custody regimes, police cells continue to be used and Aboriginal and Torres Strait Islander people remain at risk of dying in custody.

6.45 Protective custody data in all places where data is available (all except Western Australia, the Northern Territory and Queensland), shows that protective custody powers have disproportionately impacted Aboriginal and Torres Strait Islander people.[100] This includes Wiradjuri woman, Rebecca Maher, who died in custody in NSW in 2016 within five hours of being detained in protective custody for intoxication.

Recommendations:

Yoorrook should recommend that the Victorian government decriminalise public intoxication and replace it with a best practice, Aboriginal-led, state-wide public health response without further delay and by November 2023.

Yoorrook should recommend that the Victorian government ban in law the detention of people who present as intoxicated in public in prison cells and all other places of detention.

Yoorrook should recommend that the Victorian government ensure that no Victoria Police officers, Protective Services officers or any other first responders are granted any new powers as part of the public intoxication reform process.

Decriminalising minor offending

6.46 The criminalisation of minor offending and its impact on the over-imprisonment of Aboriginal and Torres Strait Islander people is well documented. It creates unnecessary contact with the criminal

[96] Data obtained by the Human Rights Law Centre.
[97] Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness Report to the Victorian Attorney-General (August 2020).
[98] Victorian Government, Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody (Review Report) October 2005.
[99] Parliament of Victoria, Drugs and Crime Prevention Committee, Inquiry into Public Drunkenness (Final report, June 2001).
[100] Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness Report to the Victorian Attorney-General (August 2020) 33-34.

legal system, and many minor offences can be difficult for people who governments have failed to support and avoid criminalisation in the first place, including people experiencing housing insecurity, food security, poor access to healthcare, family violence and systemic racism.

6.47 The above-mentioned, long overdue public intoxication reform should be complemented by broader summary offences reform and a review of the *Summary Offences Act 1966* (Vic) that creates a number of other low-level offences that can be used by police to unfairly target Aboriginal and Torres Strait Islander people. For example, it should no longer be an offence to:

- engage in obscene, indecent, threatening language and behaviour in public per section 17 of the *Summary Offences Act 1966* (Vic)
- beg in a public place per section 49 of the *Summary Offences Act 1966* (Vic)
- obstruct a foot path per section 5 of the *Summary Offences Act 1966* (Vic)
- fail to comply with a move on direction per section 6 of the *Summary Offences Act 1966* (Vic)

6.48 We also support the position adopted by the Victorian Aboriginal Legal Service in their Policy Paper on *Harm Reduction Not Harm Maximisation: An Alternative Approach to Drug Possession* that the Victorian government should decriminalise the possession of all drugs for personal use.[101]

Recommendations:

Yoorrook should recommend that the Victorian government review the *Summary Offences Act 1966* (Vic) with a view to decriminalising minor offending and repealing offences that disproportionality impact people experiencing mental illness or disability.

Yoorrook should also recommend the decriminalisation of the use of cannabis and the possession of cannabis for personal use and replace it with a public health response.

Repealing mandatory sentencing

6.49 Laws in Victoria that impose mandatory minimum sentences should be repealed. An example of these laws is section 10AA of the *Sentencing Act 1991* (Vic) which provide mandatory minimum sentences for assaults against emergency workers.

6.50 Mandatory sentencing laws can increase incarceration rates and are a well-documented driver of the over-incarceration of Aboriginal and Torres Strait Islander people.[102] This is because mandatory sentencing laws remove the discretion of the court to consider mitigating factors or alternate sentencing options and fail to account for the intersectional disadvantage experienced by many people who come into contact with the criminal legal system. This can result in arbitrary penalties being imposed in circumstances where they have inappropriate consequences.

6.51 Consistent with the concluding observations recently made by the United Nations Committee Against Torture, the Victorian government must revise mandatory sentencing laws and "take all necessary measures to give judges the necessary discretion to determine relevant individual circumstances."[103]

Recommendation:

Yoorrook should recommend that the Victorian government repeal all mandatory sentencing provisions.

7. Holding police to account

7.1 For too long in Victoria, police have been able to act with impunity. While the Victorian government has invested significant money into expanding and militarising the state's police force, there has been has been no commensurate increase in accountability.

[101] Victorian Aboriginal Legal Service, Policy Paper on Harm Reduction Not Harm Maximisation: An Alternative Approach to Drug Possession (October 2022) 6.
[102] Australian Law Reform Commission, Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples (December 2018) 273.
[103] Committee Against Torture, *Concluding observations on the sixth periodic report of Australia* (CAT/C/AUS/CO/6).

Independent investigations of police misconduct

7.2 While the Independent Broad-based Anti-Corruption Commission (**IBAC**) has the power to investigate complaints of police misconduct, in practice, the overwhelming majority of complaints by the public are sent back to the police for investigation.

7.3 So long as police have the powers to investigate the actions of other police officers, Victoria Police officers will keep escaping accountability for their actions. The current Systemic Review of Police Oversight (**Review**) presents an opportunity for the Andrews Government to create a best practice Police Ombudsman. While the Review was prompted by one of the most extreme cases of police misconduct in recent history and the subsequent recommendations made by the Royal Commission into the Management of Police Informants, abuse of police power is most often meted out on the most marginalised members of the community.

7.4 Independent investigations of police misconduct are particularly important in relation to complaints relating to the mistreatment of Aboriginal and Torres Strait Islander people, given the realities of systemic racism and discriminatory policing which drive the over-imprisonment and deaths in custody of Aboriginal and Torres Strait Islander people. As identified by the Royal Commission into Aboriginal Deaths in Custody, "far too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent."[104]

7.5 Aboriginal and Torres Strait Islander people are more likely to experience serious police misconduct, but less likely to make a complaint. This was confirmed in IBAC's report on Victoria Police handling of complaints made by Aboriginal people which identified "concerning patterns" in how Victoria Police handled 41 complaints made by Aboriginal people and its oversight of 13 serious incidents involving Aboriginal people.[105] The audit found that over half of the investigations failed to collect or consider relevant evidence, conflicts of interest were identified in 84 per cent of files (with half of these conflicts not managed appropriately) and that seventy-three per cent of Aboriginal people who made complaints were not updated on the investigation.[106]

7.6 A new body – a Police Ombudsman – must be created to investigate all allegations of police misconduct (other than customer service matters) and systemic failings. It must be:

- Independent of the police: institutionally, practically, culturally and politically.
- Properly resourced: to ascertain whether police have breached legal or disciplinary standards, and whether they have acted in compliance with human rights obligations.
- Thorough and prompt in its investigations: conducts timely interviewing of suspects and witnesses and has enforceable timelines for investigation.
- Transparent and open to public scrutiny: able to regularly and publicly report on police complaints including outcomes, disciplinary action, civil litigation and prosecutions.
- Complainant centred: is culturally appropriate and enables the complainant to fully participate in the investigation.[107]

7.7 Integrally, the Police Ombudsman must be hierarchically, institutionally and practically independent of the police. This is consistent with recommendations made by the Royal Commission into Aboriginal Deaths in Custody that complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body independent of police.[108] This is also consistent with the Australian Law Reform Commission's Pathways to Justice report, which recommended that, to provide Aboriginal people and communities with greater confidence in the integrity of police complaints handling processes, state governments should review their police

[104] Final Report of the Royal Commission into Aboriginal Deaths in Custody (1991, vol 2) 13.2.3.
[105] IBAC, Victoria Police handling of complaints made by Aboriginal people, Audit report (May 2022).
[106] IBAC, Victoria Police handling of complaints made by Aboriginal people, Audit report (May 2022).
[107] Drawn from the European Court for Human Rights and consolidated in The Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police (2009). The principles have been endorsed by the United Nations Office on Drugs and Crime, Handbook on Police accountability, oversight and integrity (2011) and have been applied by the UN Human Rights Committee in Corinna Horvath, Individual communication to the United Nations Human Rights Committee in Horvath v Australia, 19 August 2008; UN Human Rights Committee, Views: Communication No. 1885/2009 (5 June 2014), 110th sess. See also Police Accountability Project, Independent Investigation of Complaints against the Police: Policy Briefing Paper (2017).
[108] See Royal Commission into Aboriginal Deaths in Custody (Final report, 1991) recommendation 226.

complaints handling mechanisms to ensure greater practical independence, accountability and transparency of investigations.[109] This approach is consistent with the position of the Victims of Crime Commissioner, who has said that: "To ensure a robust oversight system, all complaints involving misconduct and serious misconduct must investigated by the independent oversight body, not by Victoria Police."[110]

Independent investigations of deaths in custody

7.8 In particular, the status quo of police investigating the actions of other police in relation to deaths in custody must end. The concluding observations recently made by the United Nations Committee Against Torture recommended that governments across Australia "ensure that all deaths in custody are promptly, effectively and impartially investigated by an independent entity".[111]

7.9 Consistent with that and the calls of the Victorian Aboriginal Legal Service, the Victorian government must:

- Ensure that investigations into police-contact deaths are not be carried out by police and are instead carried out by a specialist civilian investigation team that is independent from police, is culturally appropriate and includes Aboriginal and Torres Strait Islander staff and leadership;
- Consult with the families of Aboriginal and Torres Strait Islander people who have died in custody regarding the appropriate mechanism for independent investigations of police-contact deaths.[112]

Recommendations:

Yoorrook should recommend that the Victorian government properly resource an effective and independent police oversight body in the form of a best practice Police Ombudsman.

Yoorrook should recommend that the Victorian government end the practice of police investigating the actions of other police in relation to deaths in their custody, and consult with the families of Aboriginal and Torres Strait Islander people who have died in custody regarding the appropriate mechanism for independent investigation of police-contact deaths.

8. Ending human rights abuses behind bars

8.1 Prisons are inherently harmful environments and the ongoing use of archaic practices like solitary confinement and routine strip searching – compounded by poor access to medical care – undermine any rehabilitative function that government might hope they serve.

Stopping solitary confinement

8.2 Solitary confinement is a cruel practice that causes irreparable harm to the people who are subjected to it. Solitary confinement – defined by the Mandela Rules as the confinement of people in prison for 22 hours or more a day without meaningful human contact – is used in Victorian prisons under a number of different labels: isolation, separation, seclusion, segregation and lockdowns. While the words 'solitary confinement' are not used explicitly in Victorian legislation, the practice should be banned in law, regardless of how it is labelled.

8.3 The practice has been found to have a particularly detrimental impact on people living with disability and Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody finding that it is "undesirable in the highest degree" for Aboriginal and Torres Strait Islander people to be detained in isolation or segregation.[113]

[109] Australian Law Reform Commission, Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133) (28 March 2018), recommendation 14-2.
[110] Victims of Crime Commissioner, Submission on the Victorian Government's Consultation Paper: Systemic review of police oversight (February 2022) 25.
[111] Committee Against Torture, *Concluding observations on the sixth periodic report of Australia* (CAT/C/AUS/CO/6).
[112] Victorian Aboriginal Legal Service, Policy Paper Reforming Police Oversight in Victoria (August 2022) 87.
[113] Royal Commission into Aboriginal Deaths in Custody (Final report, 1991) [25.7.12].

8.4 In 2017, the Victorian Ombudsman conducted an OPCAT style inspection of the Dame Phyllis Frost women's prison and found that the use of separation practices at the prison may amount to treatment that is cruel, inhuman or degrading under the Charter and is incompatible with the Mandela Rules.[114] The following year, in 2018, the Victorian Ombudsman investigated the placement of a woman whose disability made her unfit to stand trial and who was locked in a cell for 22-23 hours a day for more than 18 months. The Ombudsman concluded that this was not compatible with the right to humane treatment when deprived of liberty, the prohibition on cruel, inhuman and degrading treatment or the right to enjoy human rights without discrimination under the Charter.[115] The Victorian Ombudsman also observed that this case was not isolated.[116]

8.5 In 2019, the Victorian Ombudsman conducted an OPCAT style investigation focused on practices related to solitary confinement of children and young people in Victorian prisons. The Victorian Ombudsman's report detailed experiences of young people detained at Port Phillip Prison in effective solitary confinement for over 100 days. This prompted the Victorian Ombudsman to recommend that the Victorian Government "establish a legislative prohibition on 'solitary confinement', being the physical isolation of individuals for '22 or more hours a day without meaningful human contact.'"[117]

8.6 Aboriginal and Torres Strait Islander children interviewed by the Koori Youth Council as part of the *Ngaga-dji* project reported incidents where they had been isolated in "the slot". Children reported being left in the slot for hours and days and being fed through a hole in the door. Being detained in the slot was described as being the worst experience of their life.[118]

8.7 The Australian Children's Commissioners and Guardians have confirmed the particularly detrimental impact solitary confinement can have on children:

> It is almost impossible to reconcile seclusion with the 'best interests' of the child as it serves no integrative or rehabilitative objective. Children in detention are particularly susceptible to medical, social and psychological problems which can be seriously exacerbated by the use of seclusion cells or being left alone in their own cells for extended periods of time.[119]

8.8 While prison authorities justify the use of solitary confinement as a behaviour and risk management tool, it is frequently used as a substitute for proper health care for people with disability or compromised mental health.[120] The stress of the closed environment, absence of meaningful social contact and the lack of activity can, however, severely heighten behaviours and symptoms.[121] Subjecting people in prison to cruel treatment does not make us safer. Rather, it damages people and can lead to an increased risk of reoffending after release.[122]

8.9 During the Covid-19 pandemic, the Victorian government increased the circumstances in which people could be subjected to solitary confinement. Instead of taking the safer approach of reducing prison populations, people entering prisons were subjected to arbitrary quarantine and 'lockdowns' have become the default response to managing outbreaks (and staff shortages connected to the ongoing pandemic). Practices that can amount to cruel, inhuman and degrading treatment should never have formed part of the public health response to the Covid-19 pandemic in prisons, and normalisation of these practices cannot become the new norm.[123]

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[114] Victorian Ombudsman, Implementing OPCAT in Victoria: Report and inspection of the Dame Phyllis Frost Centre (November 2017) 47.
[115] Victorian Ombudsman, Investigation into the imprisonment of a woman found unfit to stand trial (Investigation Report, 16 October 2018) 43.
[116] Victorian Ombudsman, Investigation into the imprisonment of a woman found unfit to stand trial (Investigation Report, 16 October 2018) 65.
[117] Victorian Ombudsman, OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people (September 2019) 254.
[118] Koori Youth Council, *Ngaga-dji (hear me):* young voices creating change for justice (2018) 33.
[119] Australian Commissioners and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices, Australian Commissioners and Guardians, 2016, 62.
[120] Human Rights Law Centre, *Stopping solitary confinement: Submission to the Royal Commission into Violence, Neglect and Exploitation of People with Disability: Criminal Justice System issues paper* (31 March 2020).
[121] Ibid.
[122] See, eg, Christopher Wildeman and Lars Hojsgaard Anderson, *Long-term consequences of being placed in disciplinary segregation* (12 March 2020) Criminology, 58:3, 423-453; see further, Walsh, et al, *Legal perspectives on solitary confinement in Queensland* (2020) University of Queensland and University of Queensland and Prisoners' Legal Service; see also Kayla James and Elena Vanko, *The impacts on solitary confinement* (April 2021) Vera Institute of Justice.
[123] See Andreea Laschz and Monique Hurley, 'Why practices that could amount to torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021) *Current Issues in Criminal Justice* 33(1) 54.

8.10 The law should be amended to clearly define the circumstances in which a person may be lawfully separated from other people in prison. This should be limited to exceptional cases, and appropriate safeguards must be put in place. Consistent with international human rights standards, the use of the practice on children and people with disabilities should be banned.

8.11 Change is also possible. Overseas, a number of jurisdictions in the United States have passed legislative measures to restrict the use of solitary confinement in prisons, or significantly limit the use of solitary confinement, by imposing caps on the number of consecutive days that people can be detained in solitary confinement.[124]

Ending routine strip searching

8.12 Overly broad laws permit the practice of routine strip searching in Victorian prisons, which involves forcing people in prison to remove their clothing on a regular basis. Evidence from Australia and around the world shows that routine strip searching does not have a deterrent effect, and that reducing strip searches does not increase the amount of contraband in prisons.[125]

8.13 Being subjected to routine strip searching can be humiliating and degrading for any person, and can be particularly harmful for women and children in prison. This is because 65 per cent of women in prison have been victim/survivors of family violence,[126] and 66 per cent of children in youth prisons are victims of abuse, trauma or neglect.[127]

8.14 The intersection of over-representation of Aboriginal and Torres Strait Islander women in prisons and disproportionate experiences of gendered violence in turn influences how strip searches are experienced and their impact on women — including their damaging and re-traumatising effects.[128]

8.15 There is no reason to subject people in prison to a practice that can scar them for life when prison authorities can instead use safer and more effective search methods, such as wands and body scanners. While the Human Rights Law Centre understands that this technology has been deployed in some Victorian prisons and has resulted in a decline in the rates of strip searching of women and children,[129] there is still significant room for improvement.

8.16 Routine strip searches remain "a very powerful weapon of social control used by the state"[130] and this was confirmed by the IBAC's Special Report on Corrections which prompted the Cultural Review of the Adult Custodial Corrections System this year. The Report documented that the General Manager of Port Phillip Prison told IBAC investigators that strip searches were "one of the options available to assert control"[131] over people in prison. The Report also documented specific incidents of prison officers at Port Phillip Prison using inappropriate strip-searching practices and found that prison staff had a poor understanding of relevant human rights standards.[132]

8.17 Consistent with the concluding observations recently made by the United Nations Committee Against Torture, the Victorian government must: "Ensure that strip searches of persons deprived of their liberty are not performed routinely".[133]

8.18 The law should be amended to prohibit routine strip searching. A strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and

[124] See Federal Anti-Solitary Taskforce, *A blueprint for ending solitary confinement by the Federal Government* (June 2021) American Civil Liberties Union; see also Garrison Lovely, *Solitary confinement is torture, and it should be banned everywhere,* Jacobin (2021).
[125] See, eg, Lord Carlile, *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes* (2006) The Howard League for Penal Reform, 173; Office of the Inspector of Custodial Services, *Strip searching in Western Australian Prisons* (March 2019) 9.
[126] Corrections Victoria, *Women in the Victorian Prison System* (2019) Department of Justice and Community Safety. See also Human Rights law Centre, *Total Control: Ending the routine strip searching of women in Victoria's prisons* (December 2017).
[127] Youth Parole Board, *Annual Report* 2020-2021, (September 2021) 31.
[128] Human Rights law Centre, *Total Control: Ending the routine strip searching of women in Victoria's prisons* (December 2017) 16.
[129] See, eg, Lily D'Ambrosio, *New Gatehouse to Boost Security and Keep People Safe*, 15 January 2020.
[130] Debbie Kilroy, 'Strip-Searching: Stop the State's Sexual Assault of Women in Prison' (2003) 12 *Journal of Prisoners on Prisons* 32.
[131] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021) 53.
[132] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021) 9.
[133] Committee Against Torture, *Concluding observations on the sixth periodic report of Australia* (CAT/C/AUS/CO/6).

there remains reasonable intelligence that the person is carrying dangerous contraband. This approach would be consistent with the Mandela Rules, which provide that strip searches should be undertaken "only if absolutely necessary". The reasons for any strip search, and the basis for having reasonable intelligence, must always be documented, in order to ensure transparency and accountability.

8.19 Enshrining protections like this in legislation is integral. As pointed out by the Royal Commission into the Protection and Detention of Children in the Northern Territory, changes in policy are not enough. Specific legal obligations must be placed on people to ensure compliance and to remove uncertainty between law and policy.[134]

Ensuring equivalency of healthcare

8.20 People in Victorian prisons have a right to "access to reasonable medical care and treatment necessary for the preservation of [their] health"[135] and the Mandela Rules provide that people in prison should have the same standards of health care that are available in the community and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.[136]

8.21 Equivalency of healthcare is particularly important for Aboriginal and Torres Strait Islander people, who experience higher rates of a number of health conditions compared to non-Indigenous people. This was recognised by the Royal Commission into Aboriginal Deaths in Custody, which recommended that "health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public."[137]

8.22 Yet people in Victorian prisons are not able to access the same standard of healthcare as they would in the community because they are not able to access Medicare, the PBS or the NDIS.

8.23 People in prison cannot access Medicare or the PBS because state governments are responsible for funding prison health services and section 19(2) of the *Health Insurance Act 1973* (Cth) prevents health services from receiving federal government funding if they receive funding from another level of government. This means that healthcare services in prisons are also often poorly integrated with community health services, creating serious reintegration risks, and too often do not meet the needs of people with disability and Aboriginal and Torres Strait Islander people in custody. For example, Aboriginal Community Controlled Health Organisations are not being able to access rebates to support in-reach services and complete annual health checks for Aboriginal and Torres Strait Islander people, which are crucial to ensuring continuity of care.[138]

8.24 This is compounded further by the privatisation of healthcare in Victorian prisons; Victoria is the only state in Australia in which all healthcare in prisons is contracted out to a for-profit private corporation, Correct Care (formerly a subsidiary of GEO Group, and now a subsidiary of Wellpath, the largest private prison healthcare provider in the United States).[139]

8.25 Equivalency of healthcare is integral for people in prison because they are forced to rely on prison authorities for access to healthcare. This is compounded by the fact that healthcare in prisons is currently delivered through Corrections Victoria, not the Department of Health. Health provision in prisons must be provided independent of detaining authorities.

Ensuring access to family

8.26 To ensure that people in prison can maintain ongoing connection with their families, phone calls made by people in prison should be free.

8.27 Disconnection from family - particularly for Aboriginal and Torres Strait Islander people - can have profound, damaging and long-lasting impacts on people's lives. For example, children of

[134] See Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 2018) 264.
[135] *Corrections Act 1986* (Vic) s 47(f).
[136] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 24.
[137] Royal Commission into Aboriginal Deaths in Custody (Final report, 1991) recommendation 150.
[138] Stuart Kinner, Witness Statement to the Royal Commission into Victoria's Mental Health System (21 July 2020) 13.
[139] Sarah Schwartz, Indigenous Victorians pay a high price when prisons prioritise profit, The Age (4 November 2022).

incarcerated mothers are more likely to be in out-of-home care, often permanently, and children in out-of-home care are more likely to have contact with the criminal legal system.[140]

8.28 The Mandela Rules provide that prison authorities should be encouraged to help people in prison maintain relationships with persons or agencies outside the prison,[141] yet considerable barriers exist to people in prison remaining connected with their families and support networks.

8.29 One barrier to maintaining connection with family is the high costs associated telephone calls, which cost $6.84 for a 12-minute phone call to a mobile phone (as at earlier this year) in circumstances where phone call costs in the community have reduced dramatically in recent years.

8.30 By virtue of their confinement, people in prison have no choice but to pay the exorbitant cost of these phone calls. This is compounded by the fact that many people in prison experience poverty and are unemployed or experience housing insecurity before being incarcerated and are only able to earn between $3.95 and $8.95 per day 'working' in prison.[142]

Preventing mistreatment behind bars

8.31 To prevent mistreatment behind bars, the Victorian government must urgently establish and adequately resource best practice and culturally appropriate oversight of prisons and police cells as part of implementing their obligations pursuant to the United Nation's anti-torture protocol - OPCAT. The Australian government ratified OPCAT in 2017, and the Victorian government is due to implement its obligations pursuant to the anti-torture protocol by January 2023.

8.32 The use of cruel and degrading practices – including solitary confinement and routine strip searching – are in direct violation of people's human rights, and they are examples of systemic human rights abuses that OPCAT-compliant oversight mechanisms are designed to prevent.

8.33 As found by the Inquiry into Victoria's criminal legal system: "the implementation of OPCAT is also critical to increasing transparency of prison conditions and addressing problematic practices" including "practices such as solitary confinement, strip searching and the use of physical restraints [which] can be highly traumatic and can impede the rehabilitation of people in incarceration."[143]

8.34 It is alarming that such little progress has been made to date in establishing and resourcing independent monitoring and oversight of places of detention in Victoria, raising serious concerns about whether the January 2023 deadline for implementation of OPCAT will be met.

8.35 While the Department of Justice and Community Safety has reaffirmed the Victorian government's support for the principles of OPCAT, they have said that additional federal funding is required to implement OPCAT in Victoria. The position is shared in New South Wales, with the Victorian and New South Wales Attorneys-General jointly writing to the Commonwealth on 18 October 2021, explaining that they "would be unable to implement OPCAT in the absence of an accompanying sufficient and ongoing funding commitment from the Commonwealth".[144]

8.36 While the federal government is responsible for jointly and adequately funding OPCAT implementation with the states, it is inexcusable for the Victorian government to use the funding deadlock as an excuse for taking no steps to implement its obligations pursuant to the protocol. Money is not the real barrier to OPCAT implementation, and it is disingenuous to say that it is when the Victorian government is pouring millions of dollars into running and expanding prisons.

8.37 Alongside the Change the Record coalition and the National Aboriginal and Torres Strait Islander Legal Service, we have established a number of principles which are essential to the effective development of an OPCAT-compliant oversight body. They must:

- be established with full and transparent consultations with civil society, including Aboriginal and Torres Strait Islander people, communities and organisations;

[140] Australian Institute of Health and Wellbeing, The health of Australia's prisoners (2018) Canberra: AIHW, 72.
[141] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 107.
[142] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 37.
[143] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 623-624.
[144] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, Inquiry into Victoria's criminal justice system (Final report, 24 March 2022) 630.

- have Aboriginal and Torres Strait Islander representation at all levels to ensure that oversight bodies are established in a culturally safe way, and with the trust of community;
- have a statutory basis and be independent of government and the institutions they oversee;
- be adequately and jointly resourced by the federal and Victorian government;
- make findings and recommendations publicly available and be empowered to require a response from governments and detaining authorities;
- be empowered to undertake regular and preventative visits;
- have free and unfettered access (to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews);
- have the power to submit proposals and observations to Parliament or the public concerning existing or proposed legislation; and
- be afforded appropriate privileges and immunities to ensure there are no sanctions or reprisals for communicating with the oversight body.

Recommendations:

Yoorrook should recommend that the Victorian government:

- ban the use of solitary confinement in law;
- ban routine strip searching in law;
- ensure equivalency of medical care for people in prison by:
    - calling for the federal government to:
        - grant an exemption under section 19(2) of the *Health Insurance Act 1973* (Cth) to allow health care providers in prisons to claim Medicare and PBS subsidies;
        - ensure that people in prison have access to the NDIS and are assessed for eligibility for NDIS upon entry to a prison;
    - transitioning the responsibility for delivering healthcare in prisons from Corrections Victoria to the Department of Health;
    - terminating the contract with Correct Care for provision of healthcare in Victoria's public prisons; and
    - resourcing Aboriginal Community Controlled Health Organisations to deliver culturally appropriate health services to Aboriginal and Torres Strait Islander people in prison and to facilitate continuity of care upon release.
- ensure access to family by making prison phone calls free;
- consult with civil society – including Aboriginal Community Controlled Organisations – and fund independent and best practice oversight of places of detention as part of implementing Victoria's obligations to prevent torture and cruel, inhuman or degrading treatment pursuant to OPCAT; and
- work with the federal and other state and territory governments to ensure that the recently suspended visit of the Subcommittee on Prevention of Torture is resumed.

9. Strengthening the Charter

9.1 Victoria's core human rights document – the *Charter of Human Rights and Responsibilities Act 2006* (Vic) – provides an important compass to help governments make the right, human rights-informed decisions. The Charter should, however, be further strengthened.

9.2 Consistent with the position adopted by the Victorian Aboriginal Legal Service, the Charter should also be amended to include recognition of the right to self-determination of Aboriginal and Torres Strait Islander people. As explained by the Victorian Aboriginal Legal Service:

> The right of Aboriginal peoples to self-determination is a collective right under international human rights law. The government should stop referring to the "principle" of self-determination and ensure that this right is enshrined in legislation, including the Victorian Charter on Rights and Responsibilities 2006, as well as all new legislation and legislation being reviewed/amended.[145]

9.3 Currently, section 39 of the Charter requires people to establish an existing cause of action before being able to rely on the human rights protected in the Charter. In practice, this means that people who believe their human rights have been breached cannot take the matter to court unless they

[145] Victorian Aboriginal Legal Service, Nuther-mooyoop to the Yoorrook Justice Commission: Criminal Legal System (November 2022) 24.

can 'piggyback' their arguments onto other legal causes of action. To make the Charter simpler and easier to enforce, it should be amended to allow people whose human rights have been breached to directly bring legal action via a standalone right of action, which could be modelled on section 40C of the *Human Rights Act 2004* (ACT) (as recommended by the 2015 Review of the Charter).[146]

9.4 The Charter should also allow for courts or tribunals to grant such relief or remedy, or make such order, as is 'just and appropriate', including making an award of damages where appropriate.

9.5 Given that they make decisions that engage with human rights on a regular basis, the Charter should also be amended so that the Adult Parole Board and Youth Parole Board are no longer exempt from its application. As already set out above, parole board processes in Victoria are notoriously opaque, and the challenges of navigating the parole process are already compounded by people in Victorian prisons having no right to legal representation in their parole matters.

9.6 Further, greater recognition of social and economic rights is needed (as foreshadowed by the 2015 Review of the Charter).[147] Housing insecurity is a significant factor that contributes to people being criminalised, and including a right to housing in the Charter would help inform future policy and legislative decisions. This was recommended in March 2021 by the Parliamentary Inquiry on Homelessness in Victoria, as well as people in social housing being able to take action if evictions are contrary to the Charter.

Recommendations:

Yoorrook should recommend that the Victorian government strengthen the Charter by:

- Enshrining recognition of the right to self-determination of Aboriginal people in the Charter;
- Establishing a standalone right of action in the Charter, along with access to appropriate remedies;
- Repealing regulation 5 of the Charter which exempts the Adult Parole Board and the Youth Parole Board from the operation of the Charter; and
- Incorporating greater recognition of social and economic rights in the Charter.

[146] Michael Brett Young, From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (September 2015) 133.
[147] Michael Brett Young, From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (September 2015) 234.