



Yoorrook Justice Commission
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Date 25 November 2022

Dear Commission,

Re: Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System

The Law Institute of Victoria (**LIV**) welcomes the opportunity to provide feedback on issues raised in the Yoorrook Justice Commission's (**the Commission**) issues paper on systemic injustice experienced by First Peoples in the criminal justice system in Victoria (**issues paper**).

While First Peoples make up only 1% of Victoria's population,¹ at 30 June 2021, the age-standardised rate of First Peoples' prisoners was 1,816.4 per 100,000² in Victoria compared to 138.7 for all Victorian prisoners.³ The LIV recognises that significant reforms are required to address the systemic injustice experienced by First Nations people in the Victorian criminal justice system. The challenges and issues that need to be addressed are significant and nuanced and this is reflected in the broad scope of the issues paper.

In this submission, the LIV seeks to focus on select critical recommendations identified by our members that have not yet been accepted or appropriately implemented by the Victorian Government (**Government**). These include:

- Reform to the police oversight system;
- Bail Reform;
- Raising the age of criminal responsibility;
- OPCAT implementation; and
- Decriminalisation of public drunkenness.

¹ Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander population summary,' (Website, 1 July 2022) <[://www.abs.gov.au/articles/victoria-aboriginal-and-torres-strait-islander-population-summary#:~:text=In%20Victoria%2066%2C000%20people%20identified,Census%20of%20Population%20and%20Housing](https://www.abs.gov.au/articles/victoria-aboriginal-and-torres-strait-islander-population-summary#:~:text=In%20Victoria%2066%2C000%20people%20identified,Census%20of%20Population%20and%20Housing)>.

² Victorian State Government, *Victorian Government Aboriginal Affairs Report 2021* (Report, 2021) 98.

³ Sentencing Advisory Council, 'Victoria's Indigenous Imprisonment Rates' (Website, 4 November 2021) <<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates>>.



The LIV welcomes ongoing consultation on the issues raised in this submission and the issues paper. The LIV expressly acknowledges the role that systemic discrimination and racial stigma has and does play in influencing the disproportionate rates of First Peoples' engagement with the criminal justice system. The LIV is committed to advocating for better laws and practices to address systemic discrimination of First Peoples and welcomes the furtherance of the Treaty process in Victoria to ensure self-determination for all First Peoples.

Police Oversight in Victoria

Victoria's police oversight system manages complaints about police misconduct and corruption and seeks to ensure the exercise of police coercive and intrusive powers, and police decisions and actions, are subject to effective oversight.⁴ The LIV is of the view that the current hybrid model of police oversight in Victoria is poorly regulated and ineffective. Notably, over 90% of police complaints are referred back to Victoria Police for internal investigation.⁵ The LIV recognises a complaints process where police investigate police facilities a lack of independent scrutiny into problematic conduct, and erodes public trust in the complaints system and police force.

LIV members raise concerns that the current oversight system can disproportionately exacerbate systemic injustices for First Peoples and other marginalised minorities by failing to address over-policing, systemic discrimination and racial bias, ultimately worsening the lack of confidence and trust in the police complaints system felt by First Peoples and the wider community. Findings of the recent Inquiry into the Criminal Justice System in Victoria reflect LIV member feedback, noting that criminal justice stakeholders, in particular Aboriginal organisations, "*have long held concerns regarding the impartiality of effectiveness of the existing police complaint handling and oversight systems in Victoria*".⁶

An independent, properly funded, culturally appropriate and complainant-centred police accountability system is essential to address the disadvantage experienced by First Peoples in the justice system. All complaints of police misconduct, excluding customer service complaints, should be investigated independently of Victoria Police. The LIV recommends that an effective oversight system would be best

⁴ Victoria State Government, *Systemic review of police oversight* (Final Consultation Paper, 25 November 2021) <<https://engage.vic.gov.au/systemic-review-police-oversight>>.

⁵ Independent broad-based anti-corruption commission, *Annual Report 2020/2021* (Annual Report, 2021)26.

⁶ Legal and Social Issues Committee, 'Inquiry into Victoria's Criminal Justice system,' *Parliament of Victoria* (Summary booklet, 2022) finding 22 xli <https://www.parliament.vic.gov.au/file_uploads/LCLSIC_59-10_Vic_criminal_justice_system_summary_booklet_MY1L5WVK.pdf>.



achieved through establishment of a completely new and independent police misconduct and corruption agency. In establishing a new agency, the LIV recommends consideration be given to the European Court of Human Rights' best practice principles, that a system investigating police should be independent, adequate, prompt, open to public scrutiny and complainant centred.⁷

Under the current system, the Independent Broad-based Anti-Corruption Commission ('IBAC') is tasked with addressing complaints of police misconduct, however in practice IBAC has highlighted it does not have sufficient resources, legislative powers or the necessary expertise to be able to independently address claims of police misconduct.⁸ One of the significant reasons identified by IBAC for its referral of complaints back to Victoria Police was its lack of necessary expertise,⁹ such as that generally found in investigating bodies with law enforcement or equivalent experience. The LIV recognises that an effective and equitable police oversight system requires a police misconduct body that has capability and staff experience to effectively carry out its functions. The oversight body should also have experience working with complainants and victims, including implementing culturally safe resolution practices.

The LIV considers the Police Ombudsman for Northern Ireland ('PONI') to be a leading example of an independent oversight body, with a prompt, transparent, and victim-centred system of police oversight. It is suggested that a model similar to PONI be introduced in Victoria. A new standalone body should have powers and resources to address all police misconduct complaints, conduct investigations and support complainants. A model comprising a focused body, external from the police is best equipped to seek prompt resolution for complainants, support them through the process, and instil confidence in complainants that their voices will be heard impartially.

LIV members have raised concerns that a significant barrier in achieving a complainant centred police misconduct system is complainant confidence in this system. Many First Peoples may foster inherent mistrust in the police force due to the historical and intergenerational experience of colonisation, involvement with the justice system and child removal. First Nations' complainants may not feel confident in making a complaint about police behaviour if the complaint may ultimately be assessed by Victoria Police, or if there is little transparency or communication concerning the complaints handling process and, in particular, determining whether or not an external body will consider the complaint. The LIV supports a model in which all police misconduct complaints are considered by an independent body,

⁷ Jim Murdoch, Ralph Roche, 'The European convention on human rights and policing' *A handbook for police officers and other law enforcement officials* (Handbook, 2013) <https://www.echr.coe.int/documents/handbook_european_convention_police_eng.pdf>.

⁸ IBAC Committee Inquiry Report (n 2) xxix.

⁹ IBAC Committee Inquiry Report (n 2) xxix.



in a transparent and accountable way to encourage complainant confidence. A fundamental flaw with the present model is that, in practice, the same body (Victoria Police) that is the subject of a misconduct complaint is responsible for reviewing the complaint's validity and investigating the misconduct.

The LIV recommends the establishment of a dedicated First Nations position in the police oversight system, similar to the NSW Select Committee Inquiry's recommendation for the NSW Law Enforcement Conduct Commission,¹⁰ to ensure policies and engagement with police misconduct processes are culturally safe and accessible in Victoria. To ensure complaint processes are accessible to vulnerable complainants who may be victims of police misconduct, individuals should be able to provide evidence through an advocate and have access to legal assistance.

Oversight of critical incidents

Currently in Victoria, when a critical incident such as a death in custody occurs, the preparation of the evidence brief for the Coroner is in practice often carried out by a member of the Victoria Police, with oversight by IBAC.¹¹ Where evidence is collected by Victoria Police on behalf of the Coroner, the Professional Standards Command of Victoria Police prepares an oversight file to examine an incident and determine whether policies, procedures and guidelines were adhered to and to determine whether any action is necessary to prevent similar incidents in the future.¹²

The practice of internal Victoria Police oversight does little to enhance confidence in the current complaints handling process and can be improved. To ensure trust and confidence in review of critical incidents it is important that independent investigation of such events occurs. It is crucial to ensure an impartial and accurate record of transpired evidence and to support a transparent system of oversight and accountability.

The 2018 Audit of Victoria Police's oversight of serious incidents showed that more than half of the investigations conducted by Victoria Police failed to consider evidence that should have been included in oversight files.¹³ The LIV recommends that critical incidents be investigated externally to Victoria Police by independent specialists, including when appropriate, by specialists with Aboriginal and Torres

¹⁰ Select Committee on the high level of First Nations people in custody and oversight and review of deaths in custody, Parliament of New South Wales, Legislative Council, The high level of First Nations people in custody and oversight and review of deaths in custody (Report, April 2021) rec 36.

¹¹ Independent Broad-based Anti-corruption Commission, 'Audit of Victoria Police's oversight of serious incidents' (Report, March 2018) 10-15, *Professional Standards Command notifies IBAC when it is overseeing an investigation into a police contact death or serious injury, and IBAC reviews some of these investigations after they have been completed* <https://www.ibac.vic.gov.au/docs/default-source/research-documents/audit-of-victoria-police-oversight-of-serious-incidents.pdf?sfvrsn=a0517775_2>.

¹² Victoria Police Oversight File Guide.

¹³ Independent Broad-based Anti-corruption Commission, 'Audit of Victoria Police's oversight of serious incidents' (Report, March 2018) 5 <https://www.ibac.vic.gov.au/docs/default-source/research-documents/audit-of-victoria-police-oversight-of-serious-incidents.pdf?sfvrsn=a0517775_2>. (citing Victoria Police's Integrity management guide, April 2016, p. 60).



Strait Islander staff and leadership. Investigations may be carried out by the new independent oversight agency recommended above, or another independent body tasked with addressing critical incidents. The independent investigation of critical incidents is essential in addressing the rates of Aboriginal deaths in custody, of which there have been over 500 in Australia since the Royal Commission into Aboriginal Deaths in Custody in 1991.¹⁴

Bail Reform

The LIV is concerned about Victoria's growing remand and prison populations and the disproportionate rate of First Peoples in custody and on remand. According to Sentencing Advisory Council of Victoria data ('**Sentencing Advisory Council**'), between 2010 and 2020, the number of prisoners on remand increased from 804 people to 2,484 people, with First Peoples comprising of a total of 35 per cent of all prisoners.¹⁵ In June 2021, 51% of Aboriginal people in prison in Victoria were on remand, compared to 32%¹⁶ in June 2017 and 20% in June 2010.¹⁷ The Sentencing Advisory Council also found that the increase in remanded children far exceeded any increase in the number of sentenced children in detention. The proportion of unsentenced children in custody on an average day more than doubled from 22 per cent in 2011-12, to 47 per cent in 2018-19.¹⁸ Further, in 2017-18, there were 442 children aged between 10 to 17 years old held on remand;¹⁹ 15 per cent of these children were Aboriginal or Torres Strait Islanders.²⁰

LIV members report that various amendments to the Bail Act 1977 (Vic) ('**Bail Act**') over the past decade, including those in 2017 and 2018, have contributed to increases in prison and remand populations. In practice, the 2018 amendments to the Bail Act mandate a presumption against bail for a broad range of offences, by expanding the circumstances where an offender is required to demonstrate 'exceptional circumstances' or a 'compelling reason' to justify the granting of bail. The implementation of this two-step test occurred alongside an expansion of the list of Schedule 1 and 2 offences, and also the introduction of the unacceptable risk test specified in section 4E of the Bail Act 1977 (Vic). The LIV strongly recommends that the current two-step test requiring an individual to show

¹⁴ Victorian Aboriginal Community Controlled Health Organisation, 'VACCHO demands urgent action to end Aboriginal deaths in custody', VACCHO (Website, 2022) <<https://www.vaccho.org.au/2022/09/14/vaccho-demands-urgent-action-to-end-aboriginal-deaths-in-custody/#:~:text=Over%20500%20Aboriginal%20people%20have,Strait%20Islander%20community%20in%20Victoria>>.

¹⁵ Corrections Victoria, 'Profile of Aboriginal People in Prison' *Annual Prisoner Statistical Profile* 2009-10 to 2019-20 (Infographic, June 2021) <https://files.corrections.vic.gov.au/202106/Infographic_Aboriginal_people_in_prison.pdf?VersionId=S8QK1zucYtcUFuk8UhQNi2ixPiJwm5Pt>.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Sentencing Advisory Council of Victoria, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (September 2020) 1.

¹⁹ Ibid.

²⁰ Ibid.



a compelling reason or exceptional circumstances to be granted bail be repealed. Instead, the LIV recommends that bail should be based on the single 'unacceptable risk' test. The LIV also recommends a presumption of bail should exist except in circumstances where there is a specific and immediate risk to the physical safety of another person.

Recent bail reforms have disproportionately impacted First Peoples who have a higher likelihood of being processed for an offence than non-Aboriginal people. First Peoples are policed for minor drug offences at a rate five times more frequently than members of the non-Aboriginal and Torres Strait Islander community;²¹ in 2019-20, Aboriginal children (10-17 years) were almost six times more likely to be processed by police as alleged offenders than their non-Aboriginal peers,²² and in 2020–21, Aboriginal women were nearly ten times more likely than non-Aboriginal women to be processed by police for an alleged offence.²³

The LIV submits that urgent changes to the bail system are necessary to aid in reducing the increasing prison and remand populations.

Age of Criminal Responsibility

Australia's 10-year age of criminal responsibility results in the over-representation of Aboriginal and Torres Strait Islander children in the youth justice system.²⁴ The LIV recommends that the Victorian Government should amend section 344 of the Children, Youth and Families Act 2005 (Vic) to raise the age of criminal responsibility to 14 years. The LIV expressed support for the Children, Youth and Families (Raise the Age) Amendment Bill 2021 (Vic) considered in Victorian parliament on 18 March 2021 and recommends urgent reform to raise the age of criminal responsibility.

Australia has been criticised by international states because of the low age of criminal responsibility in this country. In 2017, the United Nations Committee on the Elimination of Racial Discrimination recommended Australia consider raising the age of criminal responsibility, due to the disproportionate

²¹ Victoria, *Inquiry into the use of cannabis in Victoria*, (Legislative Council Legal and Social Issues Committee, 28 April 2021, Mr Leong) <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_use_of_Cannabis_in_Victoria/Transcripts/20210428/2_FINAL-VALS-280421.pdf>.

²² First Peoples Relations, 'Justice and Safety,' *Aboriginal over-representation in the justice system is eliminated* (Website, 2022) <<https://www.firstpeoplesrelations.vic.gov.au/victorian-government-aboriginal-affairs-report-2020/justice-and-safety>>.

²³ Ibid.

²⁴ Susan Baidawi, Rosemany Sheehan, 'Cross-over kids: Effective responses to children and young people in the youth justice and statutory Child Protection systems' (December 2019) Australian Institute of Criminology 11.



numbers of indigenous children imprisoned.²⁵ In 2019, the United Nations Committee on the Rights of the Child recommended that all countries increase the minimum age of criminal responsibility to at least 14 years of age,²⁶ and in 2021 the United Nations Human Rights Committee's Universal Periodic Review resulted in 31 United Nations member states calling on Australia to raise the age of criminal responsibility.²⁷

The LIV recognises that children involved with the criminal justice system at a young age are more likely to become entrenched in the system and have long-term involvement with crime, resulting in poor future economic and social outcomes. The low age of criminal responsibility disproportionately impacts Aboriginal and Torres Strait Islander young people who are 21 times more likely than non-Aboriginal and Torres Strait Islander children to be detained in youth detention facilities.²⁸

OPCAT Implementation

The Optional Protocol on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT') was ratified by Australia in 2017. Australia sought an extension to implement the treaty until January 2023. The LIV calls for the Victorian Government to promptly implement its obligations under OPCAT by establishing a culturally appropriate National Preventive Mechanism ('NPM') in Victoria which meets the requirements of the Convention. Under OPCAT, NPMs are empowered to visit places of detention, including police vehicles, prisons, youth detention facilities, detention centres, and other places people are deprived of their liberty, and mitigate risks of torture or other cruel or inhuman treatment. Given the disproportionately high rates of imprisonment and deaths in custody experienced by First Nations people, the LIV urges the Victorian Government to implement OPCAT.

Connections between systemic injustice in the criminal justice system and systemic injustice relating to issues including child protection, homelessness, family violence, health, mental health and disability and substance misuse

The LIV acknowledges the strong connection between criminal justice system involvement and other vulnerabilities experienced at disproportionate rates by First Peoples. The LIV provides the following non-exhaustive comments on select issues and welcomes the opportunity for ongoing consultation on

²⁵ United Nations Human Rights Office of the High Commissioner, Committee on the Elimination of Racial Discrimination examines Australia's report (Web Page).

²⁶ United Nations Committee on the Rights of the Child, General comment No 24 (2019) on children's rights in the child justice system, UN Doc CRC/C/GC/24 (18 September 2019) para 22

²⁷ Oliver Gordon, 'Australia urged by 31 countries at UN meeting to raise age of criminal responsibility', (online, 21 January 2021) < <https://www.abc.net.au/news/2021-01-21/un-australia-raise-the-age-of-criminal-responsibility/13078380>>.

²⁸ Sentencing Advisory Council of Victoria, 'Indigenous Young People in Detention' (Web Page, 14 July 2020).



the complex connections between systemic injustice in the criminal justice system and other intersectional vulnerabilities.

Homelessness

Alongside being overrepresented in the criminal justice system, First Peoples are also overrepresented in Victoria's homeless population. Data suggests that each year, 15-18 per cent of First Nations Victorians may experience or be at risk of homelessness.²⁹ First Peoples' make up 0.8% of Victorians, but 10.2% of homelessness service users.³⁰

The LIV notes the substantial link between homelessness and detected criminal offending, as individuals are forced to live without security or privacy, and are subject to CCTV surveillance and frequent police checks. Homeless individuals often commit offences, including substance abuse, trespassing, theft and physically defending their space and possessions, in order to cope with their circumstances. Across Australia, one in three prisoners were homeless in the four weeks before entering prison.³¹

Aboriginal and Torres Strait Islander Victorians are disproportionately reliant on the public housing system, with 19 per cent of Aboriginal and Torres Strait Islander households in Victoria currently living in some form of social housing.³² The demand for public housing exceeds availability, with the number of people on the Victorian Housing Register (public housing waiting list) as of March 2018 being 82,499.³³ The LIV urges the Victorian Government to build additional public housing and consider a waiting list priority system that better addresses the system nature of the impact of reduced public housing supply on Aboriginal Victorians.

²⁹ Aboriginal Housing Victoria, 'The Victorian Aboriginal Housing and Homelessness Summit' Analytics & Policy Observatory, (Report of Findings, April 2019) 17 <https://ahvic.org.au/cms/uploads/docs/final-summit-report-in-full-pdf_13_06.pdf>.

³⁰ Council to Homeless Persons, 'Victorian Aboriginal and Torres Strait Islander Homelessness,' (Factsheet, 2022) <<https://chp.org.au/wp-content/uploads/2022/04/Victorian-Aboriginal-and-Torres-Strait-Islander-Homelessness-Factsheet.pdf>>.

³¹ Australian Institute of Health and Welfare, The health of Australia's prisoners 2018, 30 May 2019, viii.

³² Louise Tierney et al, Aboriginal and Torres Strait Islander people: A focus report on housing and homelessness (Focus Report, 2019, Australian Institute of Health of Welfare) 35.

³³ 4 Inquiry into the Public Housing Renewal Program (Report, June 2018, Legislative Council: Legal and Social Issues Committee: Parliament of Victoria) 23.



Family Violence

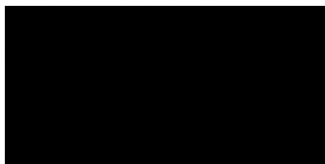
Family violence is also correlated with homelessness and justice system involvement, with 28 per cent of Australian First Peoples reporting family violence as the main reason for their homelessness.³⁴ Whilst intervention orders are commonly used to exclude perpetrators from family homes, LIV members report that in the case of First Nations Victorians, this is often ineffective to reduce consequential homelessness or family violence. Often perpetrators, most frequently males, who are excluded from the family home and forced into homelessness and subsequently return to the family home in breach of the order,³⁵ potentially leading to further criminal justice involvement. As poverty, unsafe living conditions, a lack of appropriate alternative accommodation and family violence are often interconnected, First Nations women affected by violence may be hesitant to contact authorities due to fears of child removal and losing social housing rights. This fear is exacerbated by the historical intergenerational trauma associated with child removal for many parents. The LIV submits that the Government should increase crisis accommodation and transitional housing management programs for First Peoples, and advocate to the Federal Government to include homelessness and family violence as exemptions for meeting Centrelink Newstart Reporting Obligations.

Public Drunkenness

As has been raised by the LIV in its Call to Parties ahead of the 2022 Victorian State Election, in the LIV's view the operation of the *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Act 2021 (Vic)* should commence promptly, to reduce the disproportionate impact of the retention of the offence of public drunkenness on First Nations people.

If you would like to discuss further, please contact Alex Moses, Lawyer and Lead of the Administrative Law and Human Rights Section (amoses@liv.asn.au +61 3 9607 9338).

Tania Wolff



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³⁴ 7 Louise Tierney et al, Aboriginal and Torres Strait Islander people: A focus report on housing and homelessness (Focus Report, 2019, Australian Institute of Health of Welfare) 54.

³⁵ Kyllie Cripps and Daphne Habibis, Improving housing and service responses to domestic and family violence for Indigenous individuals and families (AHURI Final Report No. 320, Australian Housing and Urban Research Institute Limited, August 2019) 24.

