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Legal and Social Issues Committee

Inquiry into Victoria's criminal justice system

Volume 1

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Legislative Council Legal and Social Issues Committee

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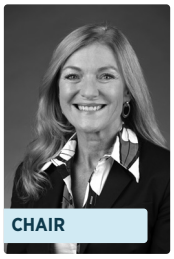

Ms Fiona Patten
Northern Metropolitan

Dr Tien Kieu
South Eastern Metropolitan

Dr Matthew Bach
Eastern Metropolitan
(*Substitute for Mr Craig Ondarchie)*

Ms Cathrine Burnett-Wake
Eastern Victoria
(*Member from 2 December 2021*)

Mr Enver Erdogan
Southern Metropolitan
(*Substitute for Ms Kaushaliya Vaghela)*

Hon Jane Garrett
Eastern Victoria

Ms Tania Maxwell
Northern Victoria

Hon Edward O'Donohue
Eastern Victoria
(*Substitute for Hon Wendy Lovell. Member until 1 December 2021)*

Mr Craig Ondarchie
Northern Metropolitan

Mr Lee Tarlamis OAM
South Eastern Metropolitan
(*Substitute for Ms Kaushaliya Vaghela)*

Ms Kaushaliya Vaghela
Western Metropolitan

Ms Sheena Watt
Northern Metropolitan
(*Substitute for Hon Jane Garrett)*

Participating members

Dr Matthew Bach, Eastern Metropolitan
Mr Rodney Barton, Eastern Metropolitan
Ms Melina Bath, Eastern Victoria
Ms Georgie Crozier, Southern Metropolitan
Dr Catherine Cumming, Western Metropolitan
Mr Enver Erdogan, Southern Metropolitan
Mr Stuart Grimley, Western Victoria
Mr David Limbrick, South Eastern Metropolitan
Hon Wendy Lovell, Northern Victoria (*Full member until 2 December 2021*)
Hon Edward O'Donohue, Eastern Victoria
Mr Tim Quilty, Northern Victoria
Dr Samantha Ratnam, Northern Metropolitan
Ms Harriet Shing, Eastern Victoria
Mr Lee Tarlamis OAM, South Eastern Metropolitan
Ms Sheena Watt, Northern Metropolitan

About the Committee

Functions

The functions of the Legal and Social Issues Committee are to inquire into and report on any proposal, matter or thing concerned with community services, education, gaming, health, and law and justice.

The Legal and Social Issues Committee may inquire into, hold public hearings, consider and report on any matter, including on any Bills or draft Bills, annual reports, estimates of expenditure or other documents laid before the Legislative Council in accordance with an Act, provided these are relevant to its functions.

Government Departments allocated for oversight:

- Department of Families, Fairness and Housing
- Department of Health
- Department of Justice and Community Safety.

Secretariat

Lilian Topic, Senior Committee Manager
Matt Newington, Committee Manager (from 19 April to 19 November 2021)
Alice Petrie, Inquiry Officer (until 25 January 2022)
Caitlin Connally, Research Assistant
Samantha Leahy, Research Assistant
Jessica Wescott, Research Assistant (from 18 October 2021)
Meagan Murphy, Research Assistant (from 17 January 2022)
Cat Smith, Administrative Officer
Sylvette Bassy, Administrative Officer

Contact details

Address Legislative Council Legal and Social Issues Committee
Parliament of Victoria
Spring Street
EAST MELBOURNE VIC 3002

Phone 61 3 8682 2869

Email lsic.council@parliament.vic.gov.au

Web www.parliament.vic.gov.au/lsic-lc

This report is available on the Committee's website.

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Terms of reference

Inquiry into Victoria's criminal justice system

On 3 June 2020 the Legislative Council agreed to the following motion:

That this House requires the Legal and Social Issues Committee to inquire into, consider and report, by no later than 28 February 2022, on various issues associated with the operation of Victoria's justice system, including, but not limited to —

(1) an analysis of factors influencing Victoria's growing remand and prison populations;

(2) strategies to reduce rates of criminal recidivism;

(3) an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime; and

(4) the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skillset necessary for judges and magistrates overseeing specialist courts.

Chair's foreword

As a Member of Parliament, I have had the opportunity to investigate subjects of immense importance to our state and its future. It has been both a privilege and a challenge.

The operation of the criminal justice system is an area of policy and practice that I have long been involved in. I have advocated for those who have been the victims of crime, supported those working in the criminal justice system, consulted with Victoria Police about their practices, and sought to understand and assist those who are serving their time in prison. Leading this Inquiry has consolidated my view that we need urgent work to improve the way we deliver justice in Victoria, to ensure our community safety, and to find modern solutions to reduce offending and reoffending.

This report is a major piece of work. It stretches to two volumes and includes 100 recommendations for change. The Committee held 50 public hearings involving more than 90 representatives. We received evidence from experts in many different fields that work in or intersect with the criminal justice system. We made it a priority to involve as many individuals with lived experience of the justice system as possible. During this Inquiry, we heard some of the most heart wrenching, tragic, evidence from victims of crime who have survived unimaginable loss and grief. I thank them for their bravery and generosity and assure them that their contribution was influential on the Committee's recommendations.

I want Victorians to be safe, always, and we must make inroads into achieving that goal. But I do not believe that building more prisons is the way to achieve that.

The Government's priorities should be focussed on supporting victims of crime, rehabilitation of offenders, circumventing recidivism, ending overrepresentation of Aboriginal people in our jails, and ensuring early intervention for those who are disadvantaged.

The statistics paint a very stark picture in relation to what is happening in the justice system in Victoria.

There are decreases in overall sentencing outcomes in higher courts, but there is a significant increase in the percentage of cases sentenced to imprisonment. The use of time served prison sentences increased 643% from 2011–2012 and 2017–2018, and now accounts for 20% of all prison sentences imposed. Unsentenced prisoners now comprise 87% of prison receptions (up from 60% in 2010).

Between 30 June 2010 and 30 June 2020 Victoria's prison population increased by 57.6%. This has disproportionately affected Aboriginal Victorians, young people, and women. Aboriginal women made up 14% of the total female prison population in 2020 despite Aboriginal and Torres Strait Islander people making up less than 0.8% of the Victorian population.

There has been an increase in recidivism over the last 10 years although 6% of offenders are responsible for 44% of crimes reported to Victoria Police.

We have some data that is stark and disturbing, but there is also plenty of data missing. That is why we have called on the authorities to collect and transparently provide data about what is happening in prisons and in the justice system more broadly.

Damaging practices like solitary confinement and intrusive strip searches still take place regularly in our prison system. Strip searching is conducted to try and prevent contraband—such as drugs—from entering the prison system. The *Corrections Act 1986* (Vic) dictates these practices can occur 'where necessary'. The Victorian Aboriginal Legal Service told us that the bar is too low in Victoria compared to other states and should only occur as a last resort. What we need is good data about why it is necessary to use these methods, to inform our decision making on such practices.

One of the saddest facts to me is that socioeconomic disadvantage is so closely linked to an increased risk of engagement with the criminal justice system. While the vast majority of people who experience disadvantage do not offend, different forms of social disadvantage compound to increase the risk of criminalisation and victimisation. For example, children in out of home care are disproportionately likely to intersect with the criminal justice system both as victims and offenders.

Therefore the Committee has made a number of recommendations for a strong focus on early intervention. We must identify individuals at risk and provide social supports to divert them away from the system.

In Victoria it does seem that governments have prioritised investment in correctional facilities over early intervention measures. Some witnesses told us that they are cautiously optimistic about the Government's new *Crime Prevention Strategy* which aims to provide integrated solutions to address disadvantage—for example, housing support, addiction support and financial assistance. This should be implemented urgently and regularly reviewed.

I believe that we need to address changing the minimum age of criminal responsibility. Raising the legal minimum age of criminal responsibility is consistent with evidence about child development, international norms, and human rights standards, and would divert children into social services rather than trapping them in the criminal justice system from an early age.

We heard from the Chief Commissioner that Victoria Police are actively engaging with minority communities and that they would like to return to a community-based approach to policing to continue this work of fostering relationships and contributing to crime prevention. I would welcome that.

Cautions and court-based diversions are key mechanisms to divert people away from the criminal justice system. Currently their application is inconsistent and often at the discretion of the attending officer.

The Victorian Government is currently developing a new victims of crime financial assistance scheme. They should review the thoughtful and considered suggestions from victims of crime that are captured in this report and our recommendations. They have told us we need to embed trauma-informed practices into the design of the justice system. It needs to be more accessible and a less adversarial process for victims of crime.

I strongly believe that we need to take a close look at Victoria's bail system to understand the impact of the reforms introduced in 2013 and 2017–18. These reforms have resulted in a significant increase to the remand population in Victorian prisons. The purpose of bail is to keep the community safe from high-risk offenders. But denying bail to so many has had negative effects on persons charged with an offence and has disproportionately impacted women, Aboriginal Victorians, children and young people, and people living with disability.

We need more transparency in relation to what is happening in prisons, and we need to ensure we are comprehensively providing support, safety, and routine. This would improve health outcomes and reduce the risk of reoffending and recidivism. Education, training, and work experience during incarceration can assist people reintegrating into the community and can connect people to employment opportunities and housing.

Recent reforms have made it more difficult for parole to be granted. The number of serious offences committed by people while on parole has decreased in recent years, however, the risk-averse approach to granting parole is resulting in more people being released back into the community without the additional supports and supervisions that parole offers.

I am pleased to present this report on the criminal justice system in Victoria. I hope that it influences the Government to work towards a more modern, rehabilitation-focused justice system in Victoria. This is what all stakeholders want.

I am satisfied that the changes we have proposed, if implemented, would have a significant positive influence on the lives of individuals and the safety of the community.

Finally, I would like to thank the secretariat staff who worked on the Inquiry and helped prepare this substantial and considered report. I would like to thank the Inquiry Officer Alice Petrie, the Research Assistants Caitlin Connally, Samantha Leahy, Jessica Wescott and Meagan Murphy, and Administrative Officers Cat Smith and Sylvette Bassy, under the management of Matt Newington and Lilian Topic. I would also like to thank my colleagues on the Committee for their work.

I commend the report to the House.

Ms Fiona Patten MLC
Chair

Executive summary

Chapter 1: Introduction

The criminal justice system in Victoria plays a key role in enforcing and upholding the rule of law in the state. It is a multifaceted system that requires a number of institutions to work both independently and collaboratively to protect the community and uphold the rule of law. However, questions have been raised about whether these elements of the criminal justice system are working together effectively, or whether government agencies and bodies are operating unilaterally. When the operation of the criminal justice system is not consistent or cohesive, it is detrimental to those interacting with the system, including agencies, participants, and the Victorian public more broadly. This Inquiry investigates the current state of the criminal justice system in Victoria, and makes recommendations to support a better functioning justice system.

Chapter 1 provides an overview of the criminal justice system in Victoria and provides an insight into potential pathways through the system. Further, the Chapter explains that the Committee has elected not to examine youth justice in Victoria due to the number of recent reviews and inquiries undertaken.

The legislative and regulatory frameworks guiding the Victorian criminal justice system are set by both state and federal parliaments. While Australian states and territories have primary responsibility for law and order within their jurisdictions, the Commonwealth Parliament has law-making powers which may interact with state legislation. However, most criminal law is primarily legislated at the state level. Legislation in Victoria for offence-based crimes includes the *Crimes Act 1958* (Vic), *Summary Offences Act 1966* (Vic), and the *Road Traffic Act 1986* (Vic).

The implementation and enforcement of the law falls within several ministerial portfolios, including police, crime prevention, corrections, youth justice and victim support. A number of government agencies and special bodies play key roles in the Victorian criminal justice system, including the Department of Justice and Community Safety, which provides administrative support to the following statutory offices, authorities and judicial bodies:

- in the portfolio of the Attorney-General: Victims of Crime Commissioner, Victorian Legal Services Commissioner, Victoria Legal Aid, state courts
- in the Corrections portfolio: Adult Parole Board, Post Sentence Authority, Women's Correctional Services Advisory Committee
- in the Police portfolio: Firearms Appeals Committee, Road Safety Camera Commissioner, Victoria Police
- in the Youth Justice portfolio: Youth Parole Board.

Chapter 1 also outlines the courts and tribunals operating in Victoria. At present, there are nine courts and two tribunals operating in Victoria: four Federal courts, two state tribunals and five specialist state courts.

To inform the Inquiry and ensure that the Committee understands the impact of exposure to the criminal justice system, the Committee called on the knowledge and expertise of community members who have lived experiences navigating the Victorian criminal justice system. Much of the evidence provided stark insight into the trauma, harm and long-lasting impacts of contact with the system. The Committee recognises the toll of revisiting such traumatic experiences during a parliamentary committee hearing, and expresses its sincere appreciation for those who shared their stories to inform the findings and recommendations of this report.

Chapter 2: Statistical and demographic snapshot

As part of the Terms of Reference for this Inquiry, the Committee was required to analyse factors influencing Victoria's growing remand and prison populations, and strategies to reduce rates of criminal recidivism. To understand the extent of these issues within the Victorian criminal justice system, Chapter 2 provides a statistical overview which covers sentencing trends, remand rates, overrepresentation of certain cohorts and rates of recidivism.

Key statistics confirmed that in the period from 2012-2021, rates of recorded crime in Victoria have increased by 21% overall. Certain crime types have increased, including crimes against the person (assault, sexual offences, and stalking, harassment and threatening behaviour), justice procedures offences, drug offences, and other offences (including regulatory driving and miscellaneous offending). However, the Committee notes that based on reported rates of victimisation, under-reporting of crimes against the person continues at pervasive rates.

While the Committee recognises decreases in overall sentencing outcomes in higher courts, it observed a significant increase in the percentage of cases sentenced to imprisonment. The use of time served prison sentences increased 643% from 2011–2012 and 2017–2018, and now accounts for 20% of all prison sentences imposed. Further, an increase of unsentenced prisoners in remand is contributing to growth in Victoria's overall prison population. The profile of prisoners being received has also changed significantly over a 10-year period, with unsentenced prisoners now comprising 87% of prison receptions (up from 60% in 2010).

Victoria's prison population has increased by 57.6% in the 10-year reporting period between 30 June 2010 and 30 June 2020. This has disproportionately affected Aboriginal Victorians, young people and women. Aboriginal women made up 14% of the total female prison population in 2020 despite Aboriginal and Torres Strait Islander people making up less than 0.8% of the Victorian population.

The Committee received evidence demonstrating an increase in recidivism over the last 10 years. The true rates of recidivism are hard to determine given that many organisations measure recidivism differently (i.e. by rearrest, reconviction, being

incarcerated multiple times). However, overall it was reported that 19% of prison receptions in 2020 were received into the system more than once in the calendar year. The Committee received evidence that recidivism rates were typically driven by a small proportion of people responsible for high-frequency offending: around 6% of offenders are responsible for 44% of crimes reported to Victoria Police.

Though the available data provided an overview of the current state of Victoria's criminal justice system, the Committee found that there was a lack of data collection in key areas throughout this Inquiry. The Committee believes that broader data collection is required to provide insight into how the criminal justice system is functioning, and inform ongoing and future reform. This Chapter recommends measures to collect and report on additional data throughout the criminal justice system.

Chapter 3: Crime prevention and early intervention

There is significant evidence that associates different forms of socioeconomic disadvantage with increased risk of engagement with the criminal justice system. While most people who do experience social disadvantage do not offend, different forms of social disadvantage can compound to increase the risk of criminalisation or victimisation. Early intervention is the practice of identifying individuals at risk of coming into contact with the criminal justice system and providing social supports to divert their trajectory away from the system. This Chapter outlines the current infrastructure for early intervention—including available legal assistance for those experiencing disadvantage—and examines how targeted early intervention can positively impact vulnerable cohorts.

Successful intervention is possible at any point prior to or after an individual's first contact with the criminal justice system. However, earlier intervention is more effective at reducing crime and is more likely to prevent engagement with the criminal justice system in the longer-term when compared to interventions targeted at incarcerated individuals. Inquiry stakeholders suggest that to date, the Victorian Government has prioritised investment in correctional facilities over early intervention structures. However, stakeholders are cautiously optimistic about the forward steps taken in the Victorian Government's new *Crime Prevention Strategy*. The Victorian Government is also pursuing reform to enhance service delivery by departments and organisations to those experiencing social disadvantage by moving to a collaborative person-centred, 'common clients' approach. A successful reform program will allow stakeholders to work together to provide integrated solutions to address disadvantage—for example, providing housing support, addiction support and financial assistance through the same service stream.

This Chapter acknowledges that adverse childhood experiences—such as exposure to all kinds of abuse or the incarceration of a family member—have a significant impact on risk-taking behaviours which may manifest in criminal behaviours. It finds that to reduce the likelihood of offending and increase protective factors, support for children and young people should focus on education, employment opportunities, culturally appropriate services and community led, place-based support.

For children and young people, living in out of home care can also exacerbate the likelihood of exposure to the criminal justice system. This Chapter touches on the criminogenic nature of out of home care. It also addresses the need to increase the minimum age of criminal responsibility. Raising the legal minimum age of criminal responsibility is consistent with evidence about child development, international norms and human rights standards, and will help divert children into social services rather than trapping them in the criminal justice system from an early age.

Chapter 4: Addressing overrepresentation in the criminal justice system

This Chapter emphasises the need to improve and increase early intervention directed at groups overrepresented in the criminal justice system, including women, Aboriginal Victorians and culturally and linguistically diverse communities. The absence of culturally appropriate services for Aboriginal Victorians and culturally and linguistically diverse people was consistently observed in all facets of the Victorian criminal justice system and is discussed in this Chapter and throughout the entirety of the report.

In recent years, the female prison population has been the fastest growing cohort in Australian prisons. The number of women in Victorian prisons has more than doubled over the past decade, with the incarceration rate of Aboriginal women more than tripling in the same period. Unlike males, females who commit criminal offences are typically victims of abuse (sexual, physical, emotional, or a combination of all three) and will typically enter the criminal justice system as a victim or a perpetrator of a non-violent crime—often related to poverty or drug dependence.

Appropriate early intervention opportunities for women who are at risk of interacting with the criminal justice system should be gender specific and trauma-informed. Well-designed therapeutic intervention for women experiencing abuse can prevent offending and reduce the risk of criminalisation. Long-term economic support and housing security is also imperative to provide safety to women who have experienced, or who are experiencing, abuse. A review of welfare services available at a federal level tailored to women should be encouraged to ensure that financial and housing support is commensurate to the current cost of living.

Culturally appropriate early intervention for Aboriginal Victorians also needs to be strengthened through collaboration between the Victorian Government, Aboriginal representative bodies, Aboriginal Community Controlled Organisations, Traditional Owners and the Aboriginal community more broadly. This collaboration should work to develop appropriate social supports, identify decision-making opportunities for Aboriginal people within these processes, and diversify the culturally appropriate social, health, educational and legal services available to Aboriginal Victorians and Aboriginal communities. Dedicated and sustained funding channels are required to support these programs. The Committee also supports the exploration of how Aboriginality is confirmed throughout the criminal justice system.

Finally, this Chapter outlines unique challenges for early intervention with culturally and linguistically diverse people who may have a greater risk of interacting with the criminal justice system due to a lack of social support avenues. Pre- and post-migration experiences may also contribute to victimisation or criminalisation. The Committee recommends that the Victorian Government should work with community representatives, service providers and Victoria Police to develop a Multicultural Youth Justice Strategy to support eradication of racial discrimination in the criminal justice system, improve monitoring and reporting on outcomes of interactions with culturally and linguistically diverse young people, and promote investment in evidence-based community-informed early intervention.

Chapter 5: Policing

The role of Victoria Police in the criminal justice system is significant. For many people, the first contact that they have with the criminal justice system is through Victoria Police. While increased funding and a number of policy and legislative reforms have facilitated the expansion and modernisation of Victoria Police, the Committee has observed areas of concern in Victoria Police's approaches to policing.

Some police responses to complex situations—such as assisting people experiencing mental health crises, homelessness and cognitive disability—have resulted in people being propelled into the criminal justice system instead of being redirected to appropriate social supports. This can have a compounding effect as interaction with the criminal justice system can preclude vulnerable people from appropriate social supports, such as housing or funding.

The actual or perceived overpolicing of Aboriginal, culturally and linguistically diverse and LGBTIQ+ communities is continuing to foster mistrust in law enforcement. The Committee heard that the continued prevalence of racial profiling and stereotyping is traumatising for those who experience it. In addition, evidence indicates that young Aboriginal Victorians and culturally and linguistically diverse people who offend are more likely to be charged with a criminal offence instead of receiving cautions or diversions. However, the Committee acknowledges that Victoria Police are actively engaging with minority communities to improve relationships with diverse community groups.

This Chapter also notes that the use of cautions and court-based diversions are key mechanisms to divert people away from the criminal justice system, but their application is inconsistent and often at the discretion of the attending officer.

The Committee also examined the regular misidentification of female victim-survivors as the primary aggressor in family violence proceedings. The repercussions of misidentification are significant and have lasting impacts on the victim-survivors. For example: temporary, long-term and sometimes permanent separation from dependent children; withdrawal of social supports; loss of housing; and exposure to further violence.

The Committee believes that Victorian police officers would benefit from additional training and education. Ongoing community collaboration is also required to begin addressing the key issues identified by stakeholders. However, significant review and reform may be required to ensure the consistent and appropriate application of cautions and court-based diversions.

This Chapter concludes by identifying shortcomings in the oversight and review processes for Victoria Police, a responsibility which typically lies with the Independent Broad-based Anti-corruption Commission. Due to under-resourcing, the Commission only investigates 2% of the complaints it receives and refers the rest of the complaints back to Victoria Police for internal investigation. The Committee acknowledges concerns regarding the effectiveness and impartiality of the complaints and review process and supports additional resourcing to ensure a dedicated team within the Commission can address complaints against Victoria Police.

Chapter 6: Victims of crime and the criminal justice system

Victoria has significant infrastructure in place to support victims of crime in the criminal justice system. The cultural and behavioural obligations of justice system agencies are guided by the *Victims' Charter Act 2006* (Vic). The Charter is the legislation which codifies the 'inherent interests' of victims of crime and their right to participate in criminal justice processes. To strengthen the application of these rights, the Committee would like the Victorian Government to look at options to improve the practical application and impact of the Victims' Charter.

The Committee has explored existing mechanisms in place to support victims of crime, including the Intermediaries Program and Independent Third Persons Programs. The work of these programs is welcome but expanding the remit and resourcing of these programs would help to ensure that more victims of crime receive appropriate support while navigating the criminal justice system.

As the Victorian Government works to develop a new victims of crime financial assistance scheme, there is an opportunity to address shortcomings in the current model. By embedding trauma-informed practices into the service design of the victims of crime financial assistance scheme, the new scheme can be a more accessible and less adversarial process for victims of crime. Further, the Committee believes that bringing the scheme into the jurisdiction of the Victims of Crime Commissioner would provide appropriate accountability and oversight.

The Victims Assistance Program, a support service which assists victims of violent crime against a person to manage and recover from the effects of crime, is a positive trauma-informed support which plays an important role for victims of violent crime navigating the justice system. However, a lack of appropriate resourcing means that too often, the available services are not commensurate with the demand. Further, wider referrals could be included to ensure a holistic triaging service is available to victims of violent crime.

Chapter 7: Experiences of victims of crime

This Chapter focuses on the experiences of victims of crime navigating the criminal justice system. These experiences can have a significant impact on the recovery of victims of crime and can contribute to healing, or conversely, can exacerbate the trauma experienced. In hearing from victims of crime, a key theme communicated was the need to feel recognised and validated by the justice system.

Current supports and justice processes can be traumatising and are not suitable or accessible for many victims of crime. Changes are needed in victim services and justice processes to build in appropriate supports, culturally appropriate services and trauma-informed practices. In particular, the Committee notes that too often the onus is on the victim to connect with services which may be difficult to access or not commonly known. This Chapter canvasses the impacts of inadequate support services and makes recommendations to improve service delivery and accessibility for victims of crime.

This Chapter presents the experiences of specific victims of crime cohorts, namely victim-witnesses, Aboriginal Victorians, culturally and linguistically diverse communities, people with disability, and LGBTIQ+ people. The Committee recognises that trauma for marginalised communities is not binary and that due to the intersectional nature of identity, trauma experienced by people identifying with multiple marginalised communities is often compounded. Further, due to historical and ongoing discrimination and persecution, mistrust of the police and justice processes is contributing to the under-reporting of crimes and inhibiting access to support services.

This Chapter also addresses the high rates of overlap between people who are victims of crime and who commit offences. The Committee found that experiencing crime can be a key risk factor for offending behaviour. The Victorian Government acknowledged that a dual experience of victimisation and offending behaviour disproportionately affects vulnerable communities. Stakeholders indicated that those most at risk were Aboriginal Victorians, culturally and linguistically diverse people, people with a disability and members of the LGBTIQ+ community—particularly transgender and gender diverse people.

The Committee heard harrowing accounts of victims of crime being retraumatised and revictimised while participating in justice processes, and has recommended measures to ensure that trauma-informed practices are embedded into the justice system.

Chapter 8: Supporting victims of crime

The Committee recognises that the need for support after experiencing crime is substantive. Ongoing support and active participation are required to ensure the interests of victims of crime are protected. Chapter 8 examines the supports currently available to victims of crime and recommends improvements to promote and expand participation for victims of crime in the criminal justice system.

This Chapter considers the infrastructure for victims of crime to participate in the criminal justice system, including:

- opportunities for engagement with victims of crime and advocates in community safety and rehabilitation
- the use of victim impact statements
- the need for enhanced or dedicated legal services
- any possible strategies to build knowledge and understanding of the criminal justice system for victims of crime
- the purposes and impact of restorative justice processes.

Key areas of recommended reform include the:

- expansion of the Victims' Legal Service to provide procedural advice
- development of a trauma-informed communications strategy for support agencies working with victims of crime
- development of a strategy for culturally and linguistically diverse victims of crime to ensure culturally safe practices are available in support services.

The Chapter also discusses ways to improve support for victims of crime beyond the criminal justice system—for example, examining ways to improve existing victims services sectors. A redesign of the victims of crime services model should be considered to ensure trauma- and culturally-informed practices are embedded in the victims services design. Further triage and referral services should also be considered to connect victims of crime with additional support services to heal trauma and prevent long-term psycho-social harm.

Chapter 9: Charges, bail and remand

This Chapter canvasses issues relating to charges, bail and remand. It outlines the importance of legal services to support individuals once they come into contact with the criminal justice system, and the need for these to be accessible, culturally safe and responsive.

This Chapter discusses the operation of Victoria's bail system and investigates the impact of reforms introduced in 2013 and 2017–18. These reforms, including the introduction of reverse onus which positions denial of bail as the default option for more serious offences, have resulted in a significant increase to the Victorian prison population (and the remand population more specifically). Further, the current bail system has a host of negative effects on persons charged with an offence and has disproportionately impacted women, Aboriginal Victorians, children and young people and people living with a disability. Specific areas of improvement in bail processes are addressed in this Chapter.

The growing remand population is a matter of concern to the Committee. Stakeholders flagged issues with police powers to remand alleged offenders in custody, specifically the broad discretion in police decisions to grant or deny bail, and the lack of transparency and independent oversight in these decisions.

Another key barrier for granting bail is a lack of secure housing, an issue which was canvassed in the Committee's Inquiry into homelessness in Victoria. The Committee reiterates the significance of supported accommodation for those seeking bail. It also notes that no response to the recommendations in the Inquiry into homelessness in Victoria has been received by the Victorian Government to date.

This Chapter also recommends further review of indictable offences which are inherently linked to disadvantage. The review should consider reclassifying certain offences as summary offences and, where appropriate, decriminalising punitive offences which target disadvantage such as homelessness, disability or mental health issues.

Chapter 10: Courts and sentencing

This Chapter discusses Victoria's court system, court processes and sentencing matters. Victorian courts are currently facing significant caseload pressure exacerbated by the impact of the COVID-19 pandemic. However, there is an opportunity to consider innovative procedural changes to help alleviate the pressure.

There is a need to expand existing court services, such as the Court Integrated Services Program and court-based diversion programs, to ensure greater accessibility and meet demand. The Committee received particularly concerning evidence that Aboriginal Victorians are less likely to receive a court-based diversion instead of sentencing—this is compounded by the reduced likelihood of receiving a caution or pre-court diversion from Victoria Police (discussed in Chapter 5). While the Committee reached out to Victorian courts for a contribution, each court declined to respond to the Inquiry and therefore a full picture of diversionary options available to judicial officers is not clear.

Restorative justice processes and non-adversarial options for sentencing processes can help promote healing and reduce recidivism. Victoria's specialist courts—including the Koori Courts, Assessment and Referral Court and Drug Courts—are providing a therapeutic alternative to traditional sentencing processes. These courts support people charged with an offence to address the reasons for offending, and have been demonstrated to reduce recidivism. However, access to specialist courts is limited and the operation and jurisdiction of the specialist courts should be widened.

There are two acts which dictate sentencing law in Victoria—the *Sentencing Act 1991* (Vic) and the *Children, Youth and Families Act 2005* (Vic). These are supported by the Victorian Sentencing Manual, written by the Judicial College of Victoria. The Manual includes methods, principles and purposes that the judiciary should employ when sentencing. This Chapter outlines sentencing schemes (including minimum sentences and presumptive sentencing), minimum terms of imprisonment and non-parole periods.

Evidence indicates that these methods are consistently failing to meet their objectives and are contributing to over-incarceration of vulnerable populations. Review and reform are needed to ensure appropriate sentencing schemes are available, including provisions built into the Sentencing Act to allow consideration of unique systemic factors impacting Aboriginal Victorians.

Many stakeholders advocated for reform to the ways that imprisonment is used as a sentence in Victoria. For example, the increased remand population has resulted in greater prevalence of time served sentences. These measures are often punitive, and result in increased rates of courts imposing time-served prison sentences to reflect the remand period. The use of incarceration as a response to social and economic disadvantage is perpetuating disadvantage, and alternative sentencing options are required to move towards a rehabilitative justice model.

Where appropriate, community corrections orders and home detention orders should be promoted as non-custodial options. The introduction of provisions for home detention in the Sentencing Act would promote community safety and allow people charged with an offence access to local rehabilitative support services. Further, it would reduce pressure on the prison system and allow resources to be redistributed.

Chapter 11: Victoria's prison system and conditions

Victoria's prison system consists of both public and privately-owned prisons. The management of both public and privately-owned prisons is the responsibility of Corrections Victoria, a business unit within the Department of Justice and Community Safety. This Chapter explores the conditions in Victorian prisons and highlights areas for reform, improvement or review.

Myriad socioeconomic factors typically impact individuals entering the prison system. The rapid expansion of the prison population in recent years and the additional complications from the COVID-19 pandemic have exacerbated challenging prison conditions and led to more limited support for complex health and wellbeing needs. Further, the Committee notes that prison conditions are also detrimental to the mental health of incarcerated people.

A concern consistently expressed by stakeholders included a lack of transparency about incarcerated people's access to healthcare commensurate to that of the wider community. While Justice Health contended that people in prison have access to the public health system, the Committee was disturbed to receive evidence of prisons denying, or interfering with, medical care. The Department of Justice and Community Safety should disclose key metrics of engagement with available health services in its annual report to ensure accountability and transparency. Further, engagement between the Victorian and Commonwealth Governments should explore options to extend Medicare and the Pharmaceutical Benefits Scheme to incarcerated Victorians.

This Chapter also explores the experience of people living with a disability in Victorian prisons. People living with disability—physical, cognitive and/or intellectual—make up a significant proportion of the prison population. However, the needs for many people living with a disability are not being met. Better systems are required to ensure that the needs of people with disability are appropriately identified and met, and to ensure that all staff are appropriately trained to identify and manage behaviours associated with cognitive and intellectual disability.

Victorian prisons are also failing to provide safe living conditions or adequate supports for Aboriginal Victorians. An overhaul of approaches to incarceration of Aboriginal Victorians is required to consider the unique impact that custody can have. The Committee recognises the need for an Aboriginal Social Justice Commissioner or other oversight mechanism to ensure the criminal justice system works appropriately with Aboriginal Victorians. Additional resources are immediately needed to fund enough Aboriginal Welfare Officer positions across the prison network.

Behaviour control techniques including solitary confinement, strip searches and the use of physical restraints can traumatise prisoners and impede rehabilitation. The use of these measures should be examined with a view to prohibiting use outside of extremely limited and specific circumstances.

Chapter 12: Prison supports and rehabilitation

Prison can be criminogenic; however a rehabilitative approach can address offending behaviours and reduce recidivism. Current rates of recidivism in Victoria indicate that punitive measures are perpetuating a cycle of crime by normalising violence and exacerbating socioeconomic disadvantage. Targeted programs which address underlying behaviours—particularly for those with disability, mental health challenges and trauma—can reduce reoffending and promote community safety.

This Chapter explores prison supports and rehabilitation measures throughout Victoria. It outlines key outcomes in Corrections Victoria's strategic plan, and notes that the plan has not been updated in five years and may no longer align with best practice approaches. A revised strategic plan and an accompanying Offender Management Framework should consider principles of effective rehabilitation and be based around best practice models.

This Chapter outlines several targeted therapeutic programs operating in Victoria and recognises that the access to rehabilitative programs is often restricted based on sentencing stage, inadequate resources and the impacts of COVID-19 restrictions. In particular, people incarcerated on remand are restricted from accessing rehabilitative supports until sentencing. This precludes a large portion of the prison population from accessing appropriate programs. More resourcing is required to ensure that all incarcerated people can access rehabilitative services when they choose.

Access to rehabilitative programs can also be restricted due to lack of technological access. Greater access to technology, including supervised or monitored internet access, can expand the delivery of rehabilitative and educational programs in prisons. Computer literacy has an additional benefit of assisting incarcerated people with life skills as they transition back into the community.

The period immediately following release from prison can be challenging and overwhelming for many formerly incarcerated people, particularly those without stable housing or with dependency or addiction issues. Resourcing should be increased to allow a throughcare model—which refers to supports which carry from incarceration to post-release—to be adopted as a model of care for prison leavers. This can apply to housing initiatives, mental health services, drug and alcohol services, and other social supports.

More comprehensive initiatives are required to support incarcerated people post-release. Providing support, safety and routine can improve health outcomes and reduce the risk of reoffending and recidivism. For example, education, training and work experience during incarceration can assist people reintegrating into the community and can connect people to employment opportunities. Housing support can also ensure that a person has safe accommodation following their release into the community, and support reunification with family members.

Chapter 13: Parole and the post sentence scheme

In Victoria, incarcerated people can apply to serve the final part of their custodial sentence in the community. This is done through parole, which is supervised by Community Correctional Services within Corrections Victoria. Parole is primarily intended to increase community safety as it provides enhanced supports to incarcerated people reintegrating into the community.

Parole is granted or denied by the Adult Parole Board, which undertakes an assessment to consider the risk to community safety and the supports and supervision in place to reduce any risk.

Similar to the reforms to bail practices, recent reforms have made it more difficult for parole to be granted. The number of serious offences committed by people while on parole has decreased in recent years. However, the risk-averse approach to granting parole is resulting in more people being released back into the community without the additional supports and supervisions that parole offers. As such, further evaluation is necessary to understand the community safety impact of people exiting prison without bail.

Throughout their time in custody, an incarcerated person may undertake courses or programs which may support their application for parole. However, these courses and programs are limited and may not be accessible or available for everyone wanting to participate. This extends to mandatory programs (for example, the violent offender program) without which a person may not be eligible for parole. The Adult Parole

Board should have provisions to exercise discretion when a person cannot complete pre-release programs due to limited availability of the programs. In addition, greater engagement between incarcerated people and the Adult Parole Board should be introduced to foster a more personal environment.

This Chapter examines evidence which indicated that the recent reforms to the parole system have disproportionately impacted certain cohorts—particularly women and Aboriginal and Torres Strait Islander women. The lack of culturally appropriate pre-release programs for Aboriginal Victorians is also a barrier to accessing parole and should be commensurate with demand. The Committee also recommends legislating a requirement for Aboriginal and Torres Strait Islander representation on the Adult Parole Board.

The Chapter also outlines the post sentence scheme, which is established by the *Serious Offenders Act 2018* (Vic). The scheme provides for alternatives to parole if a person is considered to pose an unacceptable risk to the community. They may be placed on supervision or detention orders under the post sentencing scheme to enable their ongoing incarceration, supervision and rehabilitation. The Post Sentencing Authority is responsible for monitoring the individuals subject to these orders, which can only be made to improve community safety or enable rehabilitation and treatment.

The introduction of the post sentencing scheme has increased community safety by providing greater supervision and management of people who have committed serious sex and/or violent offences.

Chapter 14: Judicial appointments

Judicial officers play a significant role in the Victorian criminal justice system. A judicial officer is appointed by the Governor in Council on a recommendation of the Attorney-General, and must meet qualifications set out in Victorian legislation (including the *Constitution Act 1975* (Vic)). Elements of the process for appointment are outlined in legislation, however there is limited publicly available information detailing how the Victorian Government identifies and recommends judicial officers.

A transparent recruitment process should be established, which includes clear selection criteria for each judicial position and standard practices to publicly advertise judicial vacancies. The criteria should be informed by the Judicial College of Victoria's *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*. The criteria should also recognise the importance of diverse representation in the judiciary. Further consideration should be given to engage specific underrepresented cohorts, including where appropriate, Aboriginal Victorians and culturally and linguistically diverse people.

Additional resourcing is required to allow rural and regional communities sufficient access to courts. These shortages are further exacerbated when considering specialist courts. More judicial officers will increase capacity to meet demand in these areas. Where appropriate, recruitment for additional specialist judiciary positions (including within the Koori Courts) should be done in consultation with the community.

Most members of the judiciary have a secure ongoing tenure until reaching the mandatory retirement age. There are very limited circumstances in which a judge or magistrate can be removed from their position. Given this, the Committee reiterates the significance of appropriate recruitment and appointment processes.

This Chapter also explores mechanisms to manage conflicts of interest and bias. Some of these mechanisms occur during the recruitment and appointment stage, such as declarations of private interest and probity checks.

Chapter 15: Judicial training and education

This Chapter addresses judicial education and training in Victoria and is informed by the Judicial College of Victoria's correspondence to the Inquiry. Under the *Judicial College of Victoria Act 2001* (Vic), the Judicial College is required to comply with requests for information from parliamentary committees that relate to the performance of its functions, the exercise of its powers or its expenditure or proposed expenditure. Given this, the Committee is disappointed to note that responses were not provided to much of the requested information and has suggested strengthening provisions in the Act to ensure that parliamentary committees are better articulated in the legislation.

The Judicial College was established to assist in the professional development of judicial officers, including continuing education and training. The Judicial College may also provide professional development or training for non-judicial officers on a fee for service basis. It is required to have regard to the differing needs of newly appointed judicial officers, and for different classes of judicial positions.

The Judicial College plays a key role for new appointees. By way of support, the Judicial College may design and implement induction programs for new judicial officers, provide a suite of programs which support the transition to judicial life, and facilitate sessions for new appointees to practice new skills under the guidance of experienced judicial officers.

The development of judicial officers focuses on six key educational areas: law, skills, judicial life, social context, First Nations and non-legal knowledge. Family violence, restorative justice and vulnerable witnesses are incorporated into social context training. There is also additional internal court training available, however there is limited publicly available information about the content or uptake of this training.

Despite the training mechanisms in place, stakeholders expressed concerns that judicial officers were not sufficiently trained in key areas, including trauma-informed practices, cultural competency, disability awareness, and awareness of issues relevant to the LGBTIQ+ community. Stakeholders provided evidence of both intentional and unintentionally discrimination in court processes. The Committee invites the Judicial College to consider increased and improved education and training targeting trauma-informed practices, cultural competency, disability awareness, and issues relevant to the LGBTIQ+ community.

Findings and recommendations

2 Statistical and demographic snapshot

RECOMMENDATION 1: That the Victorian Government work with key stakeholders across the criminal justice system to improve data collection, accessibility and transparency throughout the system. This should encompass:

- providing relevant support to Victoria Police to collect and report on data which is accessible by the Crime Statistics Agency under s 7 of the *Crime Statistics Act 2014* (Vic), relating to:
  - the use of stop and search powers and relevant information about that practice
  - the use and number of diversions, cautions or fines individually issued on contact with law enforcement
  - the demographics of those who interact with the criminal justice system
- requiring the Department of Justice and Community Safety, to provide annual updates on:
  - the number of healthcare services offered in publicly- and privately-operated Victorian prisons for the reporting period
  - document the number of incarcerated persons (deidentified) who interact with healthcare services and the period they are engaged
  - COVID-19 impacts, including applying control measures and emergency management days, with a view to identifying the impact of these on:
    1. Prison conditions, the wellbeing of incarcerated people and their families
    2. Incarcerated people's access to rehabilitative programs, health and legal services and the courts.
  - ongoing analysis to inform the ongoing management of the COVID-19 pandemic, including how to minimise disruption caused by control measures. This includes examining other institutions and how they manage vulnerable people.
- continued improvement on the collection and reporting of data on other matters of criminal justice, including:
  - recidivism rates across the criminal justice process, including for incarcerated people released into the community without supervision, those released on community correction orders, parolees, those who re-offend while bailed for trial and for those who re-offend while bailed for sentence. 35

3 Crime prevention and early intervention

RECOMMENDATION 8: That the Victorian Government provide a public update on the implementation of the *Framework to reduce criminalisation of young people in residential care* to date and outline the next steps for improving outcomes for children in out of home care. The ongoing implementation of the framework should be supported by increased investment to:

- provide training to out of home care staff and police regarding the appropriate management of challenging antisocial behaviour through therapeutic and restorative justice responses
- improve out of home care services' links with, and access to, community-based social support, legal and culturally appropriate services. **123**

RECOMMENDATION 9: That the Victorian Government, in collaboration with the Aboriginal community, evaluate the operation of its Aboriginal Children in Aboriginal Care Program with a view to identifying:

- how it can be improved to support better outcomes for Aboriginal children and young people in out of home care
- how best to overcome barriers to, and resource, Aboriginal Community Controlled Organisations taking on responsibility for all Aboriginal children and young people in out of home care. **123**

RECOMMENDATION 10: That the Victorian Government raise the minimum age of criminal responsibility, noting that this is being considered by several jurisdictions via the Meeting of Attorneys-General. **134**

RECOMMENDATION 11: That the Victorian Government invest in community-based social, health, legal and forensic services which address the factors underpinning the criminal behaviours of children and young people. This investment must include greater resourcing of services which are culturally specific to Aboriginal children. **135**

4 Addressing overrepresentation in the criminal justice system

FINDING 9: Women, particularly Aboriginal and culturally and linguistically diverse women, are overrepresented in the criminal justice system. Their criminalisation is often underpinned by unresolved trauma connected to sexual abuse, emotional abuse, and family and other forms of violence. Their offending is typically non-violent and of a less serious nature, such as low-level drug offending. 149

RECOMMENDATION 12: That the Victorian Government encourage the Australian Government to review welfare available to women and families experiencing disadvantage to ensure it is commensurate to the current cost of living. 150

RECOMMENDATION 13: That the Victorian Government increase funding and support to social support providers offering therapeutic interventions for alcohol and other drug use, sexual abuse, violence and trauma to:

- expand their services to women voluntarily seeking help and reduce wait times to access services
- develop gender-specific, trauma-informed and culturally safe therapeutic services
- enhance connectivity, collaboration and referrals between social support providers to ensure women are provided with long-term holistic support
- enhance screening programs to ensure complex and multifaceted support needs are identified and addressed. 150

FINDING 10: Most Aboriginal Victorians do not encounter the criminal justice system. However, intergenerational trauma associated with ongoing colonisation, culturally unresponsive institutional structures, complex disadvantage and systemic racism place Aboriginal people at greater risk of being victimised or criminalised than other populations in Victoria. 165

FINDING 11: Greater self-determination is the only approach which can overcome the entrenched disadvantage experienced by some Aboriginal Victorians and sustainably reduce their overrepresentation in the criminal justice system. 165

RECOMMENDATION 14: That the Victorian Government partner with Aboriginal Community Controlled Organisations to:

- develop long-term funding arrangements which support the expansion of these organisations' leadership and service provision with the justice and social services sectors
- identify opportunities for expanding these organisations' decision-making authority and responsibilities in relation to Aboriginal people at risk of, or already engaged with the criminal justice system
- diversify and expand the social, health, forensic and legal services provided by these organisations to the Aboriginal community. 165

FINDING 12: Holistic early intervention to address the overrepresentation of Aboriginal Victorians within the criminal justice system must encompass systemic reform to improve the cultural safety of justice institutions and social support more broadly. 169

RECOMMENDATION 15: That the Victorian Government ensure the comprehensive implementation and continued support for the reforms and initiatives outlined in the:

- *National Agreement on Closing the Gap*
- *Victorian Aboriginal Affairs Framework 2018–2023*
- *Burra Lotjpa Dunguludja 'Senior Leaders Talking Strong'*
- *Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017–2027*
- *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement and Strategic Action Plan*
- *Balit Murrup: Aboriginal social and emotional wellbeing framework*
- *Marrung Aboriginal Education Plan 2016–2026*
- *Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families.* 169

RECOMMENDATION 16: That the Victorian Government expand the Youth Crime Prevention Grants to include a dedicated stream of funding to support Aboriginal community led, placed-based early intervention initiatives specifically targeted at addressing the factors informing the overrepresentation of Aboriginal people within the criminal justice system. The Victorian Government should also ensure it supports these initiatives by:

- facilitating access to localised data related to criminal justice and other relevant government service provision, and associated costs
- supporting local justice reinvestment initiatives
- facilitating participation by, and coordination between, relevant government departments and agencies. 169

FINDING 13: The Committee believes that how Aboriginality is established in justice contexts, merits investigation by the Victorian Government, in partnership with Aboriginal representative bodies, Aboriginal Community Controlled Organisations, Traditional Owners and the Aboriginal community more broadly. 171

RECOMMENDATION 17: That the Victorian Government work with culturally and linguistically diverse community representatives, community service providers and Victoria Police to develop a Multicultural Youth Justice Strategy to:

- drive committed action to eradicating all forms of racial discrimination within the criminal justice system
- improve accountability and transparency through monitoring and reporting on outcomes for culturally and linguistically diverse people who encounter the criminal justice system
- promote research into underlying drivers of culturally and linguistically diverse youth offending and effective interventions targeting at risk youths, those already engaged in the criminal justice system, and those being released from incarceration
- promote investment in evidence-based, community-informed early intervention which addresses the drivers of criminal behaviours in culturally and linguistically diverse youths and their overrepresentation in the criminal justice system
- strengthen diversion pathways for culturally and linguistically diverse people who offend, including by investigating the adaptation of Victoria's Koori Court model to suit multicultural communities
- improve service coordination for young culturally and linguistically diverse people, their families and communities. 178

5 Policing

RECOMMENDATION 23: That the Department of Justice and Community Safety review the use of verbal and recorded cautions by Victoria Police to inform reform aimed at expanding the use of, and improving the consistency of, cautions across the community. Specifically, the review should consider:

- factors underpinning the declining and inconsistent use of cautions across the community and how these can best be addressed
- the advantages and disadvantages of introducing a presumption in favour of cautioning—as opposed to a charge—in relation to appropriate minor offences
- how the issuance of a caution can better connect individuals with social support to address their criminal behaviours. 218

FINDING 20: Victoria Police's provision of prosecutorial consent for a court-based diversion varies between offences and across courts. This is because its policies and decision-making tools poorly reflect the legislative basis for diversion programs and offer vague guidance, leaving it to the discretion of individual officers to grant or reject access to a diversion program. 227

RECOMMENDATION 24: That the Victorian Government review the requirement for prosecutorial consent for a court-based diversion from s 59(2)(c) of the *Criminal Procedure Act 2009* (Vic) and s 356F of the *Children, Youth and Families Act 2005* (Vic) to consider whether these sections should be replaced with a requirement for the magistrate to consider the recommendation of the prosecutor and/or informant in relation to access to a court-based diversion (as opposed to seeking consent), and the provision of a right to reply for the accused person. 227

RECOMMENDATION 25: That Victoria Police update its polices, decision-making tools, practices and training in relation to court-based diversion to reflect the outcome of the review of prosecutorial consent, and to:

- ensure that they closely reflect the parameters of court-based diversion as established by the *Criminal Procedure Act 2009* (Vic) and the *Children, Youth and Families Act 2005* (Vic)
- provide detailed guidance as to the factors which should inform any decision to consent to/recommend or withhold a recommendation/consent for diversion which are focused on the individual circumstances of the accused, the nature of the alleged offending and prospects for rehabilitation
- provide a clear process for an accused or their legal representation to seek consent to/a recommendation for diversion. 228

FINDING 21: Female victim-survivors of family violence are regularly misidentified by Victoria Police as the primary aggressor/respondent in family violence proceedings. Misidentification has serious repercussions which may include:

- criminal charges
- long term separation from dependent children
- exposure to further violence
- the withdrawal of social, legal and financial supports
- visa cancellation and deportation for migrants. **243**

RECOMMENDATION 26: That Victoria Police ensure all front-line police officers undertake regular training in relation to responding to family violence incidents, and that training continues to be provided. This training should include:

- the appropriate application of the *Code of practice for the investigation of family violence*
- the gendered nature of family violence
- the factors informing the misidentification of aggressors (including cultural and language barriers)
- the repercussions of misidentification
- social support available to families to address family violence. **244**

RECOMMENDATION 27: That Victoria Police, in collaboration with legal and community stakeholders, implement a review mechanism for family violence matters capable of identifying instances where a victim-survivor may have been misidentified as the primary aggressor in an incident and provide information about a process for the withdrawal of criminal charges. **245**

FINDING 22: Criminal justice stakeholders, in particular Aboriginal organisations, have long held concerns regarding the impartiality and effectiveness of the existing police complaint-handling and oversight systems in Victoria. **256**

RECOMMENDATION 28: That the Department of Justice and Community Safety consider, as part of its systemic review into police oversight, the evidence outlined in this report regarding:

- the inadequate impartiality and effectiveness of the existing police complaint-handling and oversight systems in Victoria, as well as investigations into deaths in police custody
- options for strengthening Independent Broad-based Anti-corruption Commission's oversight powers, improving its practices, properly resourcing its operations, and ensuring Victoria Police is held accountable for instances of serious officer misconduct
- the consideration of a possible establishment of a new independent body to investigate allegations of police misconduct and increase the accountability of Victoria Police. **256**

6 Victims of crime and the criminal justice system

FINDING 23: Despite the intentions of the *Victims' Charter Act 2006* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the inherent interests and rights of victims of crime could be better upheld throughout the criminal justice system. **275**

RECOMMENDATION 29: That the Victorian Government investigate options to strengthen the practical application and use of the *Victims' Charter Act 2006* (Vic) to protect the rights of a victim of crime to participate in justice processes. For example, amendments to s 22 of the Charter should be considered. **275**

RECOMMENDATION 30: That the Victorian Government amend the *Victims' Charter Act 2006* (Vic):

- to remove s 9B(3)(b) which exempts the Director of Public Prosecutions from seeking the views of victims of crime if it is not practical because of the speed and nature of proceedings
- to amend s 9B(1) to affirm that the Director of Public Prosecutions' requirement to seek the views of victims of crime should not unnecessarily cause delays which would impact a person's right to a fair trial
- so that all victims of crime have the same entitlements to information and consultation from investigatory and prosecuting agencies, regardless of whether it is related to a summary or indictable offence. **281**

RECOMMENDATION 31: In relation to the Intermediary Program, that the Victorian Government:

- expand the Program to include any witnesses eligible under the existing criteria regardless of the criminal offence before Victoria Police or the courts
- consider expanding the program to accused persons with a cognitive impairment or who are under 18
- investigate ways the role of intermediaries could be expanded to include assessment and referral functions for witnesses with unmet needs. Any expansion of the role allowing an intermediary to refer a witness to services should not undermine the intermediary's role as an impartial court officer. **286**

FINDING 24: Ground rules hearings support vulnerable witnesses, including victims of crime, by:

- supporting them to give their best evidence through ensuring the process for questioning suits their communication needs
- reducing the stress of giving evidence in court by protecting them against improper questioning. **287**

RECOMMENDATION 32: As interim measures, before the new victims of crime financial assistance scheme is in place, the Victorian Government should amend the *Victims of Crime Assistance Act 1996* (Vic), as a matter of urgency, to:

- remove alleged perpetrator notification and appearance provisions provided under ss 34(2) and 35(1)
- limit consideration of an applicant's character or behaviour under s 54, so that only criminal behaviour connected to the criminal act subject to the application is relevant
- prescribe time limits for the Victims of Crime Assistance Tribunal to provide awards to applicants or notify them if an application has been rejected. **302**

RECOMMENDATION 33: That the Victorian Government review the funding provided to the Victims of Crime Assistance Tribunal as part of the 2021–22 State Budget to determine if it is sufficient in reducing the backlog of pending applications before the Tribunal. **302**

FINDING 25: In developing the new victims of crime financial assistance scheme, the Victorian Government should seek to remedy issues identified with the operation of the Victims of Crime Assistance Tribunal. The Government should have regard to the views expressed by stakeholders such as the Victorian Law Reform Commission, the Victims of Crime Commissioner and people who have experienced violent crimes. In particular, the Government should address the following issues that were identified:

- lack of trauma-informed practices in hearing from and assessing applicants
- overly legalistic language used to communicate with applicants. **302**

RECOMMENDATION 34: That the Victorian Government make the new victims of crime financial assistance scheme a prescribed agency under the *Victims of Crime Commissioner Regulations 2020* (Vic), to ensure that the scheme falls within the oversight and compliance functions of the Victims of Crime Commissioner. **303**

RECOMMENDATION 35: That the Victorian Government open redress schemes to all eligible people, regardless of their criminal history. This should include advocating to the Commonwealth Government for the National Redress Scheme to be opened to anyone who was a victim of institutional child sexual abuse. **307**

RECOMMENDATION 36: In relation to the Victims Assistance Program, that the Victorian Government:

- provide further funding to ensure that participating agencies and services under the program can meet demand
- provide training and guidance to key referral agencies on referring victims of crime to the program sooner so that they can access the full range of support services
- expand the number of participating agencies to improve co-location with other services, particularly in regional and rural Victoria. **311**

RECOMMENDATION 37: That the Victorian Government ensure that the Victims Assistance Program can provide culturally safe services and support to Aboriginal Victorians by:

- funding more Aboriginal Community Controlled Organisations to become participating agencies
- provide support, including funding if necessary, to Victims Assistance Program agencies for more Koori Engagement Workers so that the number of positions is commensurate to Aboriginal victims of crime in need of support. **314**

7 Experiences of victims of crime in navigating the criminal justice system

FINDING 29: Victims of crime from culturally and linguistically diverse backgrounds may experience unique forms of disadvantage which adversely shape how they interact with victim services, such as:

- a lack of culturally appropriate or safe services
- facing familial or community pressure to not report crimes
- citizenship or visa status which may determine what services are or are not available to a victim of crime. **343**

RECOMMENDATION 40: That the Victorian Government increase the number of multicultural community organisations contracted as participating agencies under the Victims Assistance Program. **343**

RECOMMENDATION 41: That the Victorian Government finalise and make public the *State Disability Plan 2021–2025* as a matter of urgency. **351**

RECOMMENDATION 42: That the Victorian Government commit to improving the delivery of victim support services for people with disability. This commitment should involve:

- prioritising trauma recovery for victims of crime with disability
- improving the delivery of support services for victims of crime with disability, including addressing barriers experienced by victims, such as:
  - physical access and communication barriers
  - negative or biased attitudes expressed by authorities or agencies operating within the criminal justice system, including victim support agencies
  - the accessibility of adjustments or supports for people with disability participating in criminal justice proceedings
- undertaking research into whether a Disability Justice Strategy is necessary. If a dedicated strategy is deemed unnecessary, the Government should provide a report to the Parliament outlining the reasons for its decision. **351**

FINDING 30: LGBTIQ+ Victorians experience high rates of victimisation, including discrimination, physical violence and sexual violence. However, many LGBTIQ+ victims of crime do not report to police or seek out support from the criminal justice system. Barriers that are deterring LGBTIQ+ victims of crime from engaging the criminal justice system include:

- feelings of mistrust towards law enforcement and the broader criminal justice system, which has been compounded by the historical criminalisation of the LGBTIQ+ community
- lived experience of discrimination or stereotyping from police or other practitioners in the criminal justice system
- lack of LGBTIQ+-inclusive services and programs. **357**

FINDING 31: Evidence suggests that being a victim of crime can be a risk factor for future criminal behaviour. Many people in contact with the criminal justice system who have committed an offence have previously been a victim of crime. **361**

RECOMMENDATION 43: That the Victorian Government undertake a trial in the Magistrates' Court of Victoria on the use of Victim Peer Support Workers to assist victims of crime attending court proceedings, whether as a witness or otherwise. Following the conclusion of the trial, the Government should table a report in Parliament on the trial's outcomes, as well as its position on the continuation and/or expansion of the program. **372**

8 Supporting victims of crime

FINDING 32: Victim impact statements give victims of crime a direct voice in criminal proceedings and ensure that the trauma and harm they have experienced as a result of a person's offending is heard by the courts. **386**

RECOMMENDATION 44: That the Victorian Government expand the Victims' Legal Service to include legal support for victims of crime on procedural matters. Example matters which should be included in the remit of the Victims' Legal Service are advice on:

- the role of victims in criminal proceedings, including giving evidence and any entitlements for alternative arrangements or special protections
- making victim impact statements
- a victim of crime's right to be consulted during criminal proceedings. **390**

RECOMMENDATION 45: That the Victorian Government:

- introduce a right to review scheme under the *Victims' Charter Act 2006* (Vic) which allows victims of sexual offences to request an internal review of decisions made by police or a prosecuting agency to not file charges or discontinue prosecution
- direct the Victorian Auditor-General's Office to evaluate existing internal review schemes open to victims of crime to determine if an external right to review scheme should be open to all victims of crime
  - the evaluation should assess the frequency of decisions being altered or revoked based on an internal review, including whether this impacts the number of cases going to or progressing through to a criminal trial. **396**

RECOMMENDATION 46: That the Victorian Government provide funding to Victoria Legal Aid to conduct a pilot program which provides independent legal representation for victims of sexual offences up until the point of trial. The pilot should evaluate:

- demand for independent legal representation
- the impact independent legal representation has on a victim of a sexual offence's satisfaction with justice outcomes
- the impact of requisite changes to criminal procedure to accommodate independent legal representation for the victim. **396**

RECOMMENDATION 47: That the Victorian Government develop a strategy to support agencies involved in the criminal justice system to implement effective methods for communicating with victims of crime. The strategy should be trauma-informed and provide guidance on how agencies can ensure victims of crime are aware of their entitlements consistent with obligations under the *Victims' Charter Act 2006* (Vic). The Government should conduct a review of the strategy 12–24 months after its implementation to ensure it is achieving its outcomes. **398**

FINDING 33: Restorative justice processes give a greater voice to victims of crime in criminal justice proceedings compared to traditional processes, such as court proceedings. This increased participation can lessen the trauma and dissatisfaction many victims of crime experience navigating the mainstream criminal justice system. **402**

FINDING 34: Victims services in Victoria are based on a 'one-size-fits-all' approach, which is incapable of meeting the diverse and complex needs of every victim of crime. The current model for supporting victims of crime has several limitations, including:

- inadequate referral pathways for victims of crime into services
  - lack of alternative referral pathways for victims of crime from communities with high rates of underreporting
- overreliance on victims of crime to identify and self-manage their support needs, including self-referring into victims services
- victims of crime receiving disjointed or disconnected support due to an absence of a single source of information approach to case managing through an entire support period
- service periods are generally broken up into before, during and after a victim of crime is involved directly in the criminal justice system, requiring victims to retell their stories when presenting at new services, which may dissuade them from seeking further support
- lack of culturally safe support options available to victims of crime who are Aboriginal Victorians or from culturally and linguistically diverse communities. **414**

RECOMMENDATION 48: That the Victorian Government redesign Victoria's existing victim of crime services model in line with the model proposed in the Government-commissioned *Strengthening Victoria's Victim Support System: Victim Services Review*. This should be done in conjunction with the Committee's additional recommendations around legal support and entitlements for victims of crime (Recommendation 44, Recommendation 45 and Recommendation 46). **414**

RECOMMENDATION 49: That the Victorian Government establish a victims of crime strategy for culturally and linguistically diverse people to improve the delivery of culturally safe practices and support. The strategy should be informed by consultation undertaken with community leaders and organisations, as well as victims of crime who are from culturally and linguistically diverse communities. **419**

RECOMMENDATION 50: That the Victorian Government make cultural safety a foundational requirement of the criminal justice system, including victims services. In doing so, the Government should:

- improve referral pathways for Aboriginal Victorians and culturally and linguistically diverse people who are victims of crime
- expand and diversify the network of services offering victim support services across Victoria, with an emphasis on recruiting more community-led organisations
- identify opportunities to support criminal justice practitioners and victim support services to undertake cultural safety awareness and training, including education on the impact intersecting disadvantages can have on victims of crime. **420**

FINDING 35: Experiencing major or critical incidents can cause significant and long-term trauma for people, whether they are victims, secondary victims (such as families) or witnesses. It is important that all people are immediately linked into support services to help them deal with trauma and prevent long-term psychosocial harm. **428**

RECOMMENDATION 51: That the Victorian Government evaluate the surge capacity of Victim Services, Support and Reform services to attend critical incidents to provide on-the-ground support. This evaluation should assess:

- whether victim services deployed during critical incidents are meeting the critical enablers for surge capacity identified in the *Critical Incident Response: Framework for Victim Support*
- what impact deploying services to critical incident has on the broader capacity of victims services, considering the short-, medium- and long-term demand of services regarding business-as-usual activities and needs arising specifically from critical incidents
- whether services which are deployed to critical incidents are suitably skilled and supported, and align with the aims of the *Critical Incident Response: Framework for Victim Support*
  - including whether there is a strong mix of multi-disciplinary agencies available for deployment, from sectors such as allied health, community services and specialist victim services
- ways victim services could be deployed to critical incidents where it has not resulted from criminal offending, such as natural disasters, accidental road trauma, or other incidents where acute trauma may be present. **429**

9 Charges, bail and remand

10 Courts and sentencing

RECOMMENDATION 63: That in the development and implementation of the Victim-Centred Restorative Justice Program, the Victorian Government should:

- ensure the program is based on best practice, and incorporates the experiences of Australian and international jurisdictions
- prioritise the views of victims of crime
- undertake consultation with Aboriginal Victorians and culturally and linguistically diverse communities, in order to ensure the model is culturally safe and appropriate
- ensure that it operates flexibly at different stages of the criminal justice process. 510

FINDING 45: Victoria's specialist courts provide an important therapeutic alternative to traditional sentencing processes. They have been demonstrated to support individuals who are charged with an offence to address the underlying causes of their offending, reducing the risk of recidivism and improving community safety. 515

FINDING 46: The Assessment and Referral Court list provides a therapeutic response to persons accused of an offence who have a mental illness and/or cognitive impairment, and has demonstrated success in supporting them to address the underlying causes of their offending. 518

RECOMMENDATION 64: That the Victorian Government:

- provide an update on its progress to expand the Assessment and Referral Court list to each of the 12 Magistrates' Court locations by 2026, in accordance with the recommendation of the Royal Commission into Victoria's Mental Health System
- consider additional methods to improve access to Assessment and Referral Court services, including a review of the current eligibility criteria. 519

FINDING 47: Since their establishment, Victoria's Koori Courts have provided culturally safe and accessible criminal justice processes for Aboriginal Victorians. However, geographic and jurisdictional limitations restrict them from further supporting Aboriginal self-determination within the Victorian criminal justice system. 523

RECOMMENDATION 69: That the Victorian Government, in relation to community correction orders:

- provide additional resourcing to Corrections Victoria to ensure that its management of individuals on community correction orders is as effective as possible, including through achieving high rates of order completion and allowing for appropriate and timely responses to cases of non-compliance
- collaborate with successful models of therapeutic justice, including the Neighbourhood Justice Centre, to continue developing ways in which community corrections can support individuals to address the causes of their offending and comply with the conditions of an order
- amend the *Sentencing Act 1991* (Vic) to provide that people with an acquired brain injury and/or intellectual disability, not diagnosed prior to the age of 18, are eligible for a justice plan. **560**

RECOMMENDATION 70: That the Victorian Government consider amending the *Sentencing Act 1991* (Vic) to provide for courts to impose a sentence of a home detention order. **563**

RECOMMENDATION 71: That the Victorian Government amend the *Sentencing Act 1991* (Vic) to require, for the purposes of sentencing, courts to take into consideration the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples. **565**

FINDING 51: A sentencing guidelines council, with functions to develop sentencing guidelines for Victorian courts, may address some public concerns regarding whether sentencing practices adequately reflect community expectations. **568**

FINDING 52: In establishing a sentencing guidelines council, the voices of victims of crime should be prominent in the council's composition. **569**

RECOMMENDATION 72: That the Victorian Government introduce legislation to establish a sentencing guidelines council. The legislation should consider appropriate features outlined in the Sentencing Advisory Council's *A Sentencing Guidelines Council for Victoria: Report.* **569**

11 Victoria's prison system and conditions

RECOMMENDATION 75: That the Victorian Government conduct a trial screening program assessing all people entering incarceration—on remand or a custodial sentence—for physical, cognitive and intellectual disability, to inform the provision of reasonable adjustments and support in prison and following release. The trial should:

- involve a sample prison population which is representative of the demographics of people incarcerated in Victoria
- connect people identified with disability during screening to appropriate social supports and inform the implementation of reasonable adjustments within the prison to aid that person to better engage with rehabilitative programs
- connect people identified with disability during screening to appropriate social supports including the National Disability Insurance Scheme prior to release back into the community with follow up after release
- assess how identifying disability upon entry to prison benefits the incarcerated individual, the operation of the prison and society more broadly, including any impacts on recidivism
- determine the costs and resources involved in routinely screening people entering incarceration for a disability
- publish the findings of the trial on the Department of Justice and Community Safety website. **598**

RECOMMENDATION 76: That the Victorian Government ensure that all staff working in privately- and publicly-operated prisons undertake training to:

- identify behaviours associated with physical and cognitive disabilities
- manage these behaviours through the provision of appropriate supports, rather than the utilisation of punitive measures. **599**

RECOMMENDATION 77: That the Victorian Government establish a mechanism enabling prison staff to refer incarcerated people who exhibit behaviours possibly related to undiagnosed disabilities for professional independent assessment. The outcome of this assessment should inform the implementation of appropriate adjustments or the provision of support for the relevant individual to ensure prison conditions are conducive to rehabilitation. **599**

FINDING 56: Ensuring people in incarceration with disabilities have access to a Corrections Independent Support Officer leading up to, and during, a disciplinary hearing is critical to preventing unfair outcomes by making sure they understand their rights and obligations, as well as hearing processes. **599**

RECOMMENDATION 81: That the Department of Justice and Community Safety review and publicly report on the management of COVID-19 in publicly- and privately-operated Victorian prisons with a view to identifying the impact of control measures on:

- prison conditions, the wellbeing of people in incarceration and their families
- people in incarceration's access to rehabilitative programs, health and legal services, and the court system
- application of emergency management days
- staff wellbeing, access to resources and safety.

The review should inform the ongoing management of the COVID-19 pandemic, if required, by identifying how to minimise disruption caused by control measures through:

- examining how other institutions which manage vulnerable people, such as prisons in other jurisdictions, hospitals and nursing homes, manage the risks related to COVID-19 for residents and staff
- identifying how best to ensure that control measures remain proportionate to relevant levels of risk at any time posed by COVID-19 and are balanced with ensuring that prison facilitates the rehabilitation of people in incarceration and reduces recidivism. 610

FINDING 57: The conditions in Victorian prisons can retraumatise incarcerated women by echoing the power dynamics of abusive relationships and separating mothers from dependent children. 618

FINDING 58: Practices such as solitary confinement, strip searching and the use of physical restraints can be highly traumatic and can impede the rehabilitation of people in incarceration. 623

RECOMMENDATION 82: That the Victorian Government review the use of solitary confinement, physical restraints and strip searching in Victorian prisons with a view to introducing policy to regulate the use of these practices:

- in situations where such practices are necessary to maintain the safety of staff or people in incarceration
- as a last resort, where alternative, less restrictive measures have failed
- for strip searching, only where specific intelligence indicates that an individual is trafficking contraband.
- Policy should require that such instances are reported to the Secretary of the Department of Justice and Community Safety as soon as practicable. 624

RECOMMENDATION 86: That the Victorian Government provide additional funding for rehabilitative programs and supports in public and private prisons. Funding should be scaled up in line with growth in prison populations, to ensure all who wish to access these services are able to. 652

RECOMMENDATION 87: That the Victorian Government provide funding to facilitate the expansion of online rehabilitative programs and support services to increase their accessibility to a broader range of incarcerated people. 652

FINDING 63: Supporting incarcerated people to arrange continuing mental health services following their release from prison can help make reintegration into the community less stressful and reduce instances of further offending. 654

RECOMMENDATION 88: That the Victorian Government substantially increase funding to ensure that resourcing for services which treat alcohol and other drug use issues in Victorian prisons and the community is commensurate with demand for these services. Funding should also be provided to enhance connections between prison-based and community-based services to facilitate seamless throughcare for incarcerated people re-entering the community. 658

RECOMMENDATION 89: That the Department of Justice and Community Safety strengthen transitional support planning for incarcerated people in both publicly- and privately-operated prisons to ensure continuity of service with regard to mental health and alcohol and other drug treatment following release for those who require it. The Department should engage incarcerated people in transitional planning to ensure that the service meets their needs and that they are familiar with how to access it prior to their release. 658

FINDING 64: Education, training and work experience opportunities in prisons can support incarcerated people to reintegrate into the community, gain employment and refrain from reoffending following their release. 663

FINDING 65: Greater access to technology, including the internet, will expand the education and rehabilitative programs accessible to incarcerated people and support them to develop the digital literacy essential to contemporary life and successful reintegration into the community. 663

FINDING 68: Safe, secure, long-term accommodation enables people being released from prison to seek education or employment, rebuild connections with family and community, and engage with therapeutic services addressing criminal behaviours. It is also known to reduce re-offending. 684

RECOMMENDATION 93: That the Victorian Government respond to the Legislative Council Legal and Social Issues Committee's Inquiry into homelessness in Victoria as soon as possible and explain why this response was not made within the six months provided for by the Legislative Council Standing Orders. 685

RECOMMENDATION 94: That the Victorian Government provide a detailed update on the measures it has taken towards implementing the 39 recommendations it accepted in full or in principle which were made by the Legislative Council Committee on Legal and Social Issues as part of its Inquiry into Youth Justice Centres in Victoria. This implementation update should be provided within six months of this report being tabled. 690

RECOMMENDATION 95: That the Victorian Government provide a detailed update on the measures it has taken towards implementing the recommendations it accepted in full or in principle which were made in the following reports:

- the Ogloff-Armytage *Youth Justice Review and Strategy: Meeting needs and reducing offending* (2016)
- the Victorian Auditor-General's Office's *Managing Rehabilitation Services in Youth Detention* (2018).

This implementation update should be provided within six months of this report being tabled. 690

13 Parole and the post sentence scheme

FINDING 69: Between 2009–10 and 2019–20 the proportion of incarcerated people released from prison on parole has declined from 30% to 6% of all discharges from custody. This may mean that more people are being released straight from prison back into the community with limited or no support and supervision. 698

FINDING 70: Recent reforms to Victoria's parole laws made clear the need for community safety to be paramount in parole decision-making. While the number of serious offences that have been committed by people while on parole have decreased in recent years, it is not clear whether community safety outcomes have improved in respect of people exiting prison at the end of their sentence without supervision and management through the parole system. 708

RECOMMENDATION 96: That the Victorian Government:

- undertake an evaluation of the impacts of parole reforms implemented since 2013 on community safety outcomes (including recidivism), and table a report of this evaluation in the Parliament of Victoria
- amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal and Torres Strait Islander representation on the Adult Parole Board
- ensure that the Adult Parole Board can appropriately exercise discretion with regard to applications for parole from individuals who have been unable to complete pre-release programs due to limited availability
- investigate ways to improve parole processes to ensure that individuals applying for parole have direct engagement with the decision-making process
- examine whether community safety could be improved by amending the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years. 708

FINDING 71: The post sentence scheme has increased the supervision and management of individuals who have committed serious sex and/or serious violent offences and present a significant risk to community safety following the end of their prison sentence. 711

14 Judicial appointments

RECOMMENDATION 97: That the Victorian Government establish a clear recruitment process for identifying and appointing judicial officers to Victoria's courts and tribunals. This process should:

- establish clear principles which govern the process for judicial appointments in Victoria. These principles should emphasise the importance of an open and transparent process for recruiting and appointing judicial officers.
- establish clear and consistent selection criteria for each judicial position. The criteria should be informed by the qualities identified in the Judicial College of Victoria's *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*.
- facilitate the use of advisory panels to assist the Attorney-General in identifying appropriate candidates, in accordance with any statutory requirements. Panels should comprise a diverse group of stakeholders from legal and non-legal backgrounds.
- promote transparency by making the recruitment process publicly available on the Department of Justice and Community Safety's website, including advertising vacancies. 728

RECOMMENDATION 98: In the development and implementation of a recruitment process for judicial appointments, the Victorian Government should:

- establish processes that actively promote diversity in the judiciary
- consider ways to identify and engage specific cohorts which are underrepresented in the judiciary with a view of recruiting them into positions where appropriate, including Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities
- collect and make public data on the diversity of applications and recommendations for judicial office. **734**

RECOMMENDATION 99: In providing funding to Victorian courts to expand specialist court services into rural and regional Victoria, the Victorian Government should ensure that this includes the recruitment of additional judicial officers to support the work of mainstream and specialist courts in those areas. Where possible and appropriate, selection criteria or standards for appointments to specialist courts, such as the Koori Courts, should be made in conjunction with relevant stakeholders. **736**

15 Judicial training and education

RECOMMENDATION 100: That s 19 of the *Judicial College of Victoria Act 2001* (Vic) is amended to reflect the powers, privileges and immunities of all parliamentary committees, as proposed by the Committee:

(1) The College must comply with any information requirement lawfully made of it by—

(a) the Legislative Council or a committee of the Legislative Council;

(b) the Legislative Assembly or a committee of the Legislative Assembly; or

(c) a joint committee of both Houses of Parliament.

Note: A committee under s 19 includes but is not limited to a committee established under the *Parliamentary Committees Act 2003*, a committee established under the Standing Orders of the Legislative Assembly or the Legislative Council, a committee established by resolution of either or both Houses of Parliament, or a committee established under the Joint Standing Orders of the Parliament of Victoria. **764**

FINDING 72: Judicial officers are highly skilled professionals with significant knowledge and expertise. However, stakeholders considered that there are various issues in relation to which judicial officers would benefit from improved education and training. These issues include:

- trauma-informed practice
  - including an understanding of trauma as it is experienced by those who come before judicial officers in the criminal justice system; and
  - support for judicial officers to deal with vicarious trauma so that it does not adversely influence their decision-making or job performance
- engaging people with lived experience to develop judicial training related to specific cohorts or issues. For example, training areas which could benefit from the perspective of those with lived experience include:
  - increasing cultural competency, in particular in relation to Aboriginal Victorians and culturally and linguistically diverse communities
  - awareness of particular issues experienced by the LGBTIQ+ community
  - experiences of persons with a disability. **778**

FINDING 73: There is little public information on the extent to which judicial officers undertake regular and comprehensive judicial education and training in the areas outlined above, or in other related areas. While the Judicial College of Victoria provides a suite of high-level training and education programs and services, it is unclear how these are utilised and what their outcomes are. To increase public confidence that judicial officers are engaging in education and training, the College would benefit from improving transparency around training and education across all court jurisdictions. **778**

What happens next?

There are several stages to a parliamentary inquiry.

The Committee conducts the Inquiry

This report on the Inquiry into Victoria's criminal justice system is the result of extensive research and stakeholder consultation by the Legislative Council Legal and Social Issues Committee at the Parliament of Victoria.

We received written submissions, spoke with people at public hearings, reviewed research evidence and deliberated over a number of meetings. Experts, organisations and other stakeholders expressed their views directly to us as Members of Parliament.

A parliamentary committee is not part of the Government. Our Committee is a group of members of different political parties. Parliament has asked us to look closely at an issue and report back. This process helps Parliament do its work by encouraging public debate and involvement on issues. We also examine government policies and the actions of the public service.

This report is presented to Parliament

This report was presented to Parliament and can be found on the Committee's website: https://www.parliament.vic.gov.au/lsic-lc/inquiries/article/4534.

A response from the Government

The Government has 6 months to respond in writing to any recommendations we have made. The response is public and put on the inquiry page of Parliament's website when it is received: https://www.parliament.vic.gov.au/lsic-lc/inquiries/article/4535.

In its response, the Government indicates whether it supports the Committee's recommendations. It can also outline actions it may take.

PART A: INTRODUCTION

1 Overview of the criminal justice system

> **Given the many inquiries and royal commissions into the criminal legal system, it seems safe to conclude that we have reached consensus. That is, we all agree that the current system and approaches are failing to create a safer community, to reduce offending, and to lead to just outcomes. If we are serious about addressing this, we need root and branch reform of the criminal legal system.**
>
> Victorian Aboriginal Legal Service, *Submission 139*, p. 10.

The Victorian criminal justice system is multifaceted. It contains a number of institutions with varying functions that work both independently and collaboratively to protect the community and uphold the rule of law.

This Chapter provides an overview of the criminal justice system. It discusses the legal and regulatory frameworks that underpin the justice system, including the institutions that create and enforce laws and sanction non-compliance. The Chapter discusses other sectors and professions that contribute to the Victorian criminal justice system, including government departments and statutory authorities.

1.1 The report

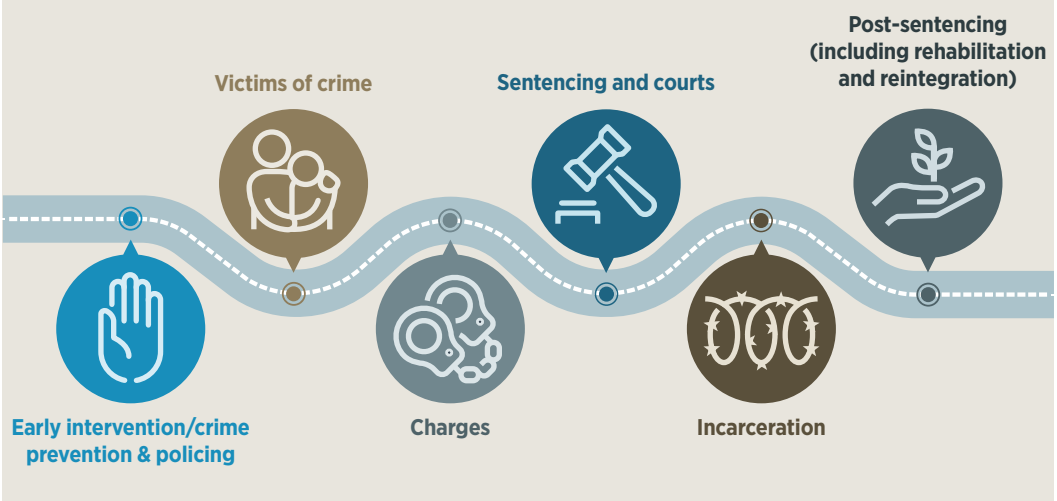
This report has been structured into six parts. Part A provides an overview of the criminal justice system and its operations, from policing and courts through to government agencies involved in the criminal justice system. It also presents a snapshot of some key data and demographic information related to the criminal justice system, including crime and recidivism statistics and prison population demographics.

Parts B to E are structured as a road map through the criminal justice system, from early intervention to post sentencing pathways. The report has been structured to move through each key part of the criminal justice journey—early intervention/crime prevention, victims of crime, charges and sentencing, to incarceration and recidivism. The aim of this approach is to highlight not only prevalent issues within each part of the criminal justice system, but how these issues are interconnected. The Committee acknowledges that a person's journey through the criminal justice system is rarely linear, with many people moving back and forth through the different stages. This demonstrates the complex challenges faced by the criminal justice system. By considering all stages of the criminal justice system, the Committee addresses

these challenges and has made recommendations for reform. Figure 1.1 below is a visual representation of the criminal justice road map as identified by the Committee in this report.

Part F of the report is focused on judicial appointments and training. Development of, and support for, the judiciary is crucial to a well-functioning justice system.

Figure 1.1 Criminal justice road map



Source: Legislative Council Legal and Social Issues Committee.

Both the adult and youth justice systems face complex challenges. For this Inquiry the Committee has focused on the adult criminal justice system. The youth justice system is not considered comprehensively in this report. The Committee elected to focus on the adult criminal justice system for several reasons:

- the breadth of evidence received on the adult criminal justice system
- its commitment to developing a comprehensive report which closely examines issues, which would have been challenged by a dual focus on both systems
- that there are several recent reports and inquiries which closely examined the youth justice system and recommended reform to improve its operation.

However, where necessary, the Committee has discussed youth justice issues as they relate to Victoria's criminal justice system more broadly (see Chapters 3 and 4 for more information).

The Committee has provided links to some recent inquiries into, and examinations of, the youth justice system. For readers interested in Victoria's youth justice system, the Committee has provided links to recent publications below:

- *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, Commission for Children and Young People (2021): https://ccyp.vic.gov.au/inquiries/systemic-inquiries/our-youth-our-way. The Inquiry was conducted by the Koori Youth Justice Taskforce and

the Commission for Children and Young People. The Inquiry sought to understand the lived experience of young Aboriginal people in Victoria and factors contributing to their overrepresentation in the youth justice system.

- *Inquiry into Youth Justice Centres*, Parliament of Victoria, Legislative Council Legal and Social Issues Committee (2018): https://parliament.vic.gov.au/lsic-lc/inquiries/inquiry/447. The Inquiry examined issues at both Parkville and Malmsbury Youth Justice Centres.
- *Managing Rehabilitation Services in Youth Detention*, Victorian Auditor-General's Office (2018): https://www.audit.vic.gov.au/report/managing-rehabilitation-services-youth-detention. The Audit examined the effectiveness of rehabilitation services, including educational services, in meeting the developmental needs of young people in youth detention centres and reducing the risk of reoffending.
- *Youth Justice Review and Strategy: meeting needs and reducing offending*, Penny Armytage and Professor James Ogloff AM (2017): https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-review-and-strategy-meeting-needs-and-reducing-offending. The Review, which was commissioned by the Department of Health and Human Services, was the first comprehensive review of youth justice in over 16 years. It examined key challenges facing the youth justice system and considered ways to redesign the youth justice system.

1.1.1 Conduct of the Inquiry

The Committee undertook a comprehensive evidence-gathering process for this Inquiry which included desktop research, surveys calling for submissions and public hearings (see Appendix A for a summary of evidence received).

The Committee received and accepted a total of 170 submissions, with 22 granted confidentiality.[1] Submissions were received from a cross-section of stakeholders, including parties within the criminal justice system, such as advocacy organisations, government agencies, legal centres, academic and research organisations as well as citizens, including people with lived experience of the criminal justice system.

The Committee held 50 public hearings over eight days involving more than 90 representatives. Public hearings for the Inquiry commenced in Wangaratta where the Committee heard from community representatives about the challenges which rural and regional communities face in relation to criminal justice.

Unfortunately, restrictions put in place due to COVID-19 prevented the Committee from travelling to more rural and regional communities for the Inquiry. The Committee is extremely grateful to all the witnesses—including representatives from rural and regional communities—who agreed to provide evidence remotely.

1 The identities of confidential submitters and/or the content of their submissions were not made public on the Committee's website. Confidential submissions inform the Committee's understanding but are not used substantively in this report.

1.1.2 Importance of lived experience

> **If you want to know certain things, go to the person with lived experience; the best advice comes from the person who has been through the problem and some people just need a bit of trust and faith…**
>
> Claire Seppings, *Submission 85*, Attachment 1, p. 90.

> **People administering criminal justice – including judges and magistrates – deal with the effects of trauma every day. For this reason, they need to be equipped with a deep understanding of complex and intergenerational trauma and its effects, and knowledge about the conditions that give rise to trauma, to be able to do their work effectively, compassionately, and humanely. One way to equip judges and magistrates with this knowledge and understanding is to embed the voices of *lived experience* into judicial and court-based training and professional development. To listen to those who have lived it.**
>
> Dr Diana Johns, *Submission 104*, p. 7

This Inquiry, like many others the Committee has undertaken, has emphasised the importance of considering the knowledge of people with lived experience when developing policies or services. Understanding lived experience provides an opportunity to develop policy which is informed by the experiences of those most affected. The Committee believes that people with lived experience are vital sources of knowledge that must be drawn on if Victoria is to improve the outcomes of its criminal justice system.

For this Inquiry, the Committee believed it was important to engage with members of the community who have had direct experience of the criminal justice system. The Committee received evidence and spoke to people who had been victims of crime as well as their families, and people in prison or people who had committed criminal offences.

Many of the stories were confronting. People with lived experience of the criminal justice system spoke of the trauma, harm and long-lasting consequences of their intersection with the system. Those who were victims of crime spoke of their disappointment in a system where they felt that they did not have a voice. The Committee believes that the aims of the criminal justice system should be to:

- rehabilitate offenders
- promote community safety
- provide justice
- prevent further trauma
- reduce reoffending.

What has been made clear to the Committee is that significant reforms are needed to the criminal justice system so that it can meet these aims.

The Committee sincerely thanks all those who have shared their story for this Inquiry. It acknowledges that sharing personal experiences to a parliamentary committee is a daunting experience. The evidence of people with lived experience has contributed essential insights that have helped form the Committee's findings and recommendations. In particular, the Committee appreciates those who came to speak directly with us at public hearings:

- Lee Little
- Hope
- Tracie Oldham
- John Herron
- Jordan Dittloff
- Dianne McDonald
- Amy
- Cathy Oddie
- Thomas Wain.

The Committee is sorry that they experienced what they did, but grateful that they shared their experiences and insights.

The Committee also acknowledges the hard work and dedication of so many criminal justice practitioners. This includes police officers, magistrates and judges, and volunteers and others who provide services to victims and people who have offended and their families.

The Committee is also grateful to representatives of Victoria Police who shared their insights from the perspective of individuals who are enforcing a system that they also can find challenging.

All witnesses told us that the system is currently very congested and burdened with many people waiting long periods of time for proceedings to be finalised.

Evidence from those with lived experience has been particularly important given the severe restrictions placed on visitors to prisons or in person contact over the last two years.

1.2 Language

Throughout this report, the Committee has recognised the role language can play to entrench negative social perceptions or biases, which are counterproductive to rehabilitation and reintegration. For many people, language can be a source of agency reflecting their experiences and their identity. The importance of language—especially

that which serves to identify or label a person—was raised by numerous stakeholders to the Inquiry.[2] Therefore, the Committee has sought to avoid language which is harmful or stigmatising.

In several Chapters, the Committee has outlined the language it has used in more detail. However, the Committee notes some of the language used in this report below.

People in prison/people who have committed criminal offences

Terms such as 'offender', 'criminal', 'prisoner', 'convict' or similar language perpetuates stigma by reducing a person's identity to the fact of their incarceration. It also creates a false distinction between people who are victims of crime and those who commit crimes, when, in reality there is substantial overlap between these two groups.

In this report, the Committee refers to 'people who have committed criminal offences', 'people who are in prison', 'incarcerated people' or a variation of this language to discuss individuals who are in contact with the criminal justice system due to criminal offending.

Victims of crime

Legislation governing the criminal justice system's response and obligations to people who have experienced crime often uses the term 'victim'. The Committee acknowledges that for some, the term 'victim' is problematic and reductive. Some stakeholders considered that terms such as 'survivor' or 'victim-survivor' were more appropriate. However, in this Inquiry the Committee received a broad range of evidence, including from families whose loved ones were killed because of a criminal act. It is important to encapsulate this breadth of experience.

In this report, the Committee uses the term 'victim of crime' to broadly describe people who have experienced crime directly and indirectly. In the Committee's view, this term most succinctly encapsulates the broad range of experiences heard.

Where a person who has experienced crime has used specific language to describe themselves, the Committee has used similar language when discussing their evidence.

Aboriginal Victorians

This report uses the term 'Aboriginal Victorians' to refer to people of Aboriginal and Torres Strait Islander descent residing within Victoria. This is consistent with the approach taken by stakeholders to the Inquiry.[3]

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2 For example, see: Victorian Aboriginal Legal Service, *Submission 139*; Fitzroy Legal Service, *Submission 152*.

3 For example, see: Victorian Government, *Submission 93*; Victorian Aboriginal Legal Service, *Submission 139*; Victorian Aboriginal Community Service Association (VACSAL), *Submission 81*.

Culturally and linguistically diverse communities

In this report, the Committee has used the term 'culturally and linguistically diverse communities' to broadly describe people born overseas, people with one or both parents born overseas, or people whose primary language is not English. This includes people with temporary visa status.

The Committee acknowledges that the term culturally and linguistically diverse is broad, and that the experiences of communities which fall under this umbrella term are just as diverse. The challenges and barriers communities face are often unique to them. The Committee has identified where an experience or challenge is specific to a community or communities.

LGBTIQ+

This report predominantly uses 'LGBTIQ+', however language may vary to accurately reflect terminology used in data or by stakeholders in their evidence. LGBTIQ+ is an evolving acronym which stands for lesbian, gay, bisexual, transgender, intersex, queer/questioning, and other gender or sexual identities people hold (such as asexual, non-binary, or pansexual).

1.3 Overview of the criminal justice system

Victoria's criminal justice system is designed to uphold the rule of law and protect the rights of citizens.[4] It comprises a wide range of bodies with distinct functions. Such institutions include Parliament, courts and tribunals, government departments and independent authorities, performing functions such as lawmaking, policymaking, enforcement and sanctioning.

The objectives of the Victorian criminal justice system, as highlighted by the Victorian Government in its submission, are:

- denouncing and punishing criminal behaviour
- protecting the community
- preventing further offending through addressing underlying causes of offending and rehabilitating offenders
- providing effective and appropriate outcomes for system participants (including victims of crime)
- ensuring like crimes are treated the same
- promoting community confidence in how the system operates.[5]

4 Department of Justice and Community Safety, *Justice system*, 2021, <https://www.justice.vic.gov.au/justice-system> accessed 21 December 2021.

5 Victorian Government, *Submission 93*, p. 9.

1

The criminal justice system forms part of the Victorian legal system, which is based on the Westminster parliamentary model. This model divides governance and regulatory responsibilities between three branches of government, to prevent a concentration of power. The administration of the criminal justice system is shared between the three branches of government:

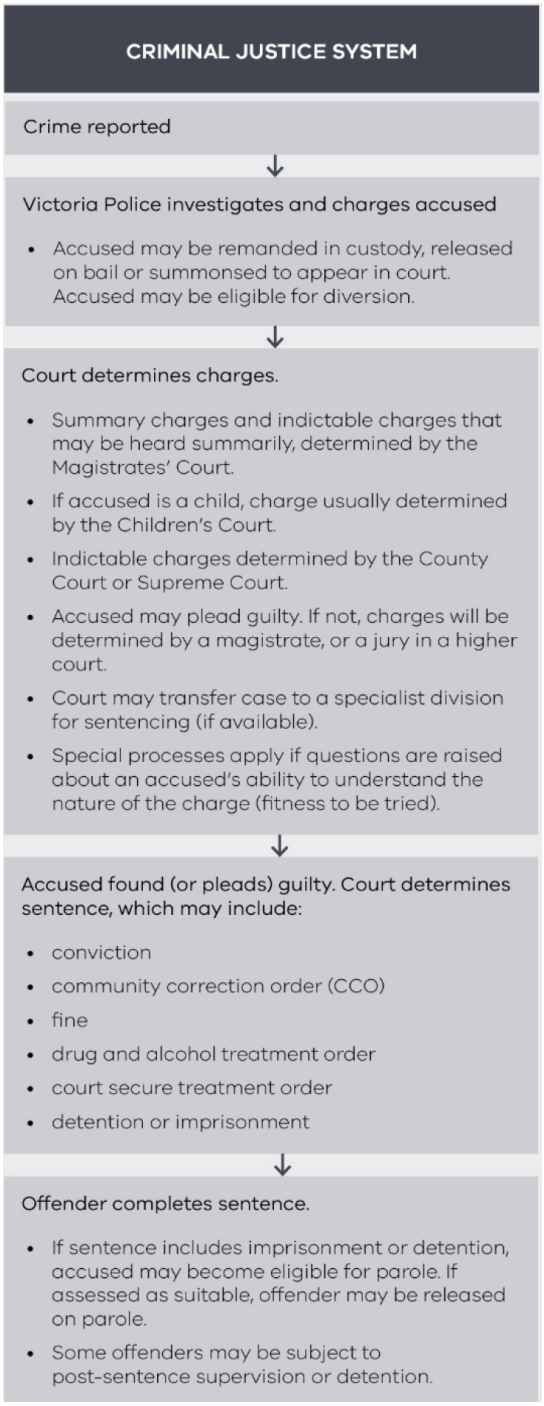
- The legislature (parliament): the legislature makes and amends laws that define criminal acts. These are intended to reflect society's views on unacceptable behaviour and to safeguard the community.
- The judiciary (courts and tribunals): the judiciary refers to the court and tribunal hierarchy. Courts and tribunals interpret and apply legislation and can impose penalties on those who have broken the law.
- The executive (government): the executive is responsible for implementing the law. It consists of the Governor as representative of the Queen, Premier as head of government and Ministers, as well as government agencies and departments. These departments are responsible for enforcement operations, such as policing, parole program management, and overseeing prisons and other detention facilities.

Further sectors and bodies play a key role in the criminal justice system but are not necessarily administered by Parliament or government bodies. For example, the legal profession works in various capacities within the system: prosecuting cases, providing advice and representation to the accused, or drafting and reforming laws. Some lawyers work for privately-owned firms and others are employed by independent statutory authorities, such as Victoria Legal Aid, the Victorian Law Reform Commission and the Office of Public Prosecutions.

In addition, various other sectors interact closely with the criminal justice system and provide linked services and supports to address underlying causes of offending or prevent further contact with this system. This includes in areas such as housing, family violence and mental health support.

In its submission to the Inquiry, the Victorian Government provided a diagram that outlines a potential pathway for a person who is charged with and pleads guilty to an offence. It shows the role of various actors within the criminal justice process.

Figure 1.2 Potential pathway through the Victorian criminal justice system



Source: Victorian Government, *Submission 93*, p. 92.

1.4 Parliament and law-making

The criminal justice system has a legislative and regulatory framework set by state and federal parliaments. The Victorian Parliament is responsible for making, reforming and amending State criminal laws, whereas the Commonwealth Parliament can legislate in regard to certain, limited powers as prescribed by the *Commonwealth of Australia*

Constitution Act 1900 (Cth). Laws made by the Commonwealth Parliament apply to the whole of Australia and complement state laws. Where they do conflict, federal laws take precedence.[6]

The laws passed by parliament in relation to criminal justice are complex and diverse. Criminal law, for example, is the body of law that defines criminal offences, prohibiting certain conduct and providing sanctions for those who fail to comply. However, other laws can create enforcement agencies (such as Victoria Police), as well as independent bodies that play an important role in justice processes (such as Victoria Legal Aid).

1.4.1 Sources of criminal law

In Victoria, criminal law comes from the Australian Constitution, federal legislation, Victorian legislation and common law.[7] Australian states and territories have primary responsibility for law and order within their jurisdictions.[8] However, the Commonwealth Parliament has law-making power in relation to the areas prescribed in ss 51 and 52 of the Australian Constitution. These are also known as enumerated powers and include:

- defence
- money
- migration
- postal and communication services
- external affairs
- matters that are 'incidental' to any listed power.[9]

On this, the Commonwealth Parliamentary Library notes:

> The Commonwealth Parliament has no general power to legislate with respect to crime. Therefore, offences must either fall within, or be incidental to the exercise of, a head of constitutional power. "In short, and generally speaking," it is said, "Commonwealth criminal law is ancillary to the performance of responsibility of the Commonwealth to protect itself, its Constitution, its institutions and services and to enforce its own laws.[10]

This means that the Commonwealth Parliament can determine criminal law with respect to its enumerated powers. For example, the *Migration Act 1958* (Cth) regulates immigration law in Australia in accordance with the Commonwealth's law-making

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6 Parliament of Victoria, *Three Levels of Government*, 2010, <https://www.parliament.vic.gov.au/about/the-parliamentary-system/three-level-of-government> accessed 21 December 2021.

7 Department of Justice and Community Safety, *How laws are made and regulated*, 2021, <https://www.justice.vic.gov.au/justice-system/laws-and-regulation/how-laws-are-made-and-regulated> accessed 21 December 2021.

8 Parliament of Victoria, *Three Levels of Government,* 2010, <https://www.parliament.vic.gov.au/the-parliamentary-system/three-level-of-government> accessed 23 December 2021.

9 *Disability and Carers: Reports and publications Applied Principles and Tables of Support (APTOS)*, <https://www.dss.gov.au/disability-and-carers-programs-services-government-international-disability-reform-council/reports-and-publications> accessed 22 December 2021.

10 Parliament of Australia Laws and Bill Digest Group, *Terrorism and the Law in Australia: Legislation, Commentary and Constraints: 1.4 Legislative Framework in Australia*, 2002.

powers under the Constitution. Within this Act, the Parliament has defined certain conduct as a criminal offence. This includes people-smuggling,[11] document falsification and forgery,[12] and worker exploitation.[13]

The main instrument that outlines federal criminal offences is the *Criminal Code Act 1995* (Cth) (Criminal Code Act). It covers conduct consistent with the Commonwealth Parliament's jurisdiction, such as:

- obtaining financial advantage by deception (taxation, social security fraud)[14]
- cybercrime[15]
- human trafficking and slavery[16]
- terrorism, including terrorist acts, organisation, financing and incursion and recruitment offences.[17]

As noted, however, criminal conduct is primarily regulated at the state and territory level. There are multiple state laws that underpin Victoria's criminal justice system. Some of the key pieces of offence-based legislation include:

- *Crimes Act 1958* (Vic)—deals with more serious (indictable) offences, such as causing serious injury, dangerous driving causing death, criminal damage to property, money laundering, theft and kidnapping. Indictable offences are generally heard in higher courts and prosecuted by the Office of Public Prosecutions.[18]
- *Summary Offences Act 1966* (Vic)—focuses on less serious (summary) criminal offences relating to public order, damage to property, wilful destruction, drunkenness and common assault. Summary criminal offences are often dealt with in the Magistrates' Court and prosecuted by Victoria Police.[19]
- *Road Traffic Act 1986* (Vic)—regulates traffic offences, including driving while intoxicated, dangerous driving and careless driving, as well as speeding infringements. As above, these are summary criminal offences dealt with in the Magistrates' Court and prosecuted by Victoria Police.[20]

There is some overlap between state and federal law-making in relation to certain areas of criminal law. For example, the Criminal Code Act addresses criminal conduct relating

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11 Commonwealth Department of Public Prosecutions, *Crimes We Prosecute: People Smuggling*, n.d., <https://www.cdpp.gov.au/crimes-we-prosecute/people-smuggling> accessed 21 December 2021.

12 *Migration Act 1958* (Cth) ss 233, 236.

13 Ibid., s 245AD.

14 Emily Piggott, Advocacy Coordinator, VALID, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 134.132(131).

15 Ibid.div 477–478.

16 *Criminal Code Act 1995* (Cth), ss 271.2, 270.3(1).

17 Ibid., div 102–103, 199.

18 Judicial College of Victoria, *2.5 Summary and Indictable Offences*, 2021.

19 Ibid.

20 *Road Traffic Act 1986* (Vic).

to terrorism.[21] In 2003, however, Victoria also legislated on terrorism law to fill certain gaps within its jurisdiction that were not covered by federal law.[22] As noted above, where state and federal law conflicts, federal law takes precedence.[23]

Common law, or judge-made law, is law developed over time through statutory interpretation and precedents.[24] This is where the legislative framework is insufficient and so a judge can reflect on past court matters to determine an appropriate, proportionate and consistent sanction.

1.5 Implementation and enforcement

In accordance with the separation of powers doctrine, the executive (the government) has responsibility for implementing and administering laws made by parliament.

There are a number of ministerial portfolios which oversee the operation of Victoria's criminal justice system. These include portfolios of the Attorney-General, police, crime prevention, corrections, youth justice and victim support.[25]

The following sections outline the main government bodies that administer the criminal justice system in Victoria, enforcement bodies and mechanisms, and other statutory bodies that contribute to the system's operation.

1.5.1 Government agencies

Department of Justice and Community Safety

The Department of Justice and Community Safety (DJCS) is the central government body with oversight of criminal justice in Victoria. It delivers justice and community safety services to ensure 'all elements... are working efficiently and effectively'.[26] Its objective is to achieve 'a justice and community safety system that works together to build a safer, fairer and stronger Victoria'.[27]

DJCS is a large and multifaceted organisation and a key coordinating body. It is led by the Secretary and a corporate governance management board that reports to eight ministers and oversees 15 groups. These groups include Aboriginal justice, corrections and justice services, legal integrity and police, community safety and communications.

DJCS' organisational structure is shown in Figure 1.3 below.

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21 See, for example, Part 5.3 of *Criminal Code Act 1995* (Cth).

22 Anoushka Jeronimus, Director, Youth Law Program, WEstjustice, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*.

23 *Commonwealth of Australia Constitution Act 1900* s 109.

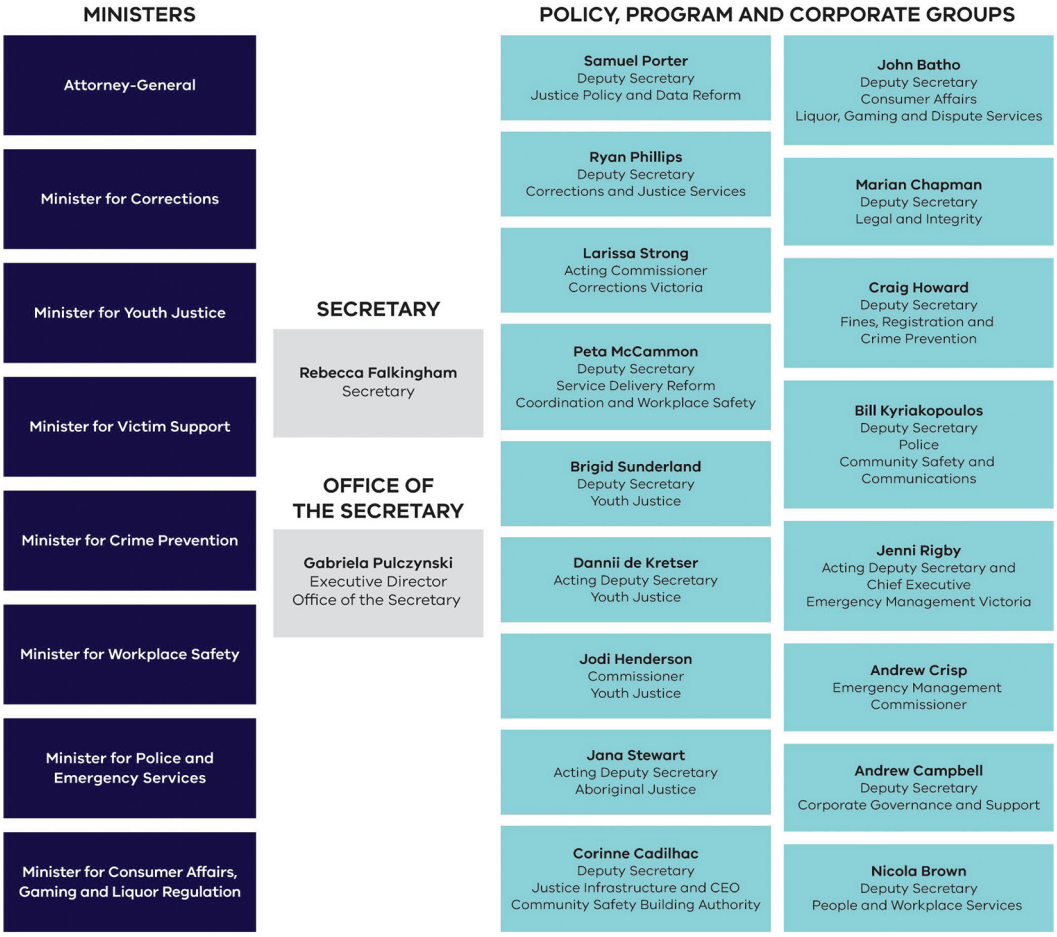
24 Victorian Government, *Submission 93*, p. 5.

25 Department of Justice and Community Safety, *People and organisational structure*, 2021, <https://www.justice.vic.gov.au/people-and-organisational-structure> accessed 21 December 2021.

26 Department of Justice and Community Safety, *20–21 Annual Report*, Victorian Government, Melbourne, p. 6.

27 Department of Justice and Community Safety, *About the department*, 2021, <https://www.justice.vic.gov.au/about-the-department> accessed 21 December 2021.

Figure 1.3 Department of Justice and Community Safety organisational structure, July 2021



Source: Department of Justice and Community Safety, *2020–21 Annual Report,* Victorian Government, Melbourne, p. 4.

DJCS also provides administrative support to a range of statutory offices, authorities and judicial bodies. This includes bodies across the different justice portfolio areas, for example:

- Attorney-General: Victims of Crime Commissioner, Victorian Legal Services Commissioner, Victoria Legal Aid, state courts
- Corrections: Adult Parole Board, Post Sentence Authority, Women's Correctional Services Advisory Committee
- Police: Firearms Appeals Committee, Road Safety Camera Commissioner, Victoria Police
- Youth Justice: Youth Parole Board.[28]

28 Department of Justice and Community Safety, *People and organisational structure,* 2021, <https://www.justice.vic.gov.au/people-and-organisational-structure> accessed 21 December 2021.

DJCS oversees or contributes to the implementation of several key policies, plans and strategies in the justice space, including:

- Aboriginal Justice Agreement—First created in 2000, the Agreement is a long-term partnership between the Victorian Government and the Victorian Aboriginal community to improve Aboriginal justice outcomes. The Agreement is currently in its fourth phase, called *Burra Lotjpa Dunguludja*. This phase is focused on self-determination, culturally strong communities and addressing overrepresentation of Aboriginal peoples within the justice system.
- Crime Prevention Strategy—Released in June 2021, the Strategy sets the Victorian Government's strategy for crime prevention and early intervention. The Strategy describes partnerships with local communities, businesses and organisations and has received funding through both the 2020–21 and 2021–22 State Budgets.[29]
- *Second Family Violence Rolling Action Plan (2020–2023)*—The second Action Plan forms part of the Victorian Government's long-term strategy to implement recommendations made by the Royal Commission into Family Violence. The Plan outlines the 10 focus areas for family violence reform as prioritised for 2020–2023.[30]
- *Youth Justice Strategic Plan 2020–2030*—Announced in May 2020, the Plan outlines the Victorian Government's priorities for reforming the youth justice system. The Plan focuses on diversion, early intervention, reducing reoffending, strengthening partnerships and investing in a stable, secure and safe justice system.[31]
- *Disability Action Plan Framework 2019–2022*—The Framework details work to be undertaken to improve accessibility to the justice system, and participation in life in Victoria for persons living with disability. The Framework's goals include an accessible, inclusive justice system; a fair justice system promoting equal rights and opportunities; and a Department that recognises and values diversity.[32]
- *Women's Diversion and Rehabilitation Strategy*—Currently in Stage One, the Strategy outlines initiatives to reduce the number of women in incarceration facilities. Initiatives include implementing a gender responsive and trauma-informed case management model, providing family therapy services at women's prisons and improving accessibility to legal services.[33]
- *Forensic Mental Health Implementation Plan*—Funded under the 2017–18 State Budget, the Plan forms part of the Victorian Government's 10-year mental health programme. The Plan focuses on the delivery of services to people interacting with

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29 Victorian Government, *Submission 93*, p. 45.

30 Department of Families, Fairness and Housing, *Family violence reform rolling action plan 2020–2023*, 2020, <https://www.vic.gov.au/family-violence-reform-rolling-action-plan-2020-2023> accessed 6 January 2022. Also see: Victorian Government, *Submission 93*, p. 46.

31 Victorian Government, *Submission 93*, p. 21. Department of Justice and Community Safety, *Youth justice strategic plan: 2020–2030 - the way forward*, 2021, <https://www.justice.vic.gov.au/youth-justice-strategic-plan-2020-2030-the-way-forward> accessed 6 January 2022.

32 Victorian Government, *Submission 93*, pp. 76–77; Department of Justice and Community Safety, *Disability action plan framework 2019–2022*, 2021, <https://www.justice.vic.gov.au/about-the-department/disability-action-plan-framework-2019-2022> accessed 6 January 2022.

33 *Victorian* Government, Submission 93, p. 74.

the justice system, such as incarcerated youths, detained adults, and court or law enforcement personnel. The Plan also provides funding for the development of the Thomas Embling Hospital.[34]

Victim support

The Victim Services, Support and Reform unit (previously the Victim Support Agency) is a departmental unit within DJCS. The unit provides a number of support programs for victims of crime, such as the Victims Register, Victims of Crime Helpline and Intermediary Program, as well as funding the Victims Assistance Program.[35]

The Victim Services, Support and Reform unit connects victims of crime with support services to manage the impacts of violent crime.[36] It does this through the Victims Assistance Program, which consists of a network of community-based support providers that provide individualised assistance to victims of crime. Support can include:

- liaising with law enforcement
- mental health and medical services
- preparing a Victim Impact Statement.

Agencies are located state-wide and their staff often also operate from accessible areas within communities, such as community centres and police stations.[37]

In addition, the unit supports initiatives such as the Victims of Crime Consultative Committee, a collaborative forum in which key stakeholders meet with the Attorney-General and Minister for Victim Support and discuss policies, practices and reforms for the criminal justice system. The Committee's purpose is 'to elevate the voices of victims of crime and promote the interests of all victims in the administration of justice'. Key stakeholders in the Victims of Crime Consultative Committee include victims of crime (or their family members), the Victims of Crime Commissioner, and representatives of Victoria Police, the Office of Public Prosecutions, the Adult Parole Board and others.[38]

The Victim Services, Support and Reform unit works closely with the Victims of Crime Commissioner, who is appointed by the *Victims of Crime Commissioner Act 2015* (Vic) as an independent statutory officer. The Commissioner's role is to:

- advocate for recognition and participation of victims of crime in government departments, prosecuting bodies and law enforcement

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34 Ibid., p. 51.

35 Ibid., p. 99.

36 Victims of Crime, *Vicim Services, Support and Reform*, 2021, <https://www.victimsofcrime.vic.gov.au/victim-services-support-and-reform> accessed 23 December 2021.

37 Victorian Government, *Submission 93*, p. 99.

38 Victims of Crime, *Victims of Crime Consultative Committee*, 2021, <https://www.victimsofcrime.vic.gov.au/victims-of-crime-consultative-committee> accessed 23 December 2021.

- conduct inquiries on and report to the Attorney-General regarding systemic victims of crime matters
- advise the Attorney-General and government agencies on reforms required to accommodate victims of crime.[39]

The Commissioner oversees and monitors the implementation of the *Victims' Charter Act 2006* (Vic) in the justice system. The Victims' Charter governs how criminal justice agencies (i.e. policing, prosecutors, support services) interact with victims of crime. This includes providing clear information, minimising contact between a victim and an accused, and treating victims with courtesy, respect and dignity.[40]

Where compliance with the Victims' Charter has not occurred, victims of crime (or their families) may make a complaint to the Commissioner. The Commissioner is empowered to investigate complaints where the Victims' Charter has not been upheld by justice agencies.[41]

Incarceration facilities and management

Corrections Victoria, a business unit within DJCS, manages the operation of Victoria's public prisons and oversees contracting for privately operated prisons. The Minister for Corrections holds portfolio responsibility for prison operation and management.

Under the *Corrections Act 1986* (Vic), the Secretary of DJCS is 'responsible for monitoring performance in the provision of all correctional services to achieve the safe custody and welfare of prisoners and offenders'.[42] This includes in relation to both public and private prisons. The Act empowers the Minister to enter into agreements with contractors to operate correctional services, with the written consent of the Treasurer.[43]

The Justice Assurance and Review Office assists the Secretary in meeting their statutory obligations. It provides advice to the Secretary 'on ways to achieve higher performing, safer and more secure youth justice and adult corrections systems'. It further seeks to identify risk and opportunities within the corrections system.[44]

The Justice Health unit within DJCS is responsible for the delivery of mental health, health, and alcohol and other drugs services to people incarcerated in public prisons.

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39 *Victims of Crime Commissioner Act 2016* (Vic) s 13.

40 Victims of Crime Commissioner, *Understanding the Victims' Charter*, 2021, <https://www.victimsofcrimecommissioner.vic.gov.au/the-victims-charter> accessed 23 December 2021.

41 Victims of Crime Commissioner, *Make a complaint*, 2021, <https://www.victimsofcrimecommissioner.vic.gov.au/victims/make-a-complaint> accessed 23 December 2021.

42 Victorian Government, *Community Crime Prevention: Building Safer Communities*, <https://www.crimeprevention.vic.gov.au/buildingsafercommunities> accessed 6 January 2022.

43 *Corrections Act 1986* (Vic) s 8(b).

44 Department of Justice and Community Safety, *Justice Assurance and Review Office (JARO)*, 2021, <https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro> accessed 21 December 2021.

It sets the healthcare standards for public prisons, manages health prevention programmes and contracts and oversees healthcare providers.[45]

There are 15 incarceration facilities in Victoria for adults who have been convicted of an offence. Twelve of these facilities are government operated and managed. A brief description of these facilities is included in Table 1.1 below.

Table 1.1 Victorian prisons and transition centres

Prison	Characteristics
Barwon Prison	• Maximum security men's prison in Lara. • Accommodates both men being held on remand and who have been convicted. • 478 bed capacity across 10 accommodation units.
Beechworth Correctional Centre	• Minimum security men's prison in Beechworth. • Generally accommodates men serving the last part of their sentences who are developing the skills to transition back into the community. • 210 person capacity across self-catered communal living units, two-bed units and dormitories.
Dame Phyllis Frost Centre	• Maximum security women's prison in Ravenhall. • Accommodates both women being held on remand and who have been convicted. • Enables select incarcerated mothers to have their infants, and children aged up to five years, stay with them in shared living units. • 604 person capacity across minimum, medium and maximum security units.
Dhurringile Prison	• Minimum security men's prison located in Murchison. • Specialises in preparing men to transition back into the community by equipping them with personal and professional skills. • Offers work in industries such as agriculture, metal fabrication, carpentry, and horticulture. • 328 person capacity across two-bedroom units and shared housing.
Hopkins Correctional Centre	• Medium security men's prison in Ararat. • Exclusively accommodates 'protected prisoners' who must be kept separate from the general prison population due to the nature of their crimes, for example people who have committed sexual offences against a child. • 760 person capacity across single, double and triple cells, cottage accommodation and a unit for aged and medically infirm people.
Judy Lazarus Transitional Centre	• Minimum security men's prison in West Melbourne. • Accommodates select men nearing the end of their sentence and offers a supervised transition back into the community. • 25 person capacity across five self-contained and self-catered units.
Langi Kal Kal Prison	• Minimum security men's prison in Trawalla. • Accommodates 'protected prisoners', prisoners with 'a lower propensity for violence', and elderly people who are incarcerated. • 428 person capacity across single rooms and shared units.

45 Corrections Victoria, *Justice Health*, <https://www.corrections.vic.gov.au/justice-health> accessed 22 November 2021.

Prison	Characteristics
Loddon Prison Precinct (Middleton)	• Medium security men's prison in Castlemaine. • Accommodates a range of people and specialises in offering programs addressing drug and family violence offences. • 468 person capacity across two-bedroom cells and self-contained communal units.
Marngoneet Correctional Centre (Karreenga)	• Medium security men's prison in Lara, adjacent to Barwon Prison. • Offers a range of rehabilitative programs, including specialised treatment for sex offenders. • 859 person capacity.
Melbourne Assessment Prison	• Maximum security men's prison in West Melbourne. • Serves as a first point of contact for all men who have been arrested on charges that potentially carry jail time if convicted. • Assesses men before they are bailed or placed on remand, making it one of the busiest prisons in the state. • Offers specialist mental health prison services including a 15 bed psychiatric facility. • 305 person capacity in multi-level building near Southern Cross Station.
Metropolitan Remand Centre	• Maximum security men's prison in Ravenhall. • Primarily accommodates men being held on remand. • 833 person capacity, mostly in single cells in large buildings.
Tarrengower Prison	• Minimum security women's prison in Nuggetty. • Specialises in preparing women to transition back into the community through education and employment programs. • 72 bed capacity across single rooms with shared kitchen and living areas.
Fulham Correctional Centre (privately operated by GEO Group Australia Pty Ltd)	• Minimum and medium security men's prison in Fulham. • 845 person capacity, across single and shared cells, lodges with shared kitchen and laundry facilities, a rehabilitation unit for young offenders, and self-contained units with four beds.
Port Phillip Prison (privately operated by G4S Correctional Services (Australia) Pty Ltd)	• Maximum security men's prison in Laverton. • Accommodates both men being held on remand and whom have been convicted. • 1,087 person capacity across 14 units, a 20 bed inpatient unit for secondary healthcare and a 30 bed forensic mental health unit.
Ravenhall Correctional Centre (privately operated by GEO Group Australia Pty Ltd)	• Medium security men's prison in Ravenhall. • Specialises in accommodating incarcerated people with mental illness. • 75 bed capacity plus additional capacity for 100 other people 'on an outpatients basis'.

Source: Corrections Victoria, *Prisons*, <https://www.corrections.vic.gov.au/prisons> accessed 18 November 2021; Corrections Jobs, *Our prisons*, <https://www.correctionsjobs.vic.gov.au/our-prisons> accessed 18 November 2021; Treasury and Finance, *Port Phillip Prison Contract Extension: Project*, <https://www.dtf.vic.gov.au/partnerships-victoria-ppp-projects/port-phillip-prison-contract-extension-project> accessed 18 November 2021; GEO Group Australia PTY Ltd, *Centres*, <https://geogroup.com.au/centres> accessed 18 November 2021.

A map of all prisons and transition centres can be seen at Figure 1.4

Figure 1.4 Prison and community correctional services locations, as at July 2020

Source: Corrections Victoria, *Location map for Prison and Community Correctional Services (CCS) locations in Victoria*, 2021, <https://www.corrections.vic.gov.au/location-map-for-prison-and-community-correctional-services-ccs-locations-in-victoria> accessed 21 December 2021.

Considering the constraints of this Inquiry and the extensive work undertaken by other inquiries and reviews into Victoria's youth justice system in recent years, the Committee has not comprehensively examined youth justice services and facilities in this report.[46] See Section 1.1 and Chapters 3 and 4 for a discussion on issues related to the youth justice system.

Community corrections

The Justice Services unit within DJCS oversees the operation of community corrections services within Victoria. It manages individuals serving Community Corrections Orders, which are non-custodial, flexible sentences aimed at promoting opportunities for rehabilitation.

Justice Services also supports individuals who are released from prison on parole. It further oversees the development of the community corrections services system and provides secretariat support for the Adult Parole Board. Other functions include court assessment and prosecutions services and undertaking community work and partnerships.

In its submission to the Inquiry, the Victorian Government stated that the Justice Services unit 'ensures that offenders are safely managed and aims to rehabilitate offenders by addressing the underlying causes of offending behaviour'.[47] There are more than 35 community corrections service locations across Victoria, as outlined in Figure 1.3.

1.5.2 Other independent bodies

As noted above, DJCS provides administrative support to several independent bodies that contribute to the operation of the criminal justice system. These agencies work independently to achieve their objectives, overseeing key areas of the system to further the protection of the community. Some of the key bodies are outlined in Table 1.2 below. A comprehensive list of independent bodies is also available on DJCS' website.

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46 The Inquiry into Youth Justice Centres in Victoria conducted by the Legislative Council Legal and Social Issues Committee was tabled in March 2018. The report and government response can be accessed at: https://www.parliament.vic.gov.au/447-lsic-lc/inquiry-into-youth-justice-centres-in-victoria.

47 Victorian Government, *Submission 93*, p. 94.

Table 1.2 Statutory bodies within Victoria's criminal justice system

Body	Role
Office of Public Prosecutions Victoria	Led by the Director of Public Prosecutions, the Office of Public Prosecutions acts on behalf of the Crown and prosecutes serious criminal matters in courts that threaten law and order within the community.
Victoria Legal Aid	Provides legal information, education, advice and services to the community. It can defend some very vulnerable people within the legal system and lobbies for law reform.
Sentencing Advisory Council	Researches, reports and analyses sentencing policy and statistics for the community, courts and government. It reviews data and trends, monitors public opinion and provides advice to the Attorney-General on sentencing matters.
Post Sentence Authority	Monitors serious sex and violent offenders on post sentence orders, such as supervision or detention orders. The Authority provides information to offenders and also makes recommendations to DJCS about supervision orders.
Adult Parole Board	Hears and determines applications for parole (structured community release programs) from eligible incarcerated people. It can grant, deny, defer or cancel parole with consideration to community safety and protection. Parole enables part of a custodial sentence to be served in the community.
Youth Parole Board	Hears and determines applications for parole from persons on a youth justice centre order or youth residential order. It can grant, deny, defer or cancel parole.

Source: Office of Public Prosecutions Victoria, *Who we are*, <https://www.opp.vic.gov.au/About-Us/Who-we-are-and-what-we-do> accessed 23 December 2021; Victoria Legal Aid, *What we do*, 2020, <https://www.legalaid.vic.gov.au/about-us/what-we-do> accessed 23 December 2021; Corrections Victoria, *Post sentence authority,* 2020, <https://www.corrections.vic.gov.au/post-sentence-authority> accessed 6 January 2021; Adult Parole Board Victoria, *About us,* <https://www.adultparoleboard.vic.gov.au/about-us> accessed 6 January 2021; Department of Justice and Community Safety, *Youth Parole Board of Victoria,* 2021, <https://www.justice.gov.au/justice-system/youth-justice/youth-parole-board-of-victoria> accessed 6 January 2021.

1.5.3 Victoria Police and policing practices

Victoria Police is Victoria's primary law enforcement agency. It provides policing services across 54 areas within 21 divisions and four regions.[48] It operates under the *Victoria Police Act 2013* (Vic) (Victoria Police Act), which defines its role as 'to serve the Victorian community and uphold the law so as to promote a safe, secure and orderly society'.[49] Its functions are:

(a) preserving the peace;

(b) protecting life and property;

(c) preventing the commission of offences;

(d) detecting and apprehending the offenders;

(e) helping those in need of assistance.[50]

Victoria Police is responsible for investigating criminal offences that breach the law and endanger the community. It is through an interaction, investigation or charge with Victoria Police that many individuals first come into contact with the criminal justice system.

48 Ibid., p. 92.

49 *Victoria Police Act 2013* (Vic) s 8.

50 Ibid. s 9.

Victoria Police is a 'special body' as designated by the *Public Administration Act 2004* (Vic). This means it is created under a separate law—the Victoria Police Act—but is a public sector body that serves the public interest.[51]

Victoria Police Act 2013 (Vic)

The Victoria Police Act outlines the force's constitution, conduct and operations. The agency is comprised of the:

- Chief Commissioner
- Deputy and Assistant Commissioners
- police officers
- protective service officers (PSOs)
- police recruits and reservists
- public servant Victoria Police employees.[52]

In September 2021, the organisation had approximately 22,000 employees.[53]

The Victoria Police Act was a direct result of recommendations made in the 2011 *Inquiry into the command, management and function of the senior structure of Victoria Police*, undertaken by the State Services Authority (the predecessor to the Victorian Public Service Commission). The Inquiry's report found that the relationship between the police and government was 'poorly defined', resulting in a need for a new law to clarify the relationship while 'preserving the operational independence of the agency'.[54] It found that a 'rule of thumb' exists that creates confusion between the police force, government and community:

> there is a tension between the democratic accountability of police to the political institutions of government and the independence of police in the performance of their law enforcement duties. Resolution of this tension is left largely to an unwritten convention or "rule of thumb" that Government is responsible for setting policy objectives, while Victoria Police is responsible for operational matters.[55]

In response, the Victoria Police Act defined the relationship between the police and the Government. Firstly, the Act outlines the Chief Commissioner's role as Chief Constable and Chief Executive Officer, responsible for the management and control of Victoria Police subject to the Minister's powers. As the agency's head, the Chief Commissioner is responsible for:

- implementing policing priorities and policy relating to the Government

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51 Victorian Public Sector Commission, *Legislative framework: the Public Administration Act 2004*, 2015, <https://vpsc.vic.gov.au/about-vpsc/legislative-framework-the-public-administration-act-2004> accessed 21 December 2021.

52 *Victoria Police Act 2013* (Vic) s 7.

53 Victoria Police, *Police numbers by region*, <https://www.police.vic.gov.au/police-number-region> accessed 21 December 2021.

54 State Services Authority, *Inquiry into the command, management and functions of the senior structure of Victoria Police*, March 2012, p. xi.

55 Ibid., p. 42.

- providing advice and information to the Minister on operational and policing matters
- the general conduct, performance and operations of the body (answerable to the Minister).[56]

The Chief Commissioner has overall command and management of the force, protecting its operational independence. This is reinforced by div 2 of the Act, which prescribes Victoria Police's accountability to the Victorian Government. As a special body, Victoria Police is accountable to the Minister; however, the Minister's powers are constrained. For example, following consultation with the Chief Commissioner, the Minister is empowered to provide written directions on policy and priority matters, but cannot do so in relation to:

- the preservation of peace and protection of life and property relating to any person or group of persons
- the enforcement of law in relation to any person or group of persons
- the investigation or prosecution of offences in relation to any person or group of persons
- decisions, including disciplinary decisions, about individual Victoria Police personnel.[57]

Section 10 also moderates the Minister's ability to give directions in relation to the organisational structure of the force, the allocation or deployment of officers and internal grievance resolution systems. A direction in these areas can only be issued if a specified body (such as a parliamentary committee or the Independent Broad-based Anti-corruption Commission) has made a recommendation for change, and where the Minister finds the Chief Commissioner has not adequately responded.[58]

The Minister can request reports from the Chief Commissioner. The Chief Commissioner is already mandated under the Victoria Police Act to provide annual reports in relation to certain personnel matters (for example, an incapacity of duty decision or disciplinary actions taken), and public interest disclosures (as required by the *Public Interest Disclosures Act 2012* (Vic)).[59] Under s 11 of the Victoria Police Act, the Minister can request reports relating to Victoria Police to which the Chief Commissioner must comply. The Chief Commissioner is empowered to withhold certain information if it will prejudice an investigation, prosecution or endanger the life and safety of an individual.[60]

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56 *Victoria Police Act 2013* (Vic) s 16.

57 Ibid., s 10.

58 Ibid.

59 Ibid., s 12.

60 Ibid., s 11.

Contemporary policing practices and policy

Victoria Police's contemporary practices are regulated by a number of Acts which dictate the duties, powers and actions of members of the police force. Some laws and the powers they confer on the police force are listed in Table 1.3 below. This is not an exhaustive list of police powers but provides insight into the number of laws that regulate police conduct and confer powers to individual officers.

Table 1.3 Legislation regulating police duties

Act	Summary of Act	Summary of powers conferred
Victoria Police Act 2013 (Vic)	• Governs the objectives, functions and constitution of the Victoria Police • Confers certain powers	• The duties and powers of a constable under common law. • Any duties or powers conferred by this Act, another Act or subordinate instrument. • Powers and processes dealing with unclaimed property. • Powers and processes dealing with disputed property seized without a warrant. • Power to assist Coroner.
Summary Offences Act 1966 (Vic)	• Makes illegal certain offences of a minor nature, and dictates police powers to deal with these	• Police able to direct persons in a public place to move on for breaching the peace, endangering public safety or behaviour that causes or is likely to cause injury or property damage (except protests). • Police able to arrest a person found drunk or drunk and disorderly in a public place.
Crimes Act 1958 (Vic)	• Outlines indictable criminal offences	• Confers powers of arrest without warrant in certain circumstances. • Confers powers to apprehend offenders without warrant in certain circumstances. • Confers entry and search of premises powers without a warrant in certain circumstances. • Allows use of proportionate force in preventing a serious crime for being committed, or to effect an arrest. • Allows certain instances where DNA profile samples can be taken by police officers.
Firearms Act 1996 (Vic)	• Regulates firearm licensing, possession, compliance and sanctions	• Outlines powers of Chief Commissioner in issuing or refusing licences for possession of handguns, long arms and other categories of firearms. • Confers powers with which the Chief Commissioner can require possession of surrender and seizure of firearms. • Powers of search and seizure without warrant, including searching individuals.

Source: *Victoria Police Act 2013* (Vic); *Summary Offences Act 1966* (Vic); *Crimes Act 1958* (Vic); *Firearms Act 1996* (Vic).

Common law also confers powers to the police. For example, there is a duty imposed on police officers at common law to take 'reasonable measures' to prevent an incarcerated person from harming themselves or destroying evidence. The police officer can conduct a 'safety and evidence search' that generally means the officer must explain the reasons for the body search and may require the removal of clothes. Other common law duties

include the power to seize stolen goods from a person (without force, violence or unlawful conduct) and the power to search persons and premises when executing an arrest to take evidence.[61]

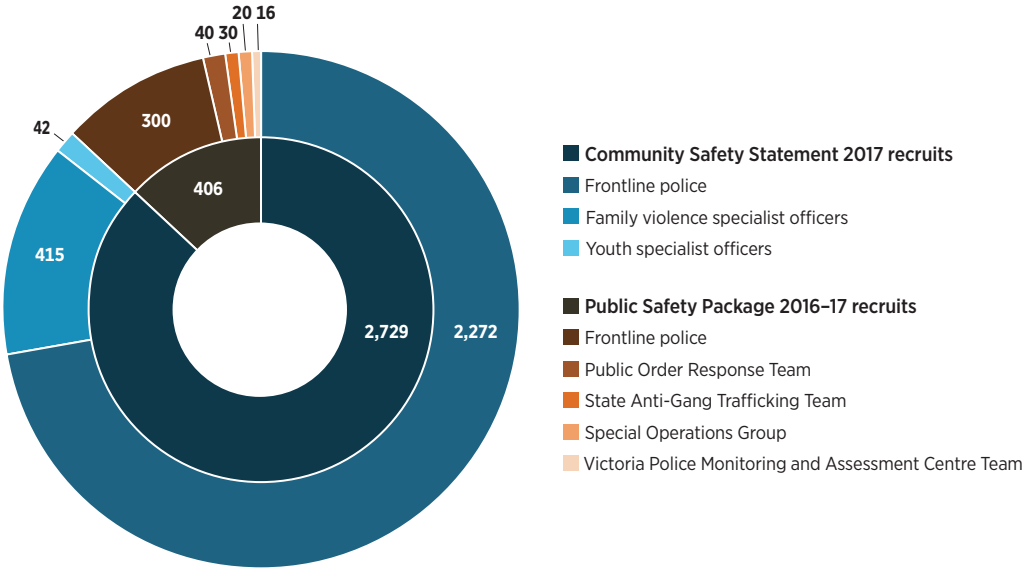
In addition to powers conferred by statute and common law, Victoria Police are expected to act in accordance with the behavioural and professional standards outlined in internal policies, such as the *Code of Conduct* and the *Victoria Police Manual*.[62]

Contemporary policing practices and policy are also guided by organisational strategy and government priority. In its submission to the Inquiry, the Victorian Government stated that it is committed to ensuring Victoria 'is a leader in crime prevention and rehabilitation':

> The government is committed to a continuous reform agenda which seeks to deliver community safety and prevent crime, intervene as early as possible where people are at risk of offending and, where contact with the criminal justice system occurs, ensure that interventions are as positive and rehabilitative as possible.[63]

Recent policy changes that have been implemented to improve community safety included continued funding for frontline police and PSOs. The Victorian Government submitted that since 2017, Victoria Police have recruited an additional 3,135 frontline police.[64]

Figure 1.5 Victoria Police recruitment since 2017



Source: Victorian Government, *Submission 93,* p. 103.

61 Judicial College of Victoria, *8.15 - Police search and seizure powers without a warrant*.

62 Victoria Police, *Procedures and legislation*, 2021, <https://www.police.vic.gov.au/procedures-and-legislation> accessed 21 December 2021.

63 Victorian Government, *Submission 93*, p. 9.

64 Ibid., pp. 103–104.

The Victorian Government stated in its submission that this investment in frontline police, plus the additional recruitment of 100 PSOs and 400 police custody officers, 'increases police responsiveness and visibility'. The Victorian Government asserted that this helps to 'reduce offending and improve feelings of safety among the community'. In this respect, the Victorian Government reports a steady positive increase in community perceptions of safety since 2016–17.[65]

The prioritisation of community-based policing is highlighted in the *Victoria Police Annual Plan 2021–2022*. The Plan outlines key areas of focus and actions that will be taken to meet strategic priorities up to 2022. The Plan outlines a number of priority areas, including community safety and reducing crime. It notes that 'everything Victoria Police does is about community safety and underpins how [they] connect with people in the community'. It further states that despite pandemic-related challenges in the previous year, the organisation has strengthened connections with the public through 'community engagement and public safety operations'.[66]Particular actions include implementing the Neighbourhood Policing Framework and expanding the Aboriginal Youth Cautioning Program to minimise youth contact with the criminal justice system.[67]

Victoria Police also facilitates Portfolio Reference Groups, which are comprised of community stakeholder organisations and bodies that meet quarterly. The Reference Groups are designed to provide advice, feedback and expertise to Victoria Police and facilitate engagement with diverse communities. There are currently nine portfolio groups which include the:

- Aboriginal Portfolio Reference Group
- Community Safety Partnerships Group
- Human Rights Strategic Advisory Committee
- LGBTIQ+ Portfolio Reference Group.[68]

Further, the Victoria Police Community Liaison Officer Program brings together specially trained officers to improve relationships between marginalised groups and law enforcement. There is currently more than 230 officers across the State, including one full-time LGBTIQ+ liaison officer, who are tasked with increasing 'confidence in police through the provision of fair and equitable policing services'. Officers provide a contact point for community members and provide recommendations on the policing needs of marginalised communities.[69]

Similarly, the Aboriginal community liaison officer program is an initiative that aims to facilitate 'a proactive community policing approach that instigates positive change' with

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65 Ibid., pp. 103–104.; Victoria Police, *Victoria Police Annual Plan 2021–2022*, p. 4.

66 Victoria Police, *Victoria Police Annual Plan 2021–2022*, pp. 8–11.

67 Ibid.

68 Victoria Police, *Reference groups*, 2021, <https://www.police.vic.gov.au/reference-groups> accessed 21 December 2021.

69 Victoria Police, *LGBTIQ+ liaison officers*, 2021, <https://www.police.vic.gov.au/LGBTIQ-liaison-officers> accessed 21 December 2021.

the Aboriginal community in Victoria. The objectives of the program include building a foundation of trust, improving understanding and maintaining positive relationships.[70]

Alongside community engagement initiatives, Victoria Police also has powers to issue cautions or diversions to individuals to prevent further contact with the criminal justice system. These include child cautions, adult cautions, drug diversions and cannabis cautioning. Victoria Police has recently amended its policies to lower the threshold to receive a caution and remove the limit on the number of cautions youth can receive before they are charged.[71] This followed successful trials in regional areas.[72]

The approach of contemporary policing in diverting people from the criminal justice system is discussed further in Chapter 5.

1.6 Courts and tribunals

The court and tribunal system in Victoria falls under the responsibility of the judicial arm of government. The role of courts and tribunals are to interpret and apply legislation, imposing sanctions on those who have not complied with the law in a criminal justice matter. The judiciary adjudicates disputes between citizens, and between the state and citizens. Judges and magistrates must uphold the law in performing their duty.

The judicial branch functions independently and impartially from the government:

> In Australia, the Commonwealth Constitution protects judicial independence at both state and federal level through the separation of federal judicial power from the political branches of government. At the state level, this is captured by the *Kable* principle, which was developed to ensure public confidence in the integrity of the state courts and administration of justice… Under the modern approach to the principle, the High Court has required States maintain certain defining characteristics of their judiciaries. These characteristics have been held to include judicial independence and impartiality, fair judicial process, open court, the right to reasons, the maintenance of appropriate judicial discretion, and, for the State Supreme Courts, minimum jurisdiction of judicial review.[73]

There are nine courts and two tribunals that operate in Victoria. Four of these are federal courts, created and empowered by Commonwealth legislation with federal jurisdiction. Two of these are state tribunals, being the Victims of Crime Assistance Tribunal and the Victorian Civil and Administrative Tribunal. The remaining five courts, including the specialist courts and divisions they contain, are Victorian courts.

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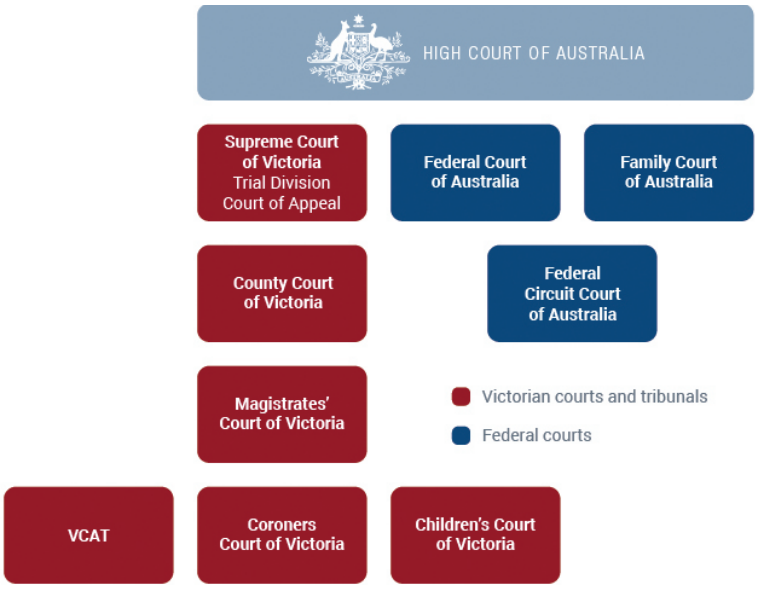
70 Ibid.

71 Victorian Government, *Submission 93*, p. 53.

72 Tammy Mills, 'Criminal charges over minor offences and police to change tack on youth cautions', *The Age*, 9 September 2021, <https://www.theage.com.au/national/victoria/criminal-charges-over-minor-offences-prod-police-to-change-tack-on-youth-cautions-20210908-p58pum.html> accessed 12 January 2022.

73 Independent Review, *Review of Sexual Harassment in Victorian Courts Report and Recommendations: Appendix 3: Judicial independence, accountability and the role of Heads of Jurisdictions*, report prepared by Dr Helen Szoke, report for Victorian Government and the Chief Justice of the Supreme Court of Victoria and the Chair of the Courts Council, 2021, p. 3.

Figure 1.6 Hierarchy of courts and tribunals operating in Victoria



Source: Law Library Victoria, *Victorian Court Hierarchy*, <https://www.lawlibrary.vic.gov.au/understanding-law/courts/victorian-court-hierarchy> accessed 23 December 2021.

A brief description of the primary courts and tribunals dealing with criminal matters, decision-makers and the issues of law that they deal with is outlined in Table 1.4

Table 1.4 The criminal jurisdiction and constitution of courts and tribunals operating in Victoria

Court	Governing law	Title of officers that appear	Jurisdiction, functions and roles in the criminal justice system
High Court of Australia	*High Court of Australia Act 1979* (Cth)	• Justice	• Federal court and the highest court in Australia • Hears final appeals in criminal matters from all state courts
Supreme Court of Victoria	*Supreme Court Act 1986* (Vic)	• Chief Justice • President Judge	• Highest state court, hears the most serious criminal matters (ie. treason, murder) • Two divisions – Court of Appeal, that hears criminal appeals from the lower courts, and the Trial Division, which conducts jury trials for criminal offences
County Court of Victoria	*County Court Act 1958* (Vic)	• Chief Justice • Judge	• State court that hears Commonwealth and State criminal offences before a jury • Hears serious criminal matters (e.g. dangerous driving, drug trafficking, fraud) • Hears criminal appeals from the Magistrates' Court • A specialised County Koori Court also exists

Court	Governing law	Title of officers that appear	Jurisdiction, functions and roles in the criminal justice system
Magistrates' Court of Victoria	*Magistrates' Court Act 1989* (Vic)	• Magistrate • Judicial registrar [a]	• Lowest court in state hierarchy • Hears minor criminal offences (summary offences), certain criminal offences that the law allows a magistrate to hear (indictable offences heard summarily), traffic offences and fines • Diversion programs are formalised in this court • Has specialist courts and tribunals, including the Victims of Crime Assistance Tribunal, Koori Court and Drug Court
Coroners Court of Victoria	*Coroners Act 2008* (Vic)	• Coroner	• State court that independently investigates violent, unnatural and unexpected deaths • Aims to reduce preventable deaths • Investigates matters rather than having adversarial functions (no trials)
Children's Court of Victoria	*Children, Youth and Families Act 2005* (Vic)	• Magistrate	• State court that hears criminal matters in which the accused is under the age of 18 • Also has a Children's Koori Court that deals with criminal matters in which the accused is Aboriginal and under the age of 18 • Does not hear sexual offences
Victims of Crime Assistance Tribunal	*Victims of Crime Assistance Act 1996* (Vic)	• Members	• Determines requests for financial restitution for victims of crime • There is a Koori List targeted towards Aboriginal victims of crime and ensuring access to the system

a. Empowered to determine certain matters by the *Magistrates' Court (Judicial Registrars) Rules 2015* (Vic).

Note: The statute that governs the establishment and functions of the bodies have been listed. Most bodies are also subject to laws and statutory rules that govern procedure, evidence and matters that judicial officers can deal with.

Source: High Court of Australia, *Role of the High Court,* <https://www.hcourt.gov.au/about/role> accessed 7 January 2022; Supreme Court of Victoria, *Judges*, 2021, <https://www.supremecourt.vic.gov.au/about-the-court/our-judiciary/judges> accessed 23 December 2021; Magistrates' Court of Victoria, *The court system*, <https://www.mcv.vic.gov.au/court-system> accessed 23 December 2021; County Court of Victoria, *Court divisions,* <https://www.countycourt.vic.gov.au/learn-about-the-court/court-divisions> accessed 23 December 2021; Magistrates Court of Victoria, *Criminal matters*, <https://www.mcv.vic.gov.au/criminal-matters> accessed 23 December 2021; Coroners Court of Victoria, *What we do*, 2018, <https://www.childrenscourt.vic.gov.au/about> accessed 23 December 2021; Children's Court of Victoria, *Judicial officers,* 2021, <https://www.childrenscourt.vic.gov.au/judicial-officers> accessed 23 December 2021; Children's Court of Victoria, *About the Children's Court,* 2021, <https://www.childrenscourt.vic.gov.au/about> accessed 23 December 2021; Victims of Crime Assistance Tribunal, *About the Tribunal: Our Role,* <https://www.vocat.vic.gov.au/about-tribunal/our-role> accessed 23 December 2021; Victims of Crime Assistance Tribunal, *Determining an Application: Koori Victims of Crime,* <https://www.vocat.vic.gov.au/determining-an-application/koori-victims-crimes> accessed 23 December 2021.

In exercising their jurisdiction and performing their statutory duties, the courts are supported by Court Services Victoria. Court Services Victoria was established as an independent statutory body corporate by the *Court Services Act 2014* (Vic). The Act specifically preserves the independence of the agency from the government.[74] This means that the agency functions independently but is accountable to the parliament for the manner in which it carries out its operations.[75]

74 *Victorian Government, Understanding intersectionality,* <https://www.vic.gov.au/understanding-intersectionality> accessed 11 January 2022.

75 Court Services Victoria, *About CSV*, 2021, <https://www.courts.vic.gov.au/about-csv> accessed 23 December 2021.

Court Services Victoria is tasked with supporting the 'performance of the judicial, quasi-judicial and administrative functions' of all state courts and tribunals, as well as to support the Judicial Commission Victoria and the Judicial College of Victoria to perform their functions.[76]

Court Services Victoria is currently aiding the implementation of the Victorian Government's *Justice Recovery Plan for the Victorian Court System*, which seeks to respond to the impacts of the COVID-19 pandemic on the State's courts.[77]

The Judicial College is an independent body designed to support the judiciary. It was created under the *Judicial College of Victoria Act 2001* (Vic) and provides legal and educational resources that contribute to the skill set of judges, coroners, members and other judicial officers.[78] Publications include:

- Bench Books, which feature explanatory commentary on different facets of the justice system
- Sentencing Manuals, which contain sentencing case summaries and assist with precedents and sanction consistency.[79]

The Judicial Commission is a key accountability body created by the *Constitution Act 1975* (Vic). It is an independent body that seeks to 'guard against any erosion in public confidence' in the judicial system, in order to ensure 'the high standard of conduct the Victorian public expects of its judiciary is maintained'.[80] The Commission receives and investigates complaints about the behaviour of judges, magistrates, members and other judicial officers from the public or from the legal profession. Should it choose to, the Judicial Commission can pass on a complaint to the head of the jurisdiction to which the officer belongs, with recommendations for action. The Head may counsel the judicial officer, advise on future behavioural standards and take other actions. They must then report on the outcome and reasons for that outcome to the complainant.[81]

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76 Victorian Government, *Understanding intersectionality*.

77 Victorian Government, *Submission 93*, p. 64.

78 Judicial College of Victoria, *About us*, n.d., <https://www.judicialcollege.vic.edu.au/about-us> accessed 23 December 2021.

79 Judicial College of Victoria, *Resources*, n.d., <https://www.judicialcollege.vic.edu.au/resources> accessed 23 December 2021.

80 Judicial Commission of Victoria, *About the Judicial Commission*, 2021, <https://www.judicialcommission.vic.gov.au/about-the-judicial-commission> accessed 23 December 2021.

81 Victoria Police, *Victoria Police Annual Plan 2021–2022*, 2021.

2 Statistical and demographic snapshot

At a glance

This Chapter provides a statistical and demographic snapshot of crime in Victoria and within the operation of the criminal justice system. This includes data relating to sentencing trends, increased remand rates, overrepresented demographics and recidivism rates—both in general and as identified in particular cohorts.

Key issues

- Recorded crime rates between 2012 and 2021 increased by 21%.
  - Increases were recorded in all offence categories except for property and deception, and public order and security offences.
  - The largest increase in recorded crime was noted in justice procedure offences (breach of court orders) and in the other offences category, which encompasses non-compliance with public health orders issued during the COVID-19 pandemic.
- Recorded crime rates do not accurately reflect the rate of criminal offending in Victoria due to under-reporting.
  - Personal crime and household crime victimisation rates have decreased.
  - Household crime victims are more likely to report offences to Victoria Police than personal crime victims.
  - Over 50% of people who experience a personal crime do not report the offending to law enforcement.
- Imprisonment sentencing rates have increased since 2004–2005 across all levels of court in Victoria, with stakeholders suggesting this is due to increased remand rates and an increased use of time served sentences.
- Victoria's prison population has increased by 58% from 2010 to 2020, noting a large rise in the number of unsentenced people held in custody. This was despite an 11.8% decrease in the 2019–2020 year, due to the impacts of COVID-19.
  - The number of unsentenced people received into custody or comprising the prison population has increased over the past 10 years.
  - Women, Aboriginal Victorians, young adults and people aged 50 years and over have been identified as overrepresented cohorts.
- Recidivism rates remain high and disproportionately affect certain cohorts.
  - Between 2007 and 2017, 43% of offenders overall were recorded for more than one offence with 6.3% recorded for more than 10 offences.

- Women tend to have lower rates of recidivism.
- Aboriginal Victorians have higher rates of recidivism than the general prison population.
- The majority of youth offenders do not reoffend; however, there is a correlation between how young a person is when first sentenced, and the likelihood of reoffending.

Recommendation

Recommendation 1: That the Victorian Government work with key stakeholders across the criminal justice system to improve data collection, accessibility and transparency throughout the system. This should encompass:

- providing relevant support to Victoria Police to collect and report on data which is accessible by the Crime Statistics Agency under s 7 of the *Crime Statistics Act 2014* (Vic), relating to:
  - the use of stop and search powers and relevant information about that practice
  - the use and number of diversions, cautions or fines individually issued on contact with law enforcement
  - the demographics of those who interact with the criminal justice system
- requiring the Department of Justice and Community Safety, to provide annual updates on:
  - the number of healthcare services offered in publicly- and privately-operated Victorian prisons for the reporting period
  - document the number of incarcerated persons (deidentified) who interact with healthcare services and the period they are engaged
  - COVID-19 impacts, including applying control measures and emergency management days, with a view to identifying the impact of these on:
    1. Prison conditions, the wellbeing of incarcerated people and their families
    2. Incarcerated people's access to rehabilitative programs, health and legal services and the courts.
  - ongoing analysis to inform the ongoing management of the COVID-19 pandemic, including how to minimise disruption caused by control measures. This includes examining other institutions and how they manage vulnerable people.
- continued improvement on the collection and reporting of data on other matters of criminal justice, including:
  - recidivism rates across the criminal justice process, including for incarcerated people released into the community without supervision, those released on community correction orders, parolees, those who re-offend while bailed for trial and for those who re-offend while bailed for sentence.

2.1 Note on data and terminology

Multiple agencies collect, analyse and publish information relating to the Victorian criminal justice system. These bodies differ in their methodologies and the reporting periods they cover. Throughout this Chapter, data used is accompanied by explanatory notes or memorandums outlining an agency's methodology, reporting periods, data gaps and social or legislative changes that affect the integrity of the data. Limitations with data include not just the clarity or comparability of data but also the lack of data collection. The Committee believes that important data sets relating to the criminal justice system are currently unavailable.

To provide clarity all data sources are extensively referenced throughout the report. This Chapter relies on data from the following agencies. Some submissions and public hearing witnesses also referred to data from these sources:

- Crime Statistics Agency (CSA)—collates and presents data about crime characteristics as recorded by Victoria Police in the Law Enforcement Assistance Program.[1]
- Sentencing Advisory Council (SAC)—collects, analyses and presents data on sentencing trends in Victoria from the Magistrates' Court Courtlink system, Court Services Victoria, notifications from the Court of Appeal and from the Australasian Legal Information Institute.[2]
- Corrections Victoria—publishes data on prisoner and offender population statistics and characteristics such as overrepresented cohorts. Data can be collected via survey or through their own records as the body responsible for prison management in Victoria.[3]
- Australian Bureau of Statistics (ABS)—federal statistical agency that provides data across a number of fields, including prison populations, crime victimisation rates and police reporting rates. Each source is accompanied by a comprehensive methodology outlining the scope of data collection, which varies depending on each release. Methodologies include national household survey results and national prisoner censuses.[4]
- The Committee has worked to ensure that the statistics and data trends identified in this Chapter are accurate and reflective of the current state of the Victorian criminal justice system. In relying on primary sources, information submitted to the Inquiry

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1 Crime Statistics Agency, *Explanatory notes*, <https://www.crimestatistics.vic.gov.au/about-the-data/explanatory-notes> accessed 9 February 2022.

2 Sentencing Advisory Council, *SACStat Technical Notes*, 2021, <https://www.sentencingcouncil.vic.gov.au/sacstat/user_information/technical_notes.html> accessed 9 February 2022.

3 Corrections Victoria, *Women in the Victorian prison system*, Department of Justice and Community Safety - Corrections Victoria, Melbourne, 2019, p. 3.

4 Australian Bureau of Statistics, *Crime Victimisation, Australia methodology*, 2021, <https://www.abs.gov.au/methodologies/crime-victimisation-australia-methodology/2019-20> accessed 9 February 2022. Australian Bureau of Statistics, *Prisoners in Australia methodology*, 2021, <https://www.abs.gov.au/methodologies/prisoners-australia-methodology/2021> accessed 9 February 2022.

- and evidence heard in public hearings, different reporting periods may be discussed to provide overviews or criminal offending analysis, recidivism rates, sentencing trends and prison populations.
- For the purposes of this Chapter, 'reported' or 'recorded crime' refers to criminal offences that are reported to Victoria Police and therefore captured as recorded criminal incidences. 'Actual crime' refers to criminal incidences that have occurred but have not been reported to law enforcement. Surveys undertaken by the ABS enable people to note if they have been a victim of crime, and whether they had reported this incidence to the police. The Committee notes distinguishing terminology is vital given that not all people who witness or are victims of a crime report this to the police. As some statistical data, such as reported by the Crime Statistics Agency, only rely on incidences recorded by Victoria Police to reflect criminal offending, it is important that police reporting rates and victimisation rates are acknowledged.
- The Committee notes that the limitations with data collection discussed above can make it harder to achieve accessibility and transparency in relation to our system of justice. In the Committee's view data collection and publishing provides the public with insight into how the criminal justice system is functioning, and facilitates the transparency and accountability of government, law enforcement, the judiciary and the corrections system. It enables government agencies to understand how elements of the criminal justice system interact and to identify trends, gaps and recurring issues.
- The Committee believes that broader data collection and public reporting is needed to improve the disaggregation of data and statistics in relation to certain areas of the criminal justice system. It will help foster accountability and transparency and will inform the ongoing reform and improvement of the criminal justice system across all areas.

RECOMMENDATION 1: That the Victorian Government work with key stakeholders across the criminal justice system to improve data collection, accessibility and transparency throughout the system. This should encompass:

- providing relevant support to Victoria Police to collect and report on data which is accessible by the Crime Statistics Agency under s 7 of the *Crime Statistics Act 2014* (Vic), relating to:
  - the use of stop and search powers and relevant information about that practice
  - the use and number of diversions, cautions or fines individually issued on contact with law enforcement
  - the demographics of those who interact with the criminal justice system
- requiring the Department of Justice and Community Safety, to provide annual updates on:
  - the number of healthcare services offered in publicly- and privately-operated Victorian prisons for the reporting period
  - document the number of incarcerated persons (deidentified) who interact with healthcare services and the period they are engaged
  - COVID-19 impacts, including applying control measures and emergency management days, with a view to identifying the impact of these on:
    1. Prison conditions, the wellbeing of incarcerated people and their families
    2. Incarcerated people's access to rehabilitative programs, health and legal services and the courts.
  - ongoing analysis to inform the ongoing management of the COVID-19 pandemic, including how to minimise disruption caused by control measures. This includes examining other institutions and how they manage vulnerable people.
- continued improvement on the collection and reporting of data on other matters of criminal justice, including:
  - recidivism rates across the criminal justice process, including for incarcerated people released into the community without supervision, those released on community correction orders, parolees, those who re-offend while bailed for trial and for those who re-offend while bailed for sentence.

Further discussion on these recommendations can be found in Chapters 5, 10, 11 and 12.

2.2 Criminal offending rates in Victoria

This Section provides an overview of the number of criminal offences recorded in Victoria, including the number of reported victims (victimisation rates) and how many are reported to law enforcement (police reporting rates). It examines evidence from Inquiry stakeholders who discussed what factors are contributing to trends in Victoria's criminal offending rates. The Section concludes with a snapshot of local government areas which have the greatest prevalence of recorded offending throughout Victoria.

2.2.1 Recorded crime rates

Recorded crime rates measure the number of criminal offences that are liable for penalties in the Victorian criminal justice system. This can be a criminal act or omission. Whilst this data set focuses on how many crimes were recorded in the State, Section 2.2.2 elaborates on these figures by counting the number of self-reported victims of crime and the number of crimes that are reported to law enforcement.

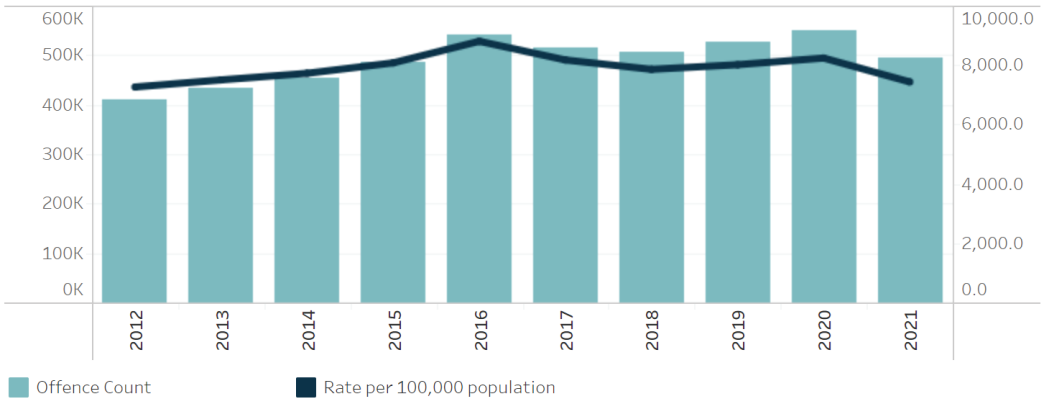
The Crime Statistics Agency Victoria (CSA) publishes statistics on criminal incidents and offending throughout the State. Data used from the CSA throughout this Chapter is presented using years ending in September.

Statistics obtained from the CSA shows that over the 10 year period from 2012 to 2021, recorded crime rates increased by 21% from 410,129 to 496,420 offence counts. As Figure 2.1 demonstrates, the rates of recorded offences have fluctuated over this period. The following is noted:

- The highest recorded crime offence count was noted in 2020 where 551,388 offences were recorded. The second highest offence count was 2016 with 543,190 offences recorded.
- The highest recorded crime rate per 100,000 population was noted in 2016, at 8,799.2. The second highest occurred in 2020, with a recorded crime rate of 8,233.8 per 100,000 population.
- There was a 10% decrease noted in offence counts between 2020 and 2021 with 496,260 recorded crimes in the year ending September 2021. The CSA explicitly notes that from early 2020, responses to COVID-19, including new breaches of public health order crimes and restrictions on people's movement 'had a flow on effect for Victorian crime'. [5] The Committee notes that this decrease may be a result of the pandemic and not reflective of wider trends.

5 Crime Statistics Agency, *Recorded Offences: Key movements in the number and rate of offences recorded*, 2021, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-2> accessed 25 January 2022.

Figure 2.1 Recorded criminal offence counts and rate per 100,000 population, September 2012–2021



Source: Crime Statistics Agency, *Recorded Offences: Key movements in the number and rate of offences recorded*, 2021, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-2> accessed 25 January 2022.

In the CSA's reporting, recorded crime data is divided and subdivided into categories identifying the specific offences committed. For example, Category A is crimes against the person and encompasses offences such as homicide, assault and other crimes perpetrated against an individual. The CSA provides breakdowns of the incidences of each crime and how they proportionally contribute to total overall recorded crimes. The Committee notes the following trends by offence-type identified by the CSA between September 2012 to September 2021:

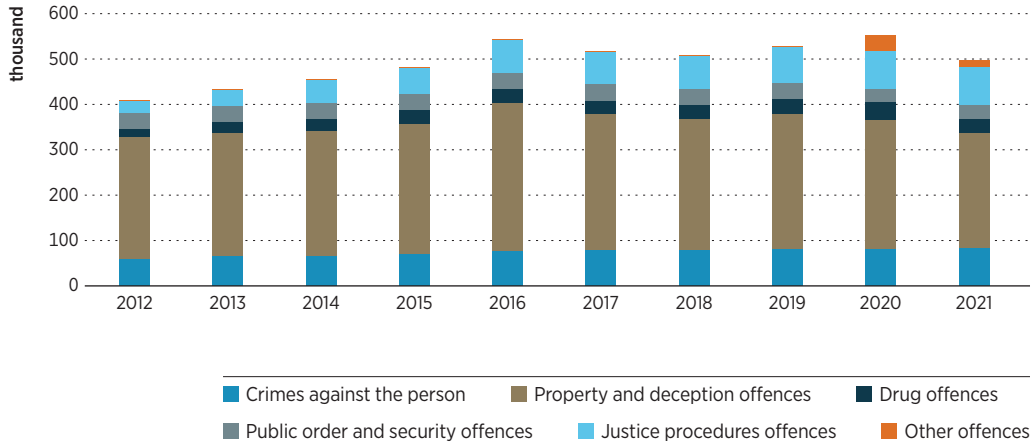
- Rates of recorded crime per 100,000 in population grew 2.4%. This meant that in September 2021, 7.430.6 offences occurred for every 100,000 Victorian residents.
- Crimes against the person increased from 60,277 to 84,756. Increases were observed in the rates of:
  - assault and related offences (35,005 to 46,081)
  - sexual offences (8,494 to 14,731)
  - stalking, harassment and threatening behaviour (8,798 to 14,406).
- Property and deception offences decreased from 267,024 instances to 251,375. All subdivisions, including arson and property damage, experienced a drop in numbers, although theft was relatively stable from 145,206 in 2012 to 144,838 in 2021.
- Justice procedure offences[6] jumped 213.9%, from 26,669 to 83,705 over the ten year reporting period.
- The drug offence count increased from 19,794 to 32,860 in the year ending September 2021.

6 Justice procedure offences refers to breaches of court orders, such as family violence or intervention orders, or bail conditions. More information on classifications can be found at Crime Statistics Agency, *Offence classification,* 2021, <https://www.crimestatistics.vic.gov.au/about-the-data/classifications-and-victorian-map-boundaries/offence-classification>

- Public order and security offences (i.e., public nuisance offending and public security) decreased by 4,706 counts.[7]
- Other offences, encompassing regulatory driving and miscellaneous offending, increased from 1,988 in 2012 to 13,893 in 2021. This category reached a high of 33,980 in 2020[8] due to offences for breaching public health orders through the COVID-19 pandemic, which constituted 96.1 % of the 2020 figure and 89.6% from 2021.[9]

The fluctuations in individual criminal offence divisions from September 2012 to September 2021 are displayed in Figure 2.2.

Figure 2.2 Recorded crimes by offence category in Victoria, 2012–2021



Source: Source: Legislative Council Legal and Social Issues Committee. Data from Crime Statistics Agency, *Recorded Offences: Offences Recorded - Tabular Visualisation*, 2021, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-2> accessed 25 January 2022.

The Committee heard from Fiona Dowsley, Chief Statistician at CSA, who told the Inquiry that in relation to criminal offending in Victoria overall, major offences against private citizens and household property have either stablished or decreased in the past decade:

> Across major offences against private citizens and household property, the occurrence of crime in the community has either been stable or decreasing over about the past decade according to representative surveys of the community. An exception to this is digitally enabled online crimes, such as online fraud and scams. They continue to grow as we embrace the online environment. But overall things have been either decreasing or stable across major categories.[10]

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7 Crime Statistics Agency, *Recorded Offences: Offences Recorded - Tabular Visualisation*, 2021, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-2> accessed 25 January 2022.

8 Ibid.

9 Crime Statistics Agency, *Police-recorded crime trends in Victoria during the COVID-19 pandemic: update to end of December*, 2021, <https://www.crimestatistics.vic.gov.au/research-and-evaluation/publications/police-recorded-crime-trends-in-victoria-during-the-covid-19-1> accessed 25 January 2022.

10 Fiona Dowsley, Chief Statistician, Crime Statistics Agency, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, pp. 1–3.

Fiona Dowsley further noted that in the ten year period between 2011 and 2020 offending related to family violence, breach of orders, drug use and possession had increased.[11]

Stakeholders told the Inquiry that numerous factors contributed to the change in criminal offending numbers, which are discussed in Section 2.2.3.

2.2.2 Victimisation rates and police reporting trends

Victimisation rates refer to the rates in which people identify as having experienced a criminal offence. The offence could be physical and against the person (for example, physical assault) or through property (for example, malicious property damage).

The ABS collects data on victimisation rates—as well as police reporting trends—through Crime Victimisation Surveys.

Crime Victimisation Surveys assist in collating data on both federal and state/territory incidents, victimisation rates and police reporting rates for the following offences:

- assault
- threat
- robbery
- break-in/burglary
- theft/stealing
- property damage.[12]

Crime Victimisation Surveys are a topic within the annual Multipurpose Household Survey issued to Australian households each financial year. The survey covers people aged 15 years or over who lived in private dwellings located in urban, rural, remote and very remote parts of the country. ABS methodology is complex as surveys are completed within the financial year, but the dates that constitute 'the previous 12 months' vary depending on the precise date within the financial year that the respondent completes their survey. Therefore, ABS analysis focusses on 2018–2020 data to ensure all respondents' 12-month periods are encompassed.[13]

Data is measured by the number of people who identify as victims of crime (victimisation rates) and the number of crimes that are reported to authorities (police reporting rates). This provides an overview of the number of criminal incidences that people report to law enforcement (reported crime) as opposed to the crime that actually occurs (that surveyed persons note as occurring, but that they did not report to law enforcement). Collecting both victimisation rates and reported incidents facilitates

11 Ibid.

12 Australian Bureau of Statistics, *Crime Victimisation, Australia*, 2021, <https://www.abs.gov.au/statistics/people/crime-and-justice/crime-victimisation-australia/2019-20#state-and-territory-statistics> accessed 27 January 2022.

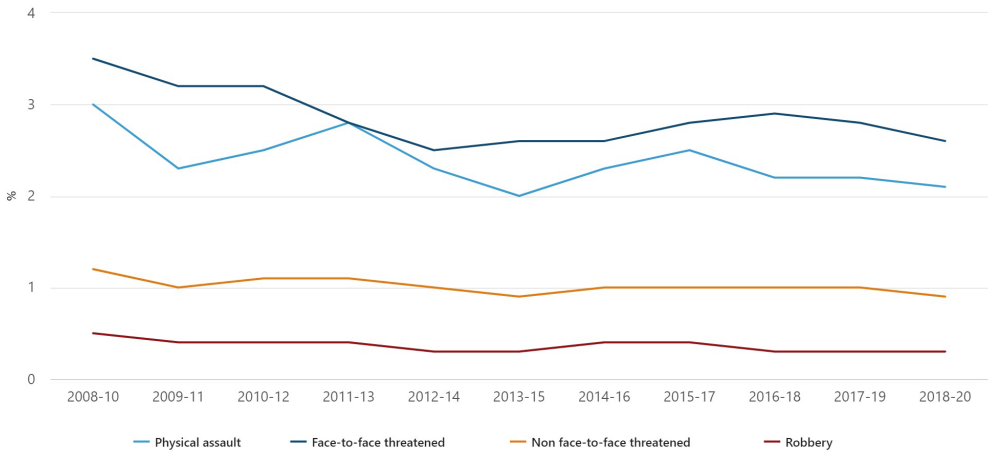
13 Australian Bureau of Statistics, *Crime Victimisation, Australia methodology*.

comparison of recorded crime numbers, the number of identified victims and matters that law enforcement deal with. The Committee notes that more incidences of criminal offending occur than is reported and therefore recorded.

Personal crimes

Survey data obtained through the ABS Crime Victimisation Surveys shows a decrease in personal crime victimisation rates since the 2008–2010 pooled data reporting period and 2018–2020. It reports a decrease in specific personal crimes, such as physical assault (3.0% to 2.1%), face-to-face threatened assault (3.5% to 2.6%) and robbery (0.5% to 0.3%). Although not specified in the ABS' analysis but apparent from statistics collected, the incidences of non-face-to-face threatened assault decreased by 0.3%, from 1.2% in 2008–2010 to 0.9% in 2018–20.[14] This indicates an overall decrease in victimisation rates in four offending categories over ten years. Figure 2.3 demonstrates these trends as observed by the ABS.

Figure 2.3 Victimisation rates for selected personal crimes in Victoria, 2008–2010 to 2018–2020



Note: ABS attaches the following notes to the above data. Victimisation data refers to the total number of victims aged 15 years old and above who experienced a crime, in proportion to the total population of those 15 years and above. Estimates have been provided from Crime Victimisation Surveys from two successive reference periods. Survey error must be considered.

Source: Australian Bureau of Statistics, *Crime Victimisation, Australia*, 2021, <https://www.abs.gov.au/statistics/people/crime-and-justice/crime-victimisation-australia/2019-20#state-and-territory-statistics> accessed 27 January 2022.

In isolating the most recent survey results, the Committee notes that data collected by the ABS for the 2018–2020 period shows that the percentage of people who experienced a personal crime and reported the offending to law enforcement was less than 50%:

- 2.1% of persons (112,300) experienced physical assault, of which 49% reported the most recent incident to the police
- 2.6% of persons (136,300) experienced face-to-face threatened assault, of which 32% reported the most recent incident to the police

14 Australian Bureau of Statistics, *Crime Victimisation, Australia*.

- 0.9% of persons (47,800) experienced non-face-to-face threatened assault
- 0.3% of persons (13,800) experienced robbery, of which 48% reported the most recent incident to the police.[15]

This analysis suggests that more people self-report experiencing crimes than report them to the police. CSA data referred to in Section 2.2.1 only reflects those crimes reported to Victoria Police. The finding that people do not report all crimes experienced suggests that there are more incidences of criminal offending than recorded crime statistics show. This can be attributed to victims not reporting all criminal offending incidences to the police. The ABS notes that the trends in victimisation rates and reporting data were 'similar' to rates observed over the 2016–2018 reference period.[16] The Committee therefore notes that more than 50% of people who experience crimes do not report them to the police. These crimes are not captured in official recorded crime statistics.

Household crimes

The most recently available ABS survey data reports higher police reporting rates for property and household crimes than personal crimes. This suggests that victims of household crimes are more likely to report offences to Victoria Police, as evident from data pooled over the 2018–2020 period:

- 2.3% of households (56,800) experienced a break-in, of which 75% reported the most recent incident to the police
- 1.6% of households (39,600) experienced an attempted break-in, of which 41% reported the most recent incident to the police
- 0.6% of households (15,000) experienced motor vehicle theft, of which 93% reported the most recent incident to the police
- 3.0% of households (75,200) experienced theft from a motor vehicle, of which 56% reported the most recent incident to the police
- 4.7% of households (118,000) experienced malicious property damage, of which 50% reported the most recent incident to the police
- 2.1% of households (52,500) experienced other theft, of which 44% reported the most recent incident to the police.[17]

The ABS made specific reference to decreased victimisation rates for all above listed crimes, except for break-in and motor vehicle theft offences. Statistics demonstrate these have remained stable with only some fluctuations, when compared to the previous reference period (2016–2018) and the ten year reference period (2008–2010). These rates are set out in Table 2.1.

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15 Ibid.

16 Ibid.

17 Ibid.

Table 2.1 Household crime victimisation rates, selected reference periods

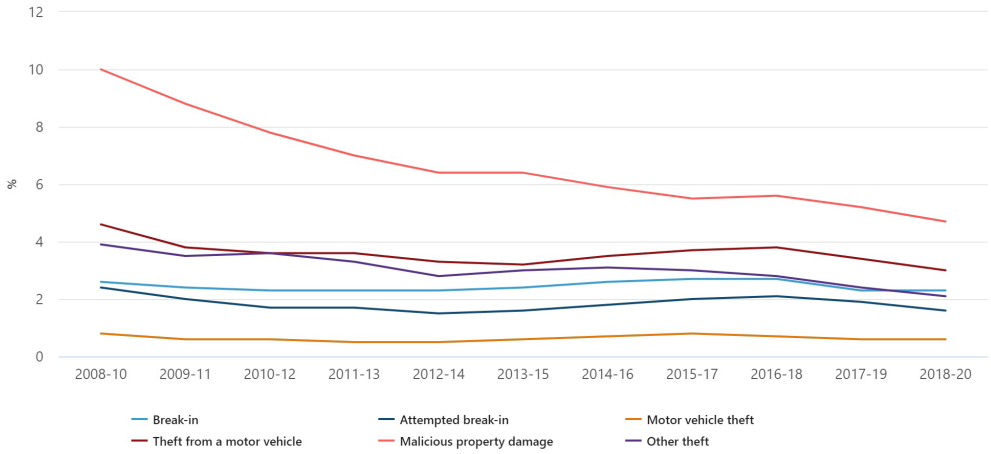
Offence	2008–2010 (%)	2016–2018 (%)	2018–2020 (%)
Attempted break-in	2.4	2.1	1.6
Theft from a motor vehicle	4.6	3.8	3.0
Malicious property damage	10.0	5.6	4.7
Other theft	3.9	2.8	2.1
Break-in	2.6	2.7	2.3
Motor vehicle theft	0.8	0.7	0.6

Note: Reference periods were selected to allow identification of trends within pooled data over a decade (between 2008–2010 and 2018–2020) as well as the previous survey reference periods of 2016–2018.

Source: Legislative and Social Issues Committee. Data from Australian Bureau of Statistics, *Crime Victimisation, Australia*, 2021, <https://www.abs.gov.au/statistics/people/crime-and-justice/crime-victimisation-australia/2019-20#state-and-territory-statistics> accessed 27 January 2022.

Figure 2.4 charts the overall trend in household crime over pooled data for the past 10 years.

Figure 2.4 Victimisation rates for selected household crimes in Victoria, 2008–2010 to 2018–2020



Note: ABS attaches the following notes to the above data. Victimisation data refers to the total number of victims aged 15 years old and above who experienced a crime, in proportion to the total population of those 15 years and above. Estimates have been provided from Crime Victimisation Surveys from two successive reference periods. Survey error must be considered.

Source: Australian Bureau of Statistics, *Crime Victimisation, Australia*, 2021, <https://www.abs.gov.au/statistics/people/crime-and-justice/crime-victimisation-australia/2019-20#state-and-territory-statistics> accessed 27 January 2022.

When asked about the gap between recorded crime and reported crime, Fiona Dowsley told the Committee that it 'varies significantly' due to structural incentives to report property crimes versus the relationship of the offender and victim in personal criminal offending:

> So, for example, if you are looking at something like motor vehicle theft, the gap is very small because there is a very strong structural incentive for people to report those crimes. It is required for insurance et cetera, so the reporting rate is extremely high.

> The closer the incident is in terms of the offender and victim it tends to be a lower reporting rate. So interpersonal assaults, for example, have one of the lower reporting rates. So depending on the type of crime, it will vary. We actually have some really good ways of measuring that by comparing data from crime victimisation surveys, so where people are surveyed about what they have actually experienced versus what they say they report and what comes through the system.[18]

Referring to the ABS Crime Victimisation Surveys, the Victorian Government submitted that the experiences of Victorians reflect wider offending and reporting trends:

> According to representative surveys of Victorians' personal and household experience of criminal victimisation, major offences against person and property crime in the community has been decreasing or relatively stable over the past 10 years ...
>
> These trends have been seen in other Australian states and territories, and in most international liberal democracies, where a drop in experiences of crime has been consistently observed over the last decade. There are broad-ranging socio-economic contributors to these declines. Actual experience of crime in the community is frequently disconnected from community perceptions of crime, however, with those least at risk of crime often most fearful.[19]

The Committee notes there is a considerable gap between crimes recorded by Victoria Police and the actual crimes that occur. This is based on ABS data obtained via household surveys where respondents note that they have experienced a crime, and whether they reported it to law enforcement. This means that CSA data, which is limited to Victoria Police records, does not accurately reflect the state of criminal offending in Victoria because of this wider trend of victims not reporting criminal incidences to law enforcement.

Some factors contributing to the reluctance of victims to report crimes (also known as 'underreporting') are discussed in Chapters 5, 7 and 8.

2.2.3 Changes in crime reporting and recording

In its submission to the Inquiry, the Victorian Government noted that the increase in the Victorian crime rate is apportionable to:

- a potential increase in the rate where crimes are recognised and reported to the police by members of the community
- an increase in police resources, which means greater visibility, availability to take reports and increased prevention
- changes in reporting mechanisms, such as the new Police Assistance Line, which enables people to report property and non-urgent crimes.[20]

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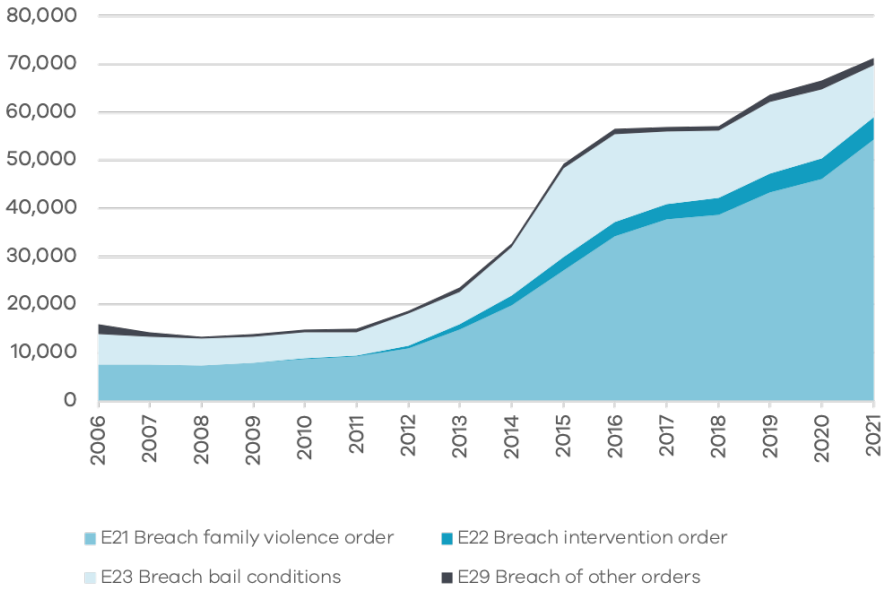
18 Fiona Dowsley, *Transcript of evidence*, p. 7.

19 Victorian Government, *Submission 93*, pp. 24–25.

20 Ibid., pp. 25–26.

Its submission canvassed the introduction of family violence intervention orders and family violence safety notices as indictable offences under the *Family Violence Protection Act 2008* (Vic). In 2012, amendments[21] to the Act further criminalised non-compliance offending.[22] The Victorian Government noted that breach of orders offences 'routinely shows the highest increases in recorded crime statistics', as shown below.[23]

Figure 2.5 Breach of orders in Victoria, year ending March 2021



Source: Victorian Government, *Submission 93*, p. 27.

Fiona Dowsley from the CSA also noted the rise in family violence related offending and criminalised breaches of orders. She attributed this to an increased focus on family violence incidents, stating:

> family violence related offending, criminalised breaches of orders, drug use and possession offences have all increased over that time[24] and driven growth in the number of people in corrections custody. The number of arrests and recorded summons has increased over the past 10 years for breaches of orders and to a lesser extent for drug use and possession offences. Excluding the COVID-19-related period, which has been very disrupted, the number of arrests and summons related to assaults has also been steadily increasing over the past decade, a significant proportion of that has been related to family violence. Arguably that focus on addressing family violence, combinedwith the cultural and justice system impact of the royal commission, has contributed to consistent growth in the number of family violence incidents overall reported to, and recorded by, police over the past decade. That has in turn increased justice system demand driven by family violence offending.[25]

21 Thomas Wain, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*.

22 Ibid.

23 Victorian Government, *Submission 93*, p. 27.

24 The time period referenced is 2011 to 2020.

25 Fiona Dowsley, *Transcript of evidence*, p. 3.

Professor Arie Freiberg, Chair of the SAC, told the Committee that researchers preparing the 2016 SAC report, *Victoria's Prison Population 2005 to 2016,* identified a trend in the imposition of custodial sentences for offences against the person:

> The researchers also found that sentenced prisoners were most likely to be in prison for an offence against the person—these are the people who are more likely to go to jail—and we have seen the increasing number of sexual assaults, and that has been a major driving factor over the last few years. The number of principal proven offences for injuries has tripled between 2005 and 2015, and they are a major factor. So we have got the minor offences as much as the growing number of offences against the person.[26]

The report found that between 2005 and 2015, principal proven offences 'more than tripled' (from 210 prisoners at the end of 30 June 2005 to 672 by 30 June 2015) [27] with sentenced people most likely to be imprisoned for an offence against the person. Where people were imprisoned for an offence against the person, this was most likely a sexual assault offence.[28] The SAC stated:

> the number of sentenced prisoners serving time for a cause injury offence as their principal proven offence more than tripled between 2005 and 2015. This suggests that across the offending, sentencing and prisoner data, an increase in cause injury and other offences against the person is having an observable influence on the prison population.[29]

2.2.4 Geographic trends

According to the CSA, the local government areas (LGAs) identified as having the highest recorded crime rate per 100,000 population (for year ending September 2021) was: Melbourne, Ararat, Latrobe, Greater Shepparton and Yarra.

Table 2.2 outlines each LGA's recorded offences per 100,000 population for the year ending September 2020 and the year ending September 2021.

Due to inconsistent reporting periods and the disaggregation of data, data sets that would have allowed the Committee to accurately undertake a full examination of how current high crime rate areas align with indicators of disadvantage are not available.[30] The Committee does note, however, that Morwell and Moe (from the Latrobe LGA) and Mooroopna (Shepparton LGA) were listed in the top 40 disadvantaged areas in Victoria, according to the Jesuit Social Services *Dropping Off the Edge 2021* report.[31]

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26 Professor Arie Freiberg, Chair, Sentencing Advisory Council, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 3. Please note a principal proven offence is defined as the offence within a case that is classified as the most serious offence, according to the National Offence Index, or the offence that has received the most severe sentence per the sentencing hierarchy. See: Sentencing Advisory Council, *SACStat Glossary*, 2021, <https://www.sentencingcouncil.vic.gov.au/sacstat/user_information/glossary.html> accessed 10 February 2022.

27 Sentencing Advisory Council, *Victoria's Prison Population 2005 to 2016*, Sentencing Advisory Council, Melbourne, 2016, p. 50.

28 Ibid., p. x.

29 Ibid., p. 50.

30 For example, the next release of the Australian Bureau of Statistics' Socio-Economic Indexes for Areas is slated for release in early to mid-2023.

31 Jesuit Social Services, *Dropping Off the Edge 2021: Persistent and multilayered disadvantage in Australia*, Jesuit Social Services, Melbourne, 2021, p. 91.

Table 2.2 Comparison of local government areas with highest recorded crime rates per 100,000 population, 2020–2021 (year ending September)

Local government areas	2020 recorded crime rates	2021 recorded crime rates
Melbourne	19,703.3	20,868.0
Ararat	11,425.0	16,527.4
Latrobe	17,920.0	15,881.8
Greater Shepparton	13,426.3	13,712.8
Yarra	13,713.5	12,800.9

Source: Crime Statistics Agency, *Latest crime data by area: crime by location – tabular visualisation*, 2021, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data-by-area> accessed 27 January 2022.

CSA data shows that:

- Ararat saw the largest increase at 44.7% to 16,527.4 recorded offences per 100,000 population from 11,425.0.
  - Ararat had the second highest recorded crime rate per 100,000 population in 2021. This was a large increase as in 2020, Ararat had the eleventh highest recorded crime rate.
  - This includes a 45.1% increase in the number of total offences recorded, from 1,367 in 2020 to 1,984 in 2021.
- Melbourne's recorded crime rates per 100,000 population increased by 5.9%, from 19,703.3 in 2020 to 20,868.0 offences in 2021.
- Greater Shepparton saw a 2.1% increase on 2020 figures, an increase of 286.4 offences per 100,000 population. This moved them from the fifth highest recorded offence rate per population in 2020 to fourth highest in 2021.
- Latrobe experienced an 11.4% decrease in recorded offence rates, after already experiencing a 3.6% decrease on the previous year's figures in September 2020.
- In 2021, Horsham dropped to the seventh highest recorded offence rate per 100,000 population, at 11,916.20. This was a decrease on their 2020 figures of 12,689.0 offences.
- The City of Yarra experienced a 6.7% decrease compared to the previous year, at 12,800.9 offences per 100,000 population. Whereas in 2020, Yarra had the fourth highest rate in the State, in 2021 this rate was the fifth highest.[32]

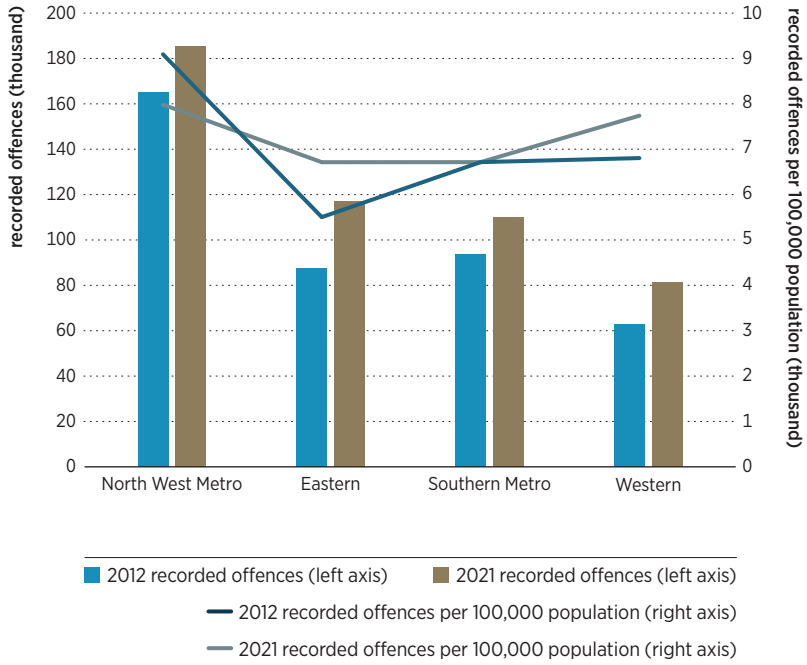
32 Crime Statistics Agency, *Key figures: year ending September 2021*, 2021, <https://www.crimestatistics.vic.gov.au/media-centre/news/key-figures-year-ending-september-2021> accessed 27 January 2022. Crime Statistics Agency, *Key figures: Year ending September 2020*, 2021, <https://www.crimestatistics.vic.gov.au/media-centre/news/key-figures-year-ending-september-2020> accessed 28 January 2022.

The CSA also provides statistics on total offences recorded per police region. Police regions encompass multiple LGAs. Victoria's police regions are:

- North West Metro—Banyule, Brimbank, Maribyrnong, Melbourne, Moreland, Whittlesea.
- Eastern—Alpine, Greater Shepparton, Indigo, Moira, Murrindindi, Strathbogie, Yarra Ranges.
- Southern Metro—Bayside, Casey, Greater Dandenong, Port Phillip, Stonnington.
- Western—Ararat, Ballarat, Central Goldfields, Glenelg.
- Justice Institutions and Immigration Facilities—jails and detention facilities.
- Unincorporated Vic—ski resorts, not elsewhere classified.[33]

Between 2012 and 2021, North West Metro consistently experienced the highest levels of recorded crime in Victoria overall, as well as incidents per 100,000 population.

Figure 2.6 Comparison of recorded crimes and offences per 100,000 population over police regions, 2012–2021



Note: The above figures do not include a comparison of the categories of Justice institutions and immigration facilities and Unincorporated Victoria. The former saw an increase in recorded criminal offences between 2012 and 2021 from 1,017 to 2,661, but the latter experienced a decrease from 123 to 95. No data on offences recorded per 100,000 is available.

Source: Crime Statistics Agency, *Latest crime data by area: Crime by location – tabular visualisation*, 2021, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data-by-area> accessed 27 January 2022

33 Crime Statistics Agency, *Latest crime data by area: Crime by Location map*, 2021, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data-by-area> accessed 27 January 2022.

Jesuit Social Services submitted to the Inquiry that a 'significant factor' as to whether a person comes into contact with the justice system is their postcode:

> A significant factor that influences whether a person will come into contact with the justice system is where they live. Entrenched geographical disadvantage has been explored in our series of research reports conducted over the past 20 years titled *Dropping Off the Edge* (DOTE). The reports found that communities in particular locations experience a web-like structure of disadvantage, with a number of compounding challenges including unemployment, a lack of safe, secure and affordable housing, low educational attainment, and poor infrastructure and services.
>
> Our DOTE 2015 research revealed that Victorian postcodes where there is entrenched disadvantage are also overrepresented in police and prison statistics, and criminal justice indicators. In addition, it showed that only six per cent of postcodes accounted for half of all prison admissions highlighting the localised nature of crime and entrenched disadvantage as an underlying cause of offending.[34]

Jesuit Social Services released an updated *Dropping Off the Edge* report in 2021, after the Committee received their submission. This research showed that three of the 40 most disadvantaged postcodes in the state fall within the LGAs of Latrobe and Greater Shepparton.[35] As demonstrated in Table 2.2 above, these LGAs were identified by the CSA as having experienced the highest rate of crime via population in their most recent release.

2.3 Sentencing

The number of custodial sentences imposed across the Victorian court system has increased in the past 20 years. Stakeholders suggested to the Inquiry that this is due to rising remand populations and an increase in the number of time served sentencing outcomes. Section 2.3.1 provides a statistical overview of imprisonment sentencing outcomes, whilst Section 2.3.2 discusses rising remand rates and the factors contributing to increased numbers of unsentenced prisoners. Section 2.3.3 looks at time served sentences and its increasing use in Victorian courts.

2.3.1 Rates of imprisonment sentencing outcomes

The Sentencing Advisory Council is the primary data collection agency for sentencing outcomes and trends in Victoria. Data shows that rates in which custodial sentences are imposed have increased across all levels of the Victorian court system. The following Sections provide a snapshot of sentencing statistics in the Magistrates' Court and County and Supreme Courts.

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34 Jesuit Social Services, *Submission 119*.

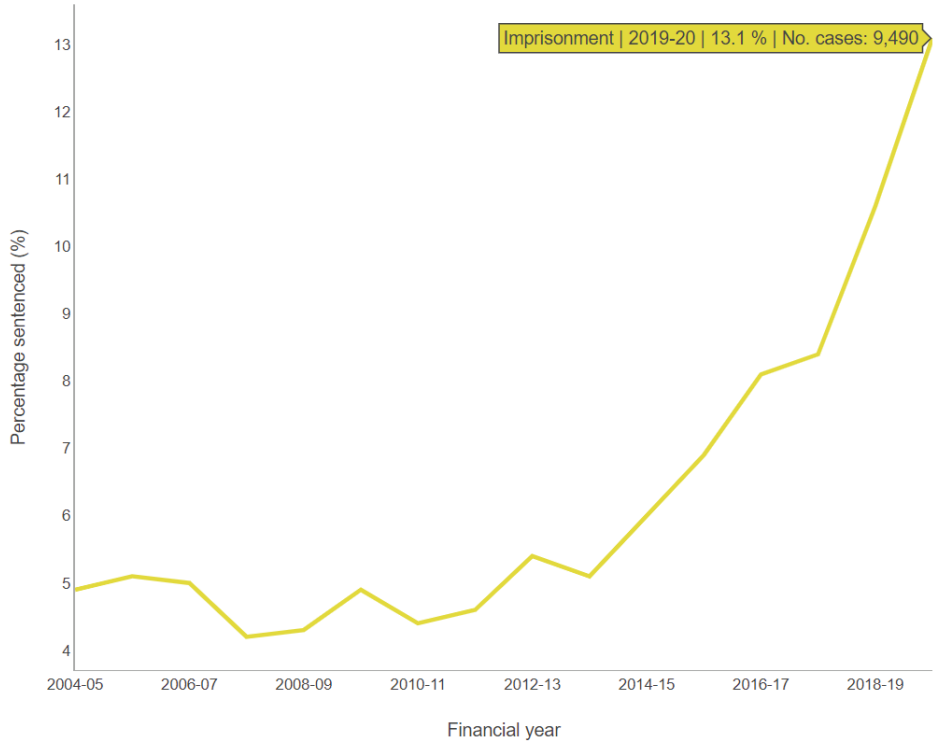
35 Jesuit Social Services, *Dropping Off the Edge 2021*, pp. 91–92.

Magistrates' Court

Statistics obtained from the SAC showed that the Magistrates' Court hears and determines more than 90% of cases in Victoria. In the 2019–2020 reference period, the Court sentenced 72,643 matters (including criminal diversion plans).[36] Of these, approximately 13.1% ended in custodial sentences (9,490 matters). This is a 165.3% increase on 2004–2005 figures, where 3,577 (4.9%) of the total matters heard by the Magistrates' Court had prison sentences imposed.[37]

As Figure 2.7 demonstrates below, between 2006–2007 and 2012–2013 there were fluctuations in the percentage of sentenced matters in the Magistrates' Court. However, this stabilised in 2014–2015 at 6.0% which led to a cumulative increase to its current recorded high point, at 13.1%.[38]

Figure 2.7 Sentencing outcomes in the Magistrates' Court, 2004–2005 to 2019–2020



Source: Sentencing Advisory Council, *Sentencing outcomes in the Magistrates' Court*, 2021, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/sentencing-outcomes-magistrates-court> accessed 13 January 2022.

36 Sentencing Advisory Council, *Cases sentenced in the Magistrates' Court*, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/cases-sentenced-magistrates-court> accessed 27 January 2022.

37 Sentencing Advisory Council, *Sentencing outcomes in the Magistrates' Court*, 2021, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/sentencing-outcomes-magistrates-court> accessed 13 January 2022.

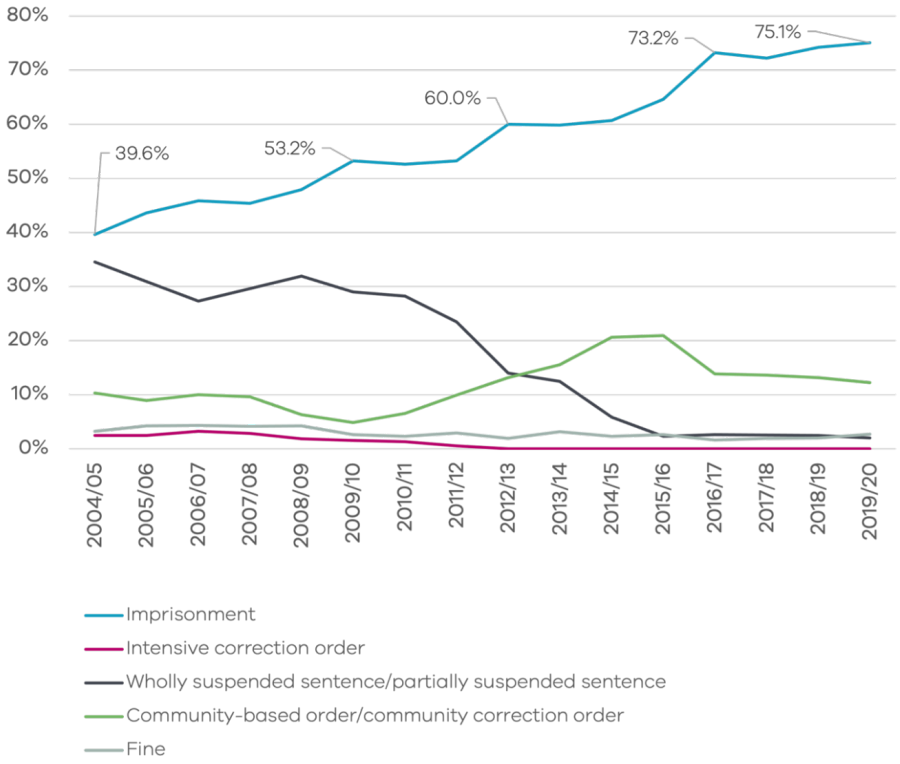
38 Ibid.

County Court and Supreme Court

Pooled data also shows increases in imprisonment sentencing outcomes at the County Court and Supreme Court. As noted in Chapter 1, these courts are the higher courts in the Victorian court system. Both courts hear indictable or more serious offences.

Although overall sentencing outcomes declined by 7% in higher courts, there was a 34% increase in the percentage of cases sentenced to imprisonment (from 40% in 2004–2005 to 74% in 2018–2019).[39] This trajectory can be traced in Figure 2.8 below, which suggests a correlation between increased prison sentences and the abolition of intensive correction orders and suspended sentences. Intensive correction orders were abolished in 2012 by the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) and suspended sentences were phased out between 2011 and 2014.[40]

Figure 2.8 Percentage of cases sentenced by higher courts in Victoria, 2004–2005 to 2019–2020



Source: Victorian Government, *Submission 93,* p. 29.

39 Ibid.

40 Sentencing Advisory Council, *Suspended sentences and other abolished sentencing orders*, 2021, <https://www.sentencingcouncil.vic.gov.au/about-sentencing/suspended-sentences-and-other-abolished-orders> accessed 1 February 2022.

2.3.2 Increased remand rates

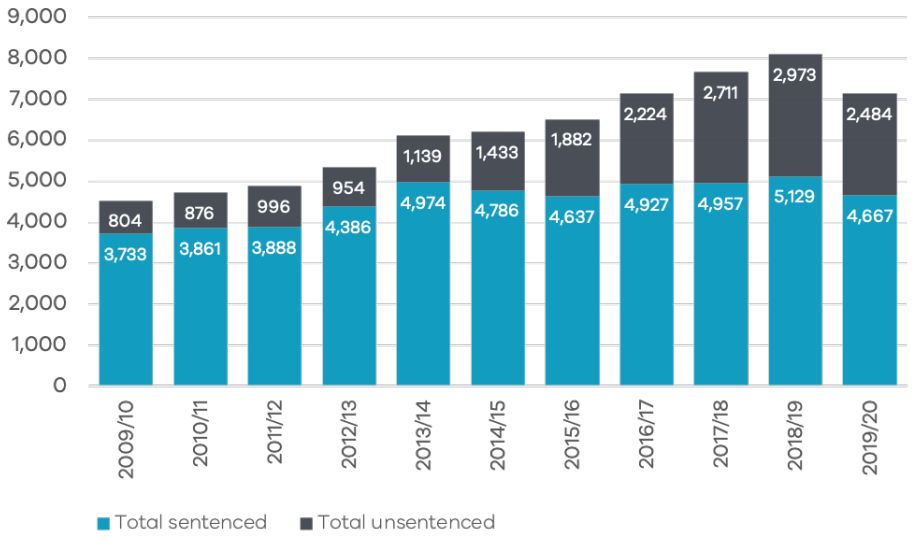
Remand refers to unsentenced prisoners who are jailed until their hearing (remanded) or sentencing (remanded for sentencing). In the past decade, remand rates have experienced significant growth in Victoria. The Victorian Government submitted to the Inquiry that Victoria's remand population is leading to increased incarceration rates.[41] This analysis was consistent with evidence received from the SAC[42] and the CSA.[43]

In the ten-year period from June 2010 to June 2020, the percentage of people remanded in custody increased from 17.7% (804 people) to 34.7% (2,484 people) of the prison population. By June 2021, this figure had risen to 44% (3,185 people, a 28.2% growth on the previous year).[44] The Victorian Government told the Inquiry that rising remand populations are being experienced across the country:

> The growing remand population is not unique to Victoria, with similar experiences across most other Australian jurisdictions, the national remand population growing from 21 per cent in 2009–10 to 32 per cent in 2019–20.[45]

Figure 2.9 charts the changes in prison populations from 30 June 2010 to 30 June 2020. It delineates between the total sentenced population and the total unsentenced population. The data shows an increase in the number of people on remand and in proportion of the overall prison population that are unsentenced. Not only are remand rates higher, but higher numbers of people are incarcerated pending their court hearing.

Figure 2.9 Total sentenced and unsentenced prison population in Victoria, June 2010 to June 2020



Source: Victorian Government, *Submission 93*, p. 33

41 Victorian Government, *Submission 93*, p. 31.

42 Sentencing Advisory Council, *Submission 17*, p. 4.

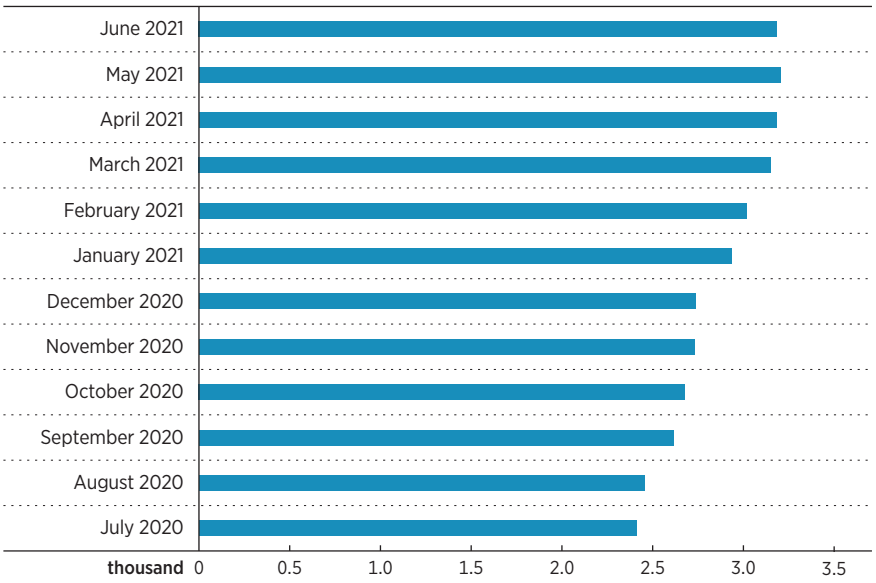
43 Fiona Dowsley, *Transcript of evidence*, p. 3.

44 Victorian Government, *Submission 93*, p. 31.

45 Ibid., p. 31.

Current data from Corrections Victoria shows that the number of unsentenced prisoners from 31 July 2020 to 30 June 2021 has grown from 2,409 to 3,185 people. As demonstrated by Figure 2.10 below, this growth was steady and cumulative.[46]

Figure 2.10 Number of unsentenced prisoners in Victoria, 31 July 2020 to 30 June 2021



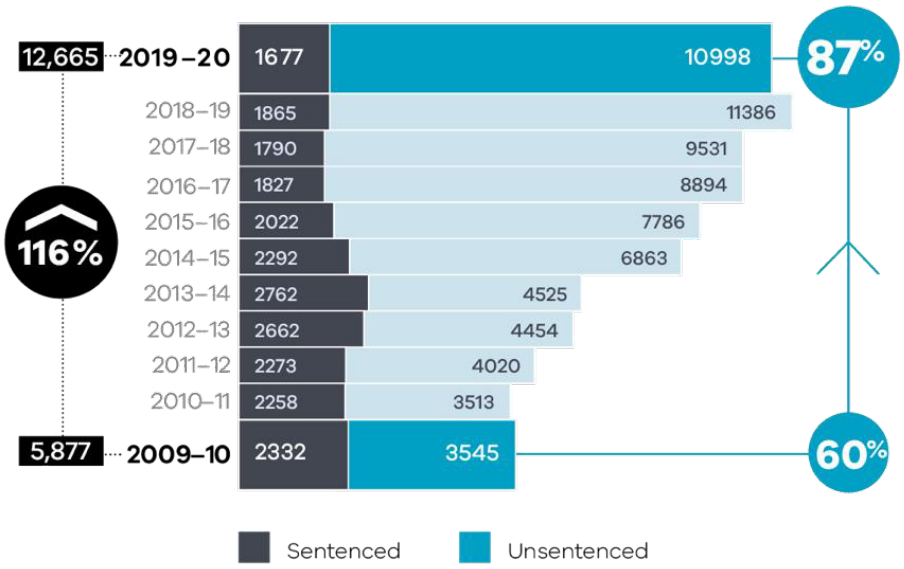
Source: Legislative Council Legal and Social Issues Committee. Data from Department of Justice & Community Safety - Corrections Victoria, *Monthly prisoner and offender statistics: Table 1 - Prisoners*, 2021.

Prison reception trends show an increase in the number of unsentenced prisoners received into the Victorian prison system over a ten-year period.[47] Figure 2.11 shows that in 2009–2010 a total of 5,887 prisoners were received into the Victorian prison system, 3,545 of these unsentenced. In 2019–2020, this figure had increased to 12,665 overall prison receptions, with 10,998 of these for remanded persons.

46 Department of Justice and Community Safety - Corrections Victoria, *Monthly prisoner and offender statistics: Table 1 - Prisoners*, 2021.

47 Victorian Government, *Submission 93*, p. 33.

Figure 2.11 Prison reception trends in Victoria, 2009–2010 to 2019–2020



Source: Victorian Government, *Submission 93*, p. 33

In the 2020–2021 financial year, the number of unsentenced prisoners received had dropped to 10,863 but was still higher than 2009–2010 figures.[48]

Fiona Dowsley from the CSA said there had been 'quite a shift' in remand trends, with 35% of female prisoners and 55% of male prisoners moving from remand to custodial sentences. She told the Committee that historical prison trends show that this 'was not always the case.'[49] She additionally flagged a 'significant increase' in sentencing outcomes ending in imprisonment, as well as a 15% increase in time served sentences from 2012–2013 to 2017–2018.[50]

The Victorian Government also commented on the changed profile of unsentenced prisoner receptions:

> The offence profile of unsentenced receptions has also changed. In 2019–20, the most serious charge categories most frequently recorded on reception were assault (26 per cent), other property offences (excluding burglary and fraud) (19 per cent) and drug offences (16 per cent). The proportion of receptions entering custody for these three offence types has increased since 2009–10, however the greatest increase has been in the proportion of unsentenced receptions for Breach of order offences, which increased from one per cent to 12 per cent. The number of people entering prison on remand for Breach of order offences as a most serious charge has increased from 47 in 2009–10 to 1,332 in 2019–20.[51]

48 Ibid.

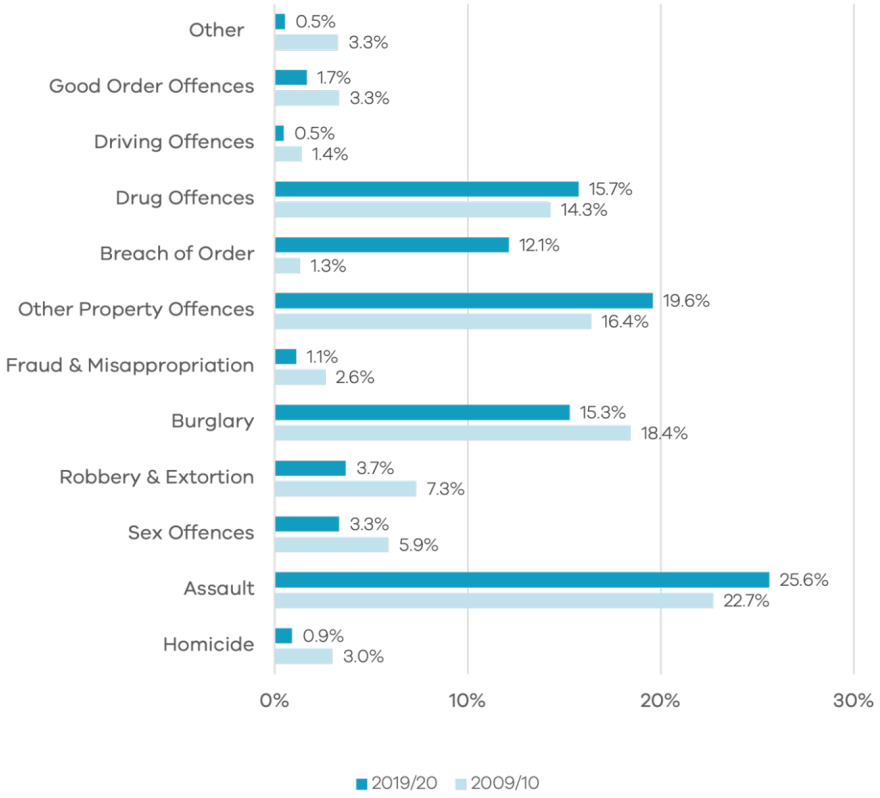
49 Fiona Dowsley, *Transcript of evidence*, p. 4.

50 Ibid., p. 3.

51 Victorian Government, *Submission 93*, p. 33.

Figure 2.12 below shows the proportion of unsentenced receptions by the most serious charge category at reception. It provides an overview of the change in remand profiles over a 10 year period.

Figure 2.12 Proportion of unsentenced people received into custody by most serious charge category at reception in Victoria, 2009–10 to 2019–20



Source: Victorian Government, *Submission 93*, p. 34.

Professor Freiberg from the SAC told the Committee that the remand population has been 'a major driver' in increased jail populations. Further, that the increase in serious criminal offences means a presumption against bail:

> It is common knowledge that our remand population has been a major driver. Our past research has suggested that the growth in the remand population is not a cumulative effect of people spending longer periods but of more people coming in charged with offences, and particularly the serious offences against the person and drug offences. So the offences have got more serious, and many of them are remanded for shorter periods of time. This is the presumption against bail and the cultural factors. We have become a very risk-adverse society, and we have been scarred by our experiences that we have had in the past ... [52]

52 Professor Arie Freiberg, *Transcript of evidence*, p. 3.

Professor Freiberg highlighted that maintaining a high remanded custody rate because of a presumption against bail can prove problematic:

> The problem is that we may get some of those wrong, but keeping a lot of people in, who would not otherwise offend, for longer than they need to be is similarly a problem.[53]

This is further discussed in Chapter 9.

Bail reforms in the last decade are seen to contribute to rising remand rates. The *Bail Act 1977* (Vic) governs when and how bail is to be granted to those charged with an offence. A denial of bail means the offender is remanded in custody pending their court hearing (an unsentenced person).

In 2013, the *Bail Amendment Act 2013* (Vic) introduced the offences of contravening a conduct condition of bail and committing an indictable offence on bail. In 2017, further reforms[54] were made that extended the range of offences which have a presumption against bail. This has meant that the accused is responsible for providing compelling reasons for granting bail, rather than a prosecutor justifying why bail should not be granted, as was the pre-amendment framework.

At a public hearing, Professor Freiberg was asked if the increase in time served sentences imposed is apportionable to bail conditions. Professor Freiberg said that 'it is difficult to tell' if the increase is apportionable to trial delays and court backlogs, explaining that the time people are held in remand may see a time served sentence imposed instead of a community corrections order:

> So if [offenders] have been refused bail, it may well be that they would have got a community correction order had they heard the case straightway. So you will get sentences which look strange, maybe a 72½-day sentence, because that is the time served. There is an irony there that had they not been in custody, they would not have received a jail sentence, which will then appear on the record—so the next judge, who may not know what they have done if and when they recidivate, might say, 'Oh my goodness, I've already given you a chance. You've already had a jail sentence.' The changes of getting a community correction order next is reduced on their record. So I think more people are getting sentences which they otherwise would not have got.[55]

The effect of bail reforms on corrections and law enforcement are discussed in Chapter 9.

Stakeholders told the Inquiry that other factors also contributed to increased remand populations, and that certain cohorts were overrepresented in the bail sentencing and remand system, including women, children and Aboriginal Victorians. These issues are discussed further in Chapter 9.

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53 Ibid.

54 *Bail (Stage One) Amendment Act 2017* (Vic); *Bail (Stage Two) Amendment Act 2018* (Vic).

55 Professor Arie Freiberg, *Transcript of evidence*, p. 4.

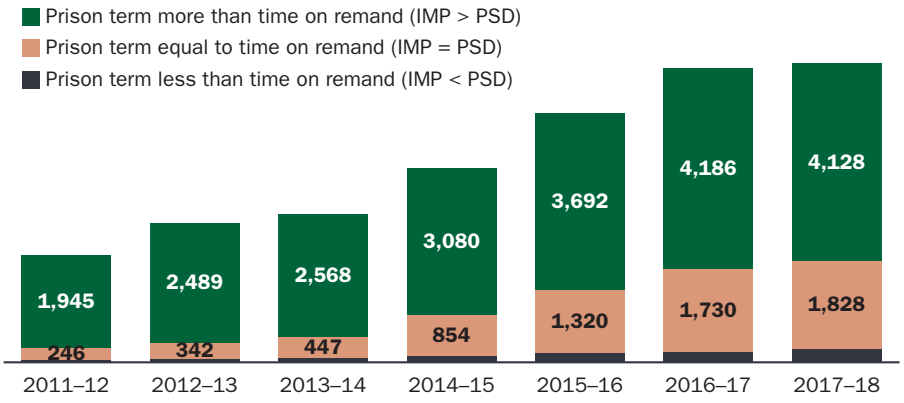
2.3.3 Time served prison sentences

As discussed in Section 2.3.2, the Sentencing Advisory Council's 2020 report, *Time Served Prison Sentences,* found that Victoria's growing remand population is leading to increased prison rates. Time served prison sentences are custodial sentences where the period of imprisonment imposed by the courts equals the period that the person spent in remand. In its submission, the SAC provided an overview of the report's key findings:

- Between 2011–12 and 2017–18, the number of time served prison sentences imposed by Victorian courts each year rose 643%, from 246 to 1,828. They now account for 20% of all prison sentences imposed, whereas previously it was 5%.
- Just over half of all time served prison sentences were combined with a CCO [Community Correction Order], with the CCO taking effect upon the person's release.
- 96% of time served prison sentences were less than six months in length.
- Almost all time served prison sentences (95%) were imposed in the Magistrates' Court, while 5% were imposed in the County and Supreme Courts.
- Time served prison sentences accounted for 39% of the increase in prison sentences imposed in Victoria in the five financial years to 30 June 2018. There were 3,500 additional prison sentences imposed in 2017–2018 than in 2013–2014. Nearly 1,400 of those were time served prison sentences. This strongly suggests that Victoria's increasing remand population is causing courts to impose prison sentences more often, without actually requiring people to spend more time in prison.[56]

Figure 2.13 shows custodial sentences imposed, and the rate at which these were less, equal to or more than time spent in remanded custody. It shows that over the reference period there was a 643% increase in the number of prison terms that were equal to the period spent on remand, from 246 to 1,828.

Figure 2.13 Prison terms imposed by all Victorian adult courts, 2011–2012 to 2017–2018



Source: Sentencing Advisory Council, *Time Served Prison Sentences in Victoria,* Sentencing Advisory Council, Melbourne, Victoria, 2020, p. 9.

56 Sentencing Advisory Council, *Submission 17*, p. 4.

In 2020, the SAC published its report, *Children Held on Remand in Victoria: A report on Sentencing Outcomes.* A summary of the report's key findings was provided to the Inquiry, showing:

> Two-thirds of the 442 remanded children (66%) did not receive a custodial sentence – 58% of outcomes were community orders and another 8% were other outcomes such as court-ordered diversions or all charges being dismissed.
>
> The remaining 34% of remanded children received a custodial sentence – 29% required the child to spend more time in detention after they were sentenced, while 5% were 'time served' sentences.
>
> Despite this, remanded children were five times more likely to receive a custodial sentence than all children whose case was finalised in the Children's Court in 2017.
>
> The vast majority of remanded children (89%) were male, but remanded female children tended to be younger – 30% of remanded female children were aged 14 and under compared with 15% of male children.
>
> Aboriginal and Torres Strait Islander children were significantly over-represented, comprising 15% of remanded children.
>
> Children from culturally and linguistically diverse communities were also over-represented, comprising 43% of remanded children.[57]

2.4 Victoria's prison population

The Sentencing Advisory Council's data shows that the number of incarcerated people has increased by 58% from 2010 to 2020 from 4,537 imprisoned people to 7,149. This includes a rise in the number of sentenced prisoners, from 3,734 in 2010 to 4,664 in 2020 and a rise in the number of unsentenced prisoners, from 803 in 2010 to 2,479 people in 2020.[58]

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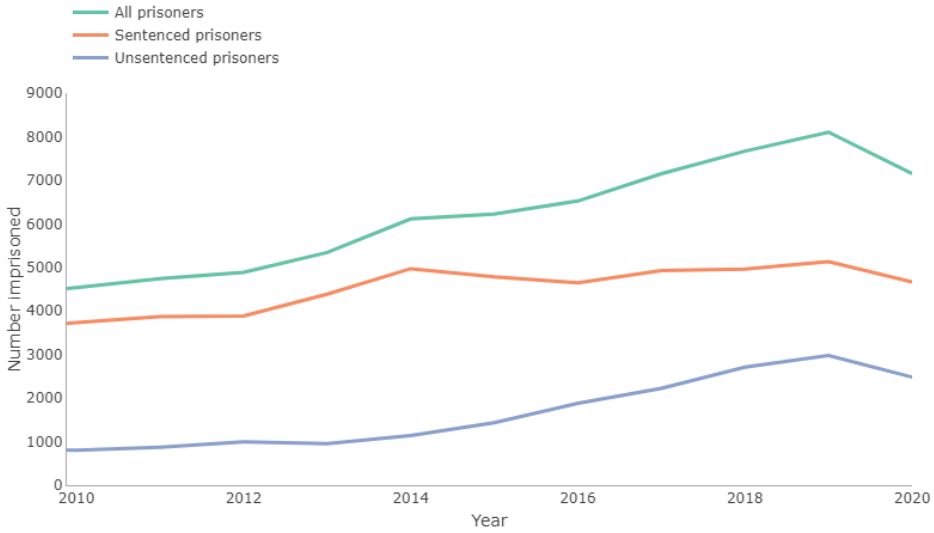
57 Ibid., p. 2.

58 Sentencing Advisory Council, *Victoria's prison population*, 2021, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-prison-population> accessed 27 January 2022.

Figure 2.14 Number of people in Victoria's prisons, 2010 to 2020.



Note: Unsentenced prisoners include those held on remand awaiting trial, those found guilty but awaiting sentencing or those detained pending deportation.

Source: Sentencing Advisory Council, *Victoria's prison population*, 2021, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-prison-population> accessed 27 January 2022.

Corrections Victoria, the executive department responsible for the management and oversight of the Victorian prison system, reports that on 30 June 2020, there were 7,151 incarcerated people in Victoria.[59] The SAC noted this 2020 figure was a 11.8% decrease from 2019, where the total number of prisoners was 8,101. Although described as 'the largest annual decrease in the number of prisoners in the history of Victoria's population',[60] this is not representative of a trend of decreasing prison numbers but rather the impact of COVID-19. The SAC stated that COVID-19 caused delays in court proceedings and impacted sentencing outcomes.[61] The ABS also noted COVID-19 restrictions skewed data trends.[62]

Accordingly, recent figures may not be reliable in representing the overall trend of incarceration numbers. Referring to historical data, the SAC notes that 2020 figures—despite the pandemic impact—was still a fourfold increase on earlier data.[63] Corrections Victoria also reported that between June 2010 and June 2020, the prison system experienced a 57.6% growth in population, from 4,537 in 2010 to 7,151 in 2020. June 2020 figures indicate that for every 100,000 Victorians, 136.1 are imprisoned.[64]

Prison populations include sentenced and unsentenced people. Numbers relating to sentenced and unsentenced people in the Victorian prison population can be seen in Figure 2.14 above.

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59 Note that the Sentencing Advisory Council figures differs slightly, documenting 7149 people. See: Victoria's Prison Population.

60 Sentencing Advisory Council, *Victoria's prison population*.

61 Ibid.

62 Australian Bureau of Statistics, *Prisoners in Australia*, 2021, <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release> accessed 7 February 2022.

63 Sentencing Advisory Council, *Victoria's prison population*.

64 Note that the Sentencing Advisory Council figures differs slightly, documenting 7149 people. See: Victoria's Prison Population.

2.4.1 Overrepresentation in the Victorian prison system

Evidence to the Inquiry demonstrated that women, Aboriginal Victorians and young people are overrepresented cohorts in the Victorian prison system. This is supported by publicly available statistics from Corrections Victoria.

Women

Corrections Victoria has documented a 'significant growth' in the number of women in prison. Changes in the profile of women in prison between 2010 and 2020 include:

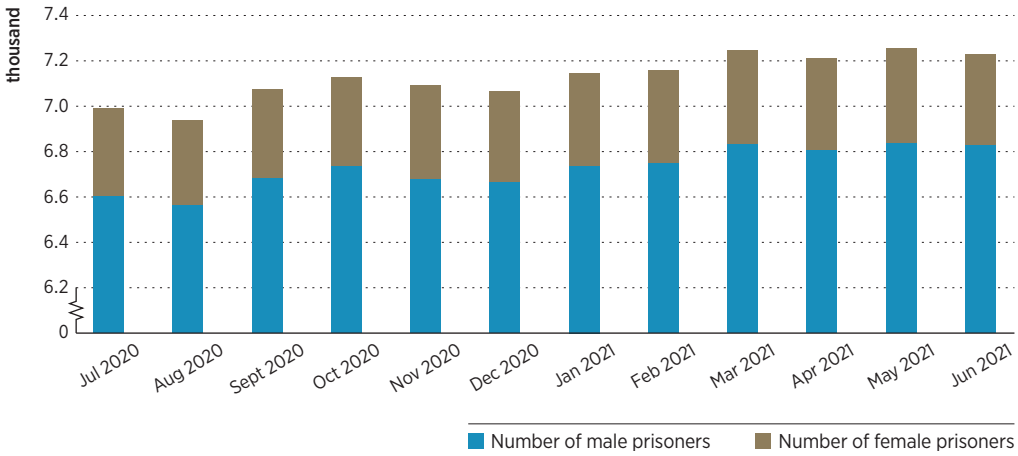
- an increase of 29% in total female prisoner population. This rise occurred mainly between 2010 and 2019, as there was a 30% decrease in the female prisoner population between 2019 and 2020[65]
- the number of remanded women constituted 22% of the total female prisoner population in 2010, which had increased to 43% of the population by 2020. This was a growth of 152% between 2010 and 2020
- that women are now more likely to be remanded in custody than men
- a drop in the average age of women in prison from 37.7 years in 2010, to 36 years in 2020
- a 48% increase in the number of female prisoners who are aged 25 or less in the ten-year period. This cohort now represents 12% of the total female prisoner population
- that the female prisoner population has overall, proportionally increased
- in 2010, 20% of imprisoned women were incarcerated for drug offences, this had grown to 26% by 2020
  - women are 11% more likely to be imprisoned for drug offences than men
- growth was also seen in the number of women imprisoned for assault charges (from 11% to 13%) and burglary (6% to 11%)
- imprisonment rates for homicide related offences dropped by 3%.[66]

Figure 2.15 shows that between 30 July 2020 to 30 June 2021, the female prison population grew 4.05%, from 395 to 411.

65 Corrections Victoria, *Profile of people in prison*, 2021.

66 Corrections Victoria, *Profile of women in prison*, 2021.

Figure 2.15 Prison population by gender, 31 July 2020 to 30 June 2021



Source: Legislative Council Legal and Social Issues Committee. Data from Department of Justice & Community Safety - Corrections Victoria, *Monthly prisoner and offender statistics: Table 1 - Prisoners*, 2021.

A 2019 CSA report entitled *Characteristics and offending of women in prison in Victoria 2012–2018*, observed that although the female prison population is a 'minority' cohort in the overall population, its increase has 'outpaced that of men'.[67] It found that the number of incarcerated women in Victoria increased from 248 in 2008 to 581 in 2018, and that a sharp rise was seen in the number of female prisoner receptions for unsentenced versus sentenced persons.[68] In discussing the report's findings, Fiona Dowsley from the CSA suggested that an increased female prison population could be the result of changes to the Victorian bail framework which disproportionately affects women:

> there were large increases in the proportion of unsentenced women who would have been placed in a reverse onus position for the granting of bail between 2012 and 2018, with most of this attributable to those changes in the *Bail Act* in 2013. Thirty-seven per cent of unsentenced women would have been subject to a reverse onus test in 2012, which increased to 74 per cent in 2015 and 79 per cent in 2018. In 2015, 32 per cent of unsentenced women were only placed in a reverse onus test due to the two new bail offences introduced—so breaches of bail.[69]

In the Victorian prison population, Aboriginal women are also overrepresented. Data notes that in 2020, more than one in ten women in prison were Aboriginal.[70] In 2019, there were 80 Aboriginal women in Victoria's prisons, equalling 14% of the total female incarceration population. There was a decrease of 49% between 2019 and 2020, which was the same year that the female prison population experienced a 30% decrease.[71] Overall, Aboriginal Victorians are an overrepresented cohort in the Victorian prison system.

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67 Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012–2018*, Melbourne, 2019, p. 4.

68 Ibid., pp. 4–5.

69 Fiona Dowsley, *Transcript of evidence*, p. 3.

70 Corrections Victoria, *Profile of people in prison*.

71 Corrections Victoria, *Profile of women in prison*.

Aboriginal Victorians

The Victorian Government told the Committee that Aboriginal Victorians 'continue to be over-represented in the prison population when compared with the prison rate of all people in prison.'[72] The following changes in the Aboriginal prisoner profile were noted by Corrections Victoria:

- Aboriginal people are an overrepresented cohort.
- In 2010, the imprisonment rate for Aboriginal adults was 1,106.4 per 100,000 Victorian Aboriginal adults. In 2020, the rate for Aboriginal adults had risen to 1,837.7 per 100,000 Victorian Aboriginal adults.
- The Victorian Government contrasts these figures with the general adult imprisonment rate, which was 107.2 per 100,000 Victorian adults in 2010 and 135.1 per 100,000 Victorian adults in 2020.[73]
- Between 30 June 2010 and 30 June 2020, the number of incarcerated Aboriginal people rose by 148%. This includes a 15% drop between 2019 and 2020.
- The average age of Aboriginal Victorian prisoners is 34.5 years, however 7% of the Aboriginal prison population were 50 years and older, a 3% growth from 2010 numbers.[74]

The CSA noted that between 2009 and 2019, there was a 774% increase in number of unsentenced Aboriginal Victorians within the prison system, totalling 48% of all Aboriginal prisoners for the 2019 year.[75] This continued to increase in the following decade, as shown by Figure 2.16 below. This demonstrates the overall increase in the Aboriginal prison population, including fluctuations in the number of sentenced and unsentenced prisoners.

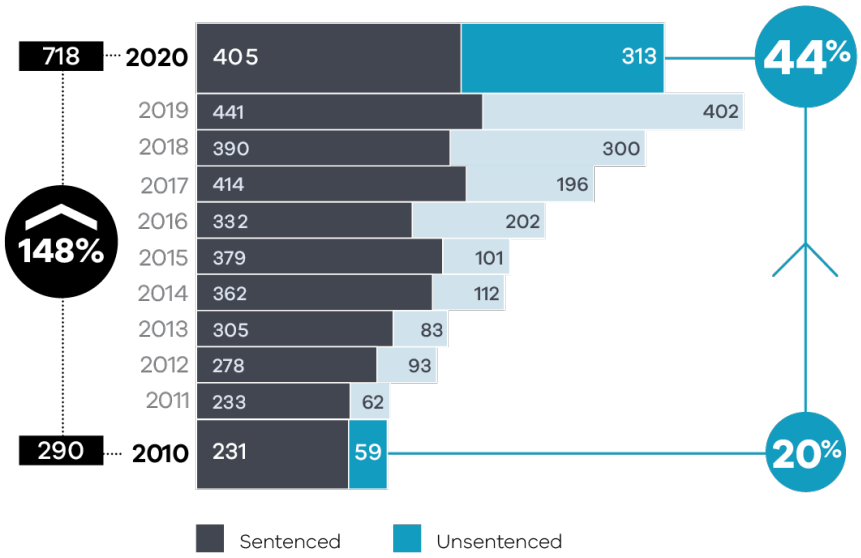
72 Victorian Government, *Submission 93*, p. 39.

73 Corrections Victoria, *Profile of Aboriginal people in prison*, 2021.

74 Ibid.

75 Fiona Dowsley, *Transcript of evidence*, p. 4.

Figure 2.16 Number of Aboriginal people in prison in Victoria, 30 June 2010 to 30 June 2020



Source: Victorian Government, *Submission 93,* p. 39.

Statistics available from Corrections Victoria show the growth in the number of Aboriginal identifying prisoners continued between July 2020 and June 2021.

Figure 2.17 Aboriginal and Torres Strait Islander prison population in Victoria, 31 July 2020 to 30 June 2021

Source: Legislative Council Legal and Social Issues Committee. Data from Department of Justice & Community Safety - Corrections Victoria, *Monthly prisoner and offender statistics: Table 1 - Prisoners*, 2021.

On Aboriginal imprisonment rates and their contact with the justice system, the Aboriginal Justice Caucus submitted the following to the Inquiry:

> Aboriginal people make contact with the justice system at higher rates than non-Aboriginal people and are disproportionately overrepresented in Victoria's remand and prison populations. Not only are Aboriginal people overrepresented across all

> stages of Victoria's criminal justice system, Aboriginal people are imprisoned at the highest rate of any in the world.[76]

Young adult offenders

Young adults are those aged between 18 and 25. In its submission to the Inquiry, the SAC identified young adults as an overrepresented group with higher rates of reoffending:

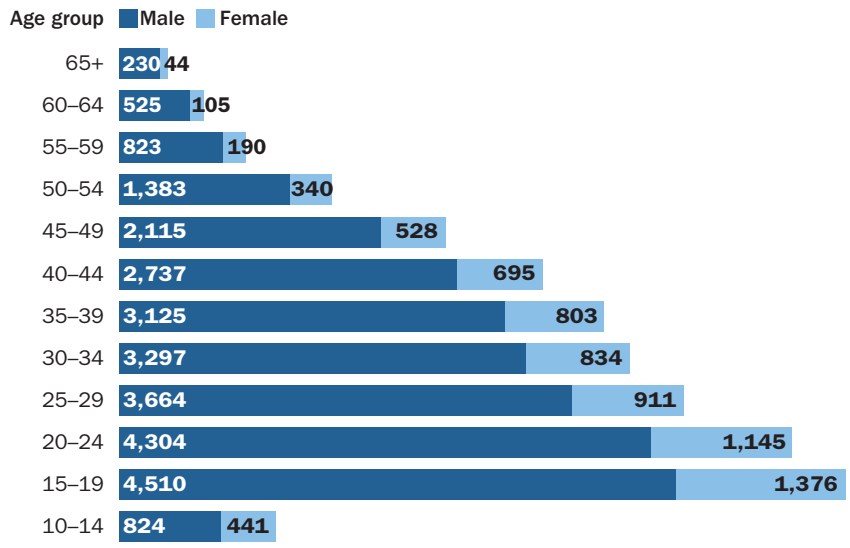
> Young adult offenders are over-represented in Victoria's criminal justice system. They make up 15% of Victoria's adult population but constituted 22% of sentenced offenders in Victoria's courts in the five years to 30 June 2018. Offenders in this age group have relatively low compliance and completion rates on community sentencing orders, and they also reoffend at higher rates than older offenders.[77]

At a public hearing, the SAC identified that young adult male offenders are 'very difficult' and have higher rates of recidivism than their counterparts:

> Males 18 to 25 show a complete lack of compliance and are over-represented in so many offences. We have found this. They have got low completion rates on community sentence orders and re-offend at higher rates...[78]

Figure 2.18 shows that the total alleged offender rate for those that fall within the 15–19 and 20–24 age brackets exceed offending rates in all others. These age groups also see the highest incidences of offending for both genders.

Figure 2.18 Alleged offender rate by gender and age, 2016–2017



Source: Sentencing Advisory Council, *Rethinking sentencing for young adult offenders*, Sentencing Advisory Council, Melbourne, 2019, p. 24.

76 Aboriginal Justice Caucus, *Submission 106*, p. 5.

77 Sentencing Advisory Council, *Submission 17*, p. 3.

78 Professor Arie Freiberg, *Transcript of evidence*, p. 3.

The SAC's 2019 report, *Reoffending Following Sentence in Victoria,* looked at the Council's database in the nine year period following its creation in 2004–2005. It shows that 52.7% of released prisoners under the age of 25 are re-imprisoned within two years of their release, compared to 44.1% of adult prisoners.[79]

Recidivism is discussed further in Section 2.4.2 and throughout this report.

Older people

Corrections Victoria identified a rise in the number of prisoners aged 50 years or over by almost 50% between 2010 and 2020. In 2020, older offenders represented 16% of the total prison population, a 2% rise on 2010 numbers.[80]

The SAC told the Committee that further work is being done to identify the types of offences being committed and sentencing trends in relation to older Victorians. It did highlight some of its preliminary findings to the Committee:

> So we are looking at the fact that the proportion aged over 60 has increased over recent years from 13 to 21 per cent, and we are going to look at the trends in the number of offenders. We are looking at age, gender and offence profiles, what sentences have been imposed, prior offending and the relevance of age as a sentencing consideration, particularly illness, ill health and the effects of imprisonment on them. We have found that a lot of those have to do with traffic offences, interestingly, and it is not the major violent offenders that are the problem. The big issue for the prison system and the courts is of course the historical sex offences, and so there are a lot of offenders who are coming out, especially post royal commission. So we have got people in their 70s, 80s and even older in jail for offences committed 40 or 50 years ago, and that raises significant problems.[81]

The CSA told the Committee that historical sexual offence convictions are also a contributor to people aged 60 and over entering prison.[82]

2.4.2 Rates of recidivism

The Australian Community Support Organisation (ASCO) defined recidivism in its submission to the Inquiry. It noted recidivism was difficult to define with different jurisdictions employing different metrics—for example, re-arrest by police, re-conviction in court or received back into custody. Nonetheless, it emphasised that it was important to define recidivism because it is a crucial metric by which to evaluate the effectiveness of a criminal justice system. ACSO defined recidivism as:

> a repeating pattern or an instance of reoffending by an individual who has previously offended. Recidivism is often used as a measure of effectiveness in criminal justice interventions ...

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79 Sentencing Advisory Council, *Reoffending following sentence in Victoria*, Melbourne, 2019, p. 8.

80 Corrections Victoria, *Profile of people in prison*.

81 Professor Arie Freiberg, *Transcript of evidence*, p. 8.

82 Fiona Dowsley, *Transcript of evidence*, p. 9.

> Recidivism is important to define because, of all individuals who commit crime, there is a relatively small cohort of individuals who account for a disproportionately large demand on the criminal justice system. This cohort has formerly been referred to as chronic recidivists (Payne, 2007). Labels aside, there is a relatively small cohort of people that account for a large proportion of the crime flows through the criminal justice system.[83]

Recidivism rates depend on a variety of social and demographic factors, including location, offending type and age. Fiona Dowsley from the CSA told the Inquiry that overall, recidivism has been 'steadily increasing over the past 10 years, and as is always found, a small group of high-frequency offenders account for a large proportion of all offending.'[84] In providing insight into recidivism trends, Fiona Dowsley noted that 6% of offenders commit 44% of incidents reported to police:

- Between 2007 and 2017, approximately 43% of offenders were recorded for more than one offence.
- 6.3% of these offenders were recorded for more than 10 offences. This was 44% of all incidents reported to the police between 2007 and 2017, meaning a 'concentrated group of offenders is having a lot of repeat contact through the system.' [85]
- Overall, the rate in which recently released prisoners were returned to custody for subsequent offending within two years was 44.2% in the 2019–2020 period.[86]
- Recidivism rates show that where there are breaches of family violence related orders, there is a 'likelihood' of further offending.
- Family violence recidivism tends to be higher in socioeconomically disadvantaged and regional areas.[87]

Based on research conducted by the CSA, Fiona Dowsley suggested there was a correlation between recidivism rates and the length of sentence served. She noted that for sentenced episodes less than six months there was a higher rate of reincarceration:

> When I have had a look at it, three-quarters of that annual flow of prisoners entering the system served short remand only or sentenced episodes under six months; that was 2018–19 data. So what we can see when we have a look at the rate of return is that the shorter the sentence, the higher the rate of return to imprisonment within that two-year period. Looking at the people who have the lower rate of return, it seems to be people who were released to parole or were on longer sentences and are a little older in terms of their cohort.[88]

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83 Australian Community Support Organisation, *Submission 91*, p. 13.

84 Fiona Dowsley, *Transcript of evidence*, p. 1.

85 Ibid.

86 Ibid., p. 4.

87 Ibid., p. 7.

88 Ibid., p. 4.

The Victorian Government submitted that overall recidivism rates were rising. The submission noted that 19% of prison receptions were people who had been received into the system more than once that year (2019–2020). This was a 9% increase on 2009–2010 numbers.[89]

Women

Women tend to have lower rates of recidivism. As stated by Corrections Victoria:

> Women are consistently more likely than men to have not served a prior term of imprisonment, with around half of male prisoners in 2020 having had a prior term of imprisonment.[90]

In 2020, Corrections Victoria reported that the number of imprisoned women serving their first custodial sentence had increased by 28%, totalling 62% of the female prison population. This means that 250 women were serving their first sentence, up from 195 recorded in 2010.[91]

The average age of incarcerated women in 2020 was 36 years. The average age of incarcerated males was 37.7 years. This shows that younger women are more likely to be imprisoned. Consistent with this trend is the increase in the number of female offenders aged 25 or younger. Between 2010 and 2020, the number of younger female offenders rose by 48%, representing 12% of the female prison population.[92]

Aboriginal Victorians

The proportion of Aboriginal Victorian prisoners serving their first custodial sentence dropped 2% between 2010 (33%) and 2020 (31%). Of the overall prison population, the rate of prisoners serving a subsequent (or more) sentence was 49%. Data from Corrections Victoria shows:

- the rate of returned prisoners who were Aboriginal Victorians rose by 2% between 2010 and 2020
- Aboriginal Victorians have higher rates of recidivism than the general prison population.[93]

Figure 2.19 charts the fluctuation rate of Aboriginal and Torres Strait Islander prisoners with prior known custody sentences. The lowest proportional rate seen in the ten-year period was the year ending 30 June 2013 (65.2%) whereas the proportional rate peaked in the year ending 30 June 2016 (75.4%).

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89 Victorian Government, *Submission 93*, p. 3.

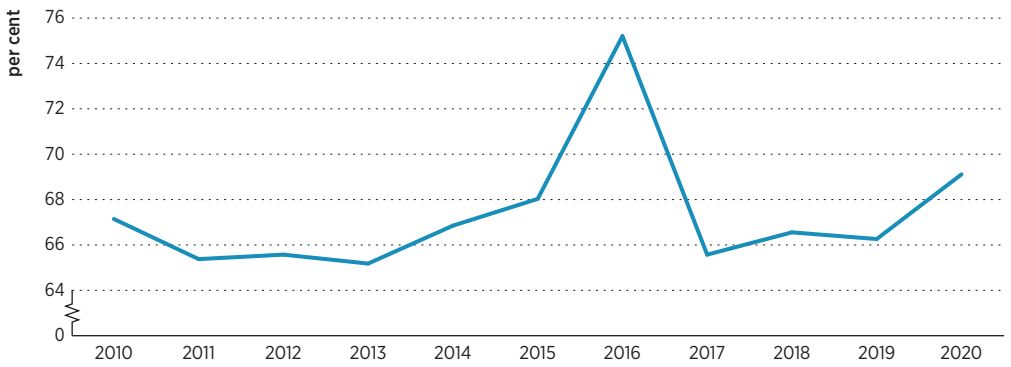
90 Corrections Victoria, *Profile of women in prison*.

91 Ibid.

92 Ibid.

93 Corrections Victoria, *Profile of Aboriginal people in prison*.

Figure 2.19 Proportion of the Aboriginal and Torres Strait Islander prison population with prior known adult imprisonment sentences, 30 June 2010 to 30 June 2020



Source: Legislative Council Legal and Social Issues Committee. Data from Corrections Victoria, *Annual prisoner statistical profile 2019–20: Table 1.4 - Overview of Aboriginal and Torres Strait Islander prisoners at 30 June*, 2020.

In its submission, Jesuit Social Services noted that 'structural and systemic racism are key underlying drivers of the rising Aboriginal prison population'.[94] Data shows that in March 2021, Aboriginal Victorians were 13.8 times more likely per 100,000 population to be incarcerated than the general adult population.

Youth offenders

Although there has been a decrease in the number of youth offenders, youth recidivism rates can be high. Young offenders refer to those between the ages of 10 and 17 unless otherwise indicated. As noted in Chapter 1, the Committee has not examined the youth criminal justice system in detail however makes note of the following statistics.

The CSA told the Committee that between 2011 and 2020 youth offending decreased by almost one third. However, it also reported that within 12 months, 36% of youth offenders who had received cautions and 38% of offenders charged had re-offended.[95] The number of warnings and cautions issued by police declined between 2010–2011 and 2019–2020.[96]

Fiona Dowsley told the Committee that the largest group of youth offenders experience a low rate of recidivism, but youth recidivism is still apparent and ongoing:

> So we found a number of different groups. One group … is the kids who start really, really young. So 10 to 14 is when they are having their first contacts with the justice system, and those can be intensive contacts, so a lot of contacts through their teen years. They are obviously the cohort that are likely to become then youth justice clients and likely to commence into adult offending as well. You also have a group, which is by far the most voluminous group, which is the young people who have one or two contacts with police then that is it—they never come back. They move on with their life,

94 Jesuit Social Services, *Submission 119*, p. 12.

95 Fiona Dowsley, *Transcript of evidence*, pp. 1–3.

96 Ibid.

> they go in a different direction and they are not seen again by the system. That is the majority of young people. There is also an emerging cohort who had their first offence later in their teens, and there is a bit of a suggestion that their offending can start a little more seriously.[97]

The SAC also noted a clear correlation between the age of a child and their likelihood to reoffend. This was noted in its 2016 report, *Reoffending by Children and Young People,* which looked at offending rates for the 5,385 people who were sentenced in the Children's Court in 2008–2009:

> One of the key findings of this report is that the younger a child is at their first sentence, the more likely they are to reoffend (with any offence), to reoffend violently, to continue offending into the adult criminal jurisdiction, and to be imprisoned in an adult prison before their 22nd birthday. The six-year reoffending rate of offenders who were first sentenced at 10–12 years old (86%) was more than double that of those who were first sentenced at 19–22 years old (33%).[98]

The SAC summarised the youth recidivism trends, stating:

> Most children and young people do not commit offences. But the Council's research also shows that once children are in the youth justice system their reoffending rates are high.[99]

The relationship between recidivism and early intervention rates for young offenders is discussed further in Chapter 3.

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97 Ibid., p. 3.

98 Sentencing Advisory Council, *Submission 17*, p. 2.

99 Ibid., p. 3.

PART B: EARLY INTERVENTION, CRIME PREVENTION AND POLICING

3 Crime prevention and early intervention

At a glance

There is significant evidence that experiencing socioeconomic disadvantage places a person at risk of encountering the criminal justice system as either a victim or a perpetrator of crime. This risk is heightened for people experiencing multiple forms of disadvantage compounded in a geographical region, intersectional disadvantage associated with their identity, or disadvantage across multiple generations of their family. However, the provision of social supports that address disadvantage or enhance protective factors can reduce this risk and divert people away from the criminal justice system. The earlier this intervention is provided, the more likely a person is to avoid victimisation and/or criminalisation in the longer term. As a result, many stakeholders—including the Victorian Government and Victoria Police—advocated for or are already delivering early intervention programs targeting children, young people and their families.

Key issues

- Most people experiencing disadvantage do not encounter the criminal justice system. Disadvantage typically culminates in engagement with the criminal justice system in cases where society has failed to provide the social, economic, or legal supports that a person requires to thrive.
- The Victorian Government has historically favoured investment in the criminal justice system over investment in early intervention to prevent criminalisation or victimisation.
- Stakeholders are cautiously optimistic about the Government's *Crime Prevention Strategy* which aims to reduce engagement with the criminal justice system through early intervention programs and social services reform.
- Early intervention to reduce the risk of engagement with the criminal justice system must encompass the provision of social supports, such as disability support, mental health services and social housing.

Findings and recommendations

Finding 1: Different forms of socioeconomic disadvantage—such as poverty, housing instability, trauma and discrimination—increase a person's risk of encountering the criminal justice system through offending or victimisation. Particularly where multiple factors are at play through compounding intergenerational and intersectional disadvantage.

Finding 2: The nexus between disadvantage, victimisation and criminalisation is not causational. Disadvantage typically culminates in engagement with the criminal justice system in instances where society has repeatedly failed to provide the social, mental health, economic or legal supports a person needs to live productively in the community.

Finding 3: Access to timely legal education and assistance can prevent issues related to housing, alcohol and other drugs, civil law matters, mental illness, or debt from escalating into criminal matters. Particularly where legal advice is provided in conjunction with health and social support through a health justice partnership.

Recommendation 2: That the Victorian Government consult Victoria Legal Aid, community legal centres and providers involved in health justice partnerships to design and implement long-term funding mechanisms capable of supporting service provision commensurate to evolving demand.

Recommendation 3: That the Victorian Government provide seed funding and other resources to assist community legal centres, health and social support providers to investigate and facilitate the establishment of additional health justice partnerships in communities experiencing socioeconomic disadvantage around Victoria.

Finding 4: Integrated social support services which holistically address compounding or intersectional disadvantage can increase the efficacy of early intervention aimed at preventing contact with the criminal justice system.

Recommendation 4: That the Victorian Government develop a Victorian Childhood Strategy to complement the objectives of the Victorian Youth Strategy currently being drafted and facilitate cross-portfolio collaboration in relation to policies and programs aimed at supporting children and their families.

Finding 5: Education reduces young people's risk of engaging with the criminal justice system by enhancing their wellbeing and self-esteem and expanding their opportunities and choices in life.

Recommendation 5: That the Victorian Government fund the expansion of relevant programs and the provision of youth workers and youth mentors to young people in primary and secondary schools in disadvantaged communities across Victoria.

Finding 6: Stable employment which aligns with a young person's aspirations reduces their risk of engaging with the criminal justice system by providing a meaningful focus for their life, promoting a positive self-image and providing regular income.

Recommendation 6: That the Victorian Government review its policy and programs assisting young people from disadvantaged backgrounds to gain meaningful and stable employment in light of the finalised Victorian Youth Strategy. This review should assess whether these programs reflect best practice and achieve results with a view to informing improvements.

Finding 7: Place-based early intervention initiatives which are community designed and led, and which facilitate collaboration between schools, social support and legal services, can effectively address socioeconomic disadvantage compounded within a geographical area, with flow on benefits for young people.

Recommendation 7: That the Victorian Government extend the Youth Crime Prevention Grants to enable community led place-based early intervention initiatives which are achieving demonstrable benefits to continue, and to expand access to the Grants Program to additional communities.

Finding 8: Out of home care is criminogenic. Services are responding to children and young people experiencing complex disadvantage who exhibit difficult antisocial behaviours with punitive measures instead of providing the therapeutic and/or culturally appropriate support they require to overcome these challenges.

Recommendation 8: That the Victorian Government provide a public update on the implementation of the *Framework to reduce criminalisation of young people in residential care* to date and outline the next steps for improving outcomes for children in out of home care. The ongoing implementation of the framework should be supported by increased investment to:

- provide training to out of home care staff and police regarding the appropriate management of challenging antisocial behaviour through therapeutic and restorative justice responses
- improve out of home care services' links with, and access to, community-based social support, legal and culturally appropriate services.

Recommendation 9: That the Victorian Government, in collaboration with the Aboriginal community, evaluate the operation of its Aboriginal Children in Aboriginal Care Program with a view to identifying:

- how it can be improved to support better outcomes for Aboriginal children and young people in out of home care
- how best to overcome barriers to, and resource, Aboriginal Community Controlled Organisations taking on responsibility for all Aboriginal children and young people in out of home care.

Recommendation 10: That the Victorian Government raise the minimum age of criminal responsibility, noting that this issue is being considered by several jurisdictions via the Meeting of Attorneys-General.

Recommendation 11: That the Victorian Government invest in community-based social, health, legal and forensic services which address the factors underpinning the criminal behaviours of children and young people. This investment must include the greater resourcing of services which are culturally specific to Aboriginal children.

3.1 Disadvantage, the criminal justice system and the importance of early intervention

> **we need … to acknowledge that we are currently incarcerating (across Australia, and certainly right now in Victoria) large numbers of people who have been criminalised as a consequence of their disadvantage.**
>
> Justice Reform Initiative, *Submission 103*, p. 1.

The nexus between different forms of socioeconomic disadvantage and engagement with the criminal justice system—as someone who perpetrates and/or is victimised by an offence—was acknowledged by the Victorian Government[1] and many other stakeholders throughout the Committee's Inquiry. For example, the Victorian Council of Social Services submitted that:

> social inequality and exclusion, in the form of social, economic or intergenerational disadvantage, limited education and employment opportunities and poor health and wellbeing, is a risk factor for antisocial and offending behaviours.[2]

Likewise, Dr Mindy Sotiri, Executive Director of the Justice Reform Initiative, began her evidence at a public hearing in Melbourne by asserting that 'right now in Victoria, large numbers of people [are being] criminalised as a consequence of their disadvantage'. She suggested that Victorian 'prisons are filled with people who come from situations of extreme poverty and disadvantage' and that, had these individuals been supported to address the factors informing their disadvantage early on, many would not have come into contact with the criminal justice system:

> We also know that had the majority of people that we incarcerate right now received [little or no] support and opportunity in the community—had they had access to resources, to education, to housing, to employment; had their disabilities and mental health conditions been adequately responded to; had they had access to drug and alcohol treatment at the moment when they needed help; had they had access to anchors and cultural connection in the community to assist with trauma and poverty and discrimination—then we would have a vastly different looking justice system.
>
> There is very little debate about any of this in the research literature in terms of the demographics of who it is that we send to prison, but the fact of disadvantage of course does not and should not minimise the severity of crime or the impact that crime has on victims.[3]

Dr Sotiri asserted that addressing disadvantage and the 'underlying social and economic causes and drivers of incarceration' must be 'front and centre' of any strategy to reduce prison populations.[4]

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1 Victorian Government, *Submission 93*, pp. 16–19.

2 Victorian Council of Social Service, *Submission 137*, p. 11.

3 Dr Mindy Sotiri, Executive Director, Justice Reform Initiative, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 17.

4 Ibid.

Evidence highlighted many different forms of disadvantage associated with increased risk of engagement with the criminal justice system, including:

- poverty[5]
- homelessness/housing instability[6]
- lower education attainment
- unemployment[7]
- trauma[8]
- exposure/victimisation to violence and/or sexual abuse[9]
- family member offending/incarceration
- poor health and wellbeing, including mental illness[10]
- disability or cognitive impairment[11]
- discrimination, racism and exclusion.[12]

However, while these forms of disadvantage are associated with a higher risk of engagement with the criminal justice system, it is important to note that there is no causal link. As Dr Karen Hart, Senior Lecturer at Victoria University, explained during a public hearing in Melbourne 'criminal activity is only one manifestation of … disadvantage' and many people experiencing these challenges do not encounter the criminal justice system:

> importantly, the great majority of people living within our neglected communities in Victoria are faring as best they can against the odds without ever having had to voluntarily or coercively be involved in the criminal justice system.[13]

Professor James Ogloff, Professor of Forensic Behavioural Science and Director of the Centre for Forensic Behavioural Science at Swinburne University of Technology, made a similar observation at a public hearing. He noted that the majority of people who experience social disadvantage and inequality do not offend:

> it is not being poor, it is not being a multicultural group, it is not being disadvantaged in and of itself; it is that plus a range of other factors.[14]

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5 Victorian Council of Social Service, *Submission 137*, p. 11; WEstjustice, *Submission 141*, p. 5; Uniting Vic. Tas, *Submission 129*, pp. 1–2; Law and Advocacy Centre for Women, *Submission 135*, p. 14.

6 Uniting Vic. Tas, *Submission 129*, p. 2; Law and Advocacy Centre for Women, *Submission 135*, pp. 6–9.

7 Victorian Council of Social Service, *Submission 137*, p. 12.

8 Ibid., p. 21; Uniting Vic. Tas, *Submission 129*, p. 3.

9 Victorian Council of Social Service, *Submission 137*, pp. 21, 26; WEstjustice, *Submission 141*, p. 4; Centre for Drug Use Addictive and Anti-social Behaviour Research, *Submission 165*, p. 9; Sexual Assault Services Victoria, *Submission 136*, p. 5.

10 Law and Advocacy Centre for Women, *Submission 135*, pp. 13–14; ibid., pp. 16–17.

11 Victorian Council of Social Service, *Submission 137*, p. 21.

12 Law and Advocacy Centre for Women, *Submission 135*, pp. 2–3.

13 Dr Karen Hart, Senior Lecturer, Victoria University, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 27.

14 Professor James Ogloff, Professor of Forensic Behavioural Science and Director, Centre for Forensic Behavioural Science, Swinburne University of Technology, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 28.

The Committee heard that engagement with the criminal justice system becomes more likely when people experience multiple forms of compounding disadvantage. For example, Fitzroy Legal Service asserted:

> Criminalisation and incarceration happen when a number of systemic drivers intersect: experiences of trauma and victimisation, mental illness and drug use and/or dependence, poverty and unstable housing and for Aboriginal people in particular, racism and colonisation. Focusing our policy responses to crime and offending on the criminal legal system leaves the drivers of criminalisation unaddressed and all but guarantees people will return to prison.[15]

The Committee heard that multiple forms of disadvantage can compound in a geographical area, across generations or due to the different facets of an individual's identity.

Emeritus Professor Joe Graffam, Deputy Vice-Chancellor of Research at Deakin University, Jesuit Social Services, and Professor Ogloff noted that disadvantage can be concentrated in particular communities.[16] Professor Graffam informed the Committee at a public hearing that a handful of Victorian postcodes are home to the largest portion of Victorians engaged with the criminal justice system.[17]

> **Acknowledging and addressing disadvantage as a main driver of incarceration is critical to understanding what takes an individual on a pathway to incarceration and to altering that pathway. Clearly there is a community disadvantage effect. Six per cent of Victorian postcodes contribute 50 per cent of the state's prison population and 2 per cent of postcodes contribute 25 per cent of that total.**
>
> Emeritus Professor Joe Graffam, Former Deputy Vice-Chancellor, Research, Deakin University, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 2.

Jesuit Social Services explained in a written submission to the Inquiry that disadvantage can be concentrated and compounded in particular communities. It termed this the 'web of disadvantage' and asserted people who get caught up in this web are not necessarily 'bad', rather a series of factors are coalescing to create a pathway into the criminal justice system. It argued that supports which address risk factors such as drug use, mental illness and trauma, and which assist a person to engage with education or employment can shape a trajectory out of this web.[18]

Aboriginal Victorians who participated in the Inquiry described how disadvantage left unaddressed can culminate across generations. At a public hearing, Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer of the Victorian Aboriginal Child Care Agency, noted that there are examples of this within the Aboriginal community:

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15 Fitzroy Legal Service, *Submission 152*, p. 24.

16 Professor James Ogloff, *Transcript of evidence*, p. 28; Jesuit Social Services, *Submission 119*, p. 10.

17 Emeritus Professor Joe Graffam, Former Deputy Vice-Chancellor, Research, Deakin University, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 2.

18 Julie Edwards, Chief Executive Officer, Jesuit Social Services, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 18.

> when I look at those Aboriginal people, when I look at our Aboriginal children, these are people. These are young people and children in jail. Many come from families who have fifth or sixth generations who have been removed and are in a pattern of giving up. Many see themselves as unable to fight the system and relinquish their children to welfare, through drug and/or alcohol abuses are victims and perpetrators of violence, continue to live in hardship and are trapped in the cycle of poverty. I know their history, their story. Many entered the justice system for something small or have exposure to a learned drug and alcohol culture in this country. Then our system criminalises them. They do not know a different life. We purport to take a tough stance towards crime in this country, then talk about injustice—the injustice of it all— when we discuss the Aboriginal over-representation, failing to see what we can do about this.[19]

In its submission to the Inquiry, the Victorian Government noted that intersectionality can also compound disadvantage.[20] Intersectionality refers to the manner in which different aspects of a person's identity, or social characteristics—such as gender, migration status, age, Aboriginality, or sexual orientation—can subject them to overlapping forms of discrimination or disadvantage.[21] The Victorian Government submitted an example:

> the factors relating to an individual's contact with the justice system are multidimensional and complex …
>
> Some groups of people are more at risk of cross-sectional challenges that may further entrench socioeconomic disadvantage. For example, Aboriginal women may face discrimination and disadvantage as both women and Aboriginal people. Their contact with the criminal justice system may be as both victim and offender.[22]

Inquiry stakeholders argued that disadvantage typically culminates in engagement with the criminal justice system in cases where social support addressing risk factors is not provided in a timely manner. Sergeant Wayne Gatt, Secretary and Chief Executive Officer of the Police Association Victoria, argued that a lack of social support is at the root of most offending:

> there are people that are bad, and there are people that are bad at times because they lack social support. And overwhelmingly at the seat of most offending at some point in that journey of offending is a low level of support to a person in terms of their social situation. Now, whether you look at it in terms of people that are over-represented in crime categories for whatever reason, at some point you will see a system in terms of social support that fails to support that. It could be employment. It could be health. It could be education. Now, these have little to do with the work of police officers, but unaddressed, unsupported and uninvested in, they [can] culminate in people ultimately engag[ing] with police.[23]

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19 Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer, Victorian Aboriginal Child Care Agency, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 34.

20 Victorian Government, *Submission 93*, p. 19.

21 Victorian Government, *Understanding intersectionality*, <https://www.vic.gov.au/understanding-intersectionality> accessed 11 January 2022.

22 Victorian Government, *Submission 93*, p. 67.

23 Sergeant Wayne Gatt, Secretary and Chief Executive Officer, The Police Association Victoria, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 22.

Victoria Legal Aid asserted that failures in Victoria's social support system contribute to people entering the criminal justice system:

> Failures in community-based care and support systems lead to people entering the criminal justice system. Our criminal law clients often have histories of trauma and abuse, family instability and poverty. Many of our criminal law clients have disabilities, experience mental health issues and substance dependence and many of them are [experiencing] homelessness. We regularly see our clients suffer discrimination and disadvantage due to these factors. Services in intersecting systems are critical for enabling people to maintain stable lives and recover, rather than entering the criminal justice system.[24]

The Committee heard that early intervention to address the forms of disadvantage associated with increased risk of engagement with the criminal justice system is key to avoiding victimisation or criminalisation in the longer term.

At a public hearing in Melbourne, Jill Prior, Principal Legal Officer of the Law and Advocacy Centre for Women and representative of the Federation of Community Legal Centres Victoria Inc., explained that there are many possible points along a pathway into the criminal justice system at which intervention is possible.[25]

> **in the journey of a human being from their first contact with the justice system to the point of incarceration … there are points of intervention all the way along that journey … there is a very clear path that we can see, and at each point there are available interventions that are not outlandish, you know. They are housing and mental health and other social supports, and where we tweak those points of intersection then we are stopping this cascade of disadvantage that ends up being a custodial sentence where we start having whole other discussions.**
>
> Jill Prior, Principal Legal Officer, Law and Advocacy Centre for Women, Federation of Community Legal Centres Victoria Inc., public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 37.

Jill Prior emphasised that successful intervention is possible at any point in an individual's pathway into the criminal justice system.[26] However, her colleague Louisa Gibbs, Chief Executive Officer of the Federation, noted that earlier intervention is more effective at preventing offending and more cost effective for the Victorian Government.[27] She said supporting people to overcome disadvantage can prevent crime:

> There is extensive evidence that providing a person with stable housing, employment and community-based supports for mental ill health, substance use or victimisation reduces the likelihood that a person will come into contact with the criminal legal system, either as a victim or as a perpetrator.[28]

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24 Victoria Legal Aid, *Submission 159*, p. 5.

25 Jill Prior, Principal Legal Officer, Law and Advocacy Centre for Women, Federation of Community Legal Centres Victoria Inc., public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 37.

26 Ibid., p. 39.

27 Louisa Gibbs, Chief Executive Officer, Federation of Community Legal Centres Victoria Inc., public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 36.

28 Ibid.

Emily Piggott, Advocacy Coordinator at VALID—an advocacy group for people with disabilities—suggested that the earlier support is provided, the more likely it is to be successful and prevent vulnerable people from moving closer towards an encounter with the criminal justice system. She noted that intervention is less likely to succeed when it is provided at the point of incarceration:

> unfortunately the strange thing that we do now is wait for people to offend, pop them in prison and then expect them to engage in therapeutic programs in a system that is punishing them, and then wonder why they come out broken and angry. If we can put in support right at the front end, then, yes, we have a huge, huge, huge chance of stopping that pipeline.[29]

Samantha Sowerwine, Principal Lawyer of Homeless Law at Justice Connect—a social justice legal service—also noted that intervening to provide social support at the earliest opportunity is more likely to achieve long-term sustainable prevention of engagement with the criminal justice system than waiting until individuals are incarcerated.[30]

The Committee understands that the nexus between socioeconomic disadvantage and engagement with the criminal justice system is well established.

FINDING 1: Different forms of socioeconomic disadvantage—such as poverty, housing instability, trauma and discrimination—increase a person's risk of encountering the criminal justice system through offending or victimisation. Particularly where multiple factors are at play through compounding intergenerational and intersectional disadvantage.

It is also evident to the Committee that early intervention to address disadvantage and enhance protective factors, such as education and employment, can reduce this risk by enhancing individual wellbeing and connection to the community. Disadvantage typically culminates in engagement with the criminal justice system in cases where society has failed to provide the social, economic, or legal supports that a person requires to thrive.

FINDING 2: The nexus between disadvantage, victimisation and criminalisation is not causational. Disadvantage typically culminates in engagement with the criminal justice system in instances where society has repeatedly failed to provide the social, mental health, economic or legal supports a person needs to live productively in the community.

As stakeholders note, there are many possible points of intervention and diversion along an individual's pathway into the criminal justice system and the earlier an intervention is made, the more likely it is to be effective.

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29 Emily Piggott, Advocacy Coordinator, VALID, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 55.

30 Samantha Sowerwine, Principal Lawyer, Justice Connect Homeless Law Justice Connect, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 29.

3.2 Early Intervention Investment Framework

In its submission to the Inquiry, the Victorian Government outlined its commitment to 'a continuous reform agenda which seeks to deliver community safety and prevent crime, [and] intervene as early as possible where people are at risk of offending'. It asserted that continuing efforts to reduce offending will build a safer community and ultimately reduce the number of people experiencing trauma as a result of crime.[31]

In pursuit of these aims, the Victorian Government has established the *Early Intervention Investment Framework*. The framework aims to facilitate government investment in social services. It seeks to deliver measurable outcomes for disadvantaged people accessing these services or drive better outcomes across the social services system.[32] The Victorian Government hopes to reduce the burden on acute service providers and improve the wellbeing of Victorians facing disadvantage by investing in the provision of timely social assistance to prevent escalations such as engagement with the criminal justice system:

> This approach recognises that a significant and sustained investment in early intervention is needed to change the current service landscape and acute service demand trends. There are benefits to both the system and the service user, addressing challenges and needs as they emerge, avoiding the entrenchment or escalation of problems and the need for further, and possibly more intensive or intrusive, services.[33]

The 2021–2022 State Budget includes $324 million to fund 10 programs for intervening early to address disadvantage and prevent people from requiring acute social support. The Victorian Government described these programs in its submission to the Inquiry:

> The package includes initiatives that offer early support to a diverse range of Victorians. This includes people with chronic health conditions or patients waiting to receive elective surgery; Victorians who are at risk of chronic homelessness; families showing early signs of vulnerability and at risk of interacting with the statutory child protection system; and disengaged young people.[34]

It is hoped that this work by the government will have benefits that flow through to the criminal justice system. There are three initiatives that relate directly, namely:

- the Crime Prevention Strategy
- legal assistance
- the common clients reforms.[35]

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31 Victorian Government, *Submission 93*, p. 9.

32 Department of Treasury and Finance, *Early Intervention Investment Framework*, 19 October 2021, <https://www.dtf.vic.gov.au/funds-programs-and-policies/early-intervention-investment-framework> accessed 21 January 2021.

33 Victorian Government, *Submission 93*, p. 61.

34 Ibid.

35 Ibid.

Other changes being pursued by the Victorian Government also aim to improve the social support systems addressing the disadvantage which places people at risk of encountering the criminal justice system, including:

- family violence reform
- mental health reform.

The following sections of this Chapter examine these overarching strategies, programs and changes. Investment aimed at specific populations at greater risk of encountering the Victorian criminal justice system are acknowledged in Chapter 4.

3.2.1 Crime Prevention Strategy

In June 2021, the Victorian Government launched the *Crime Prevention Strategy* which describes how it plans to work with businesses, key organisations and the broader community to prevent crime by delivering the following four goals:

- Victorian communities are more connected, cohesive, and engaged in designing and delivering local solutions to prevent crime.
- Fewer Victorians come into contact with the criminal justice system.
- More people at risk of offending are connected earlier with more effective support.
- Victorians are safer and feel safer.[36]

The Strategy seeks to coordinate collaboration between government and communities to develop effective local solutions to crime that address the factors underpinning criminal behaviours. This includes 'social and economic disadvantage, disengagement from education, unemployment, housing instability, and social isolation'.[37] During a public hearing in Melbourne, Rebecca Falkingham, Secretary of Department of Justice and Community Safety (DJCS), described the strategy as evidence-led and said it will support the sustained effort necessary to address the factors informing criminal behaviour:

> this is a really evidence-led strategy, and it has been really critical that we do recognise that complex causes of crime do require..., that sustained effort across government and the need to build on major Victorian government reforms, particularly in housing, employment, mental health, education and family violence. So we are really trying to leverage off those big investments in those other reforms as well, particularly around housing.[38]

A key initiative of the Strategy is the *Building Safe Communities Program*. The Program provides community forums and grants to support local governments, not-for-profit organisations and other stakeholders to deliver evidence-based approaches to address

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36 Ibid., p. 45.

37 Ibid.

38 Rebecca Falkingham, Secretary, Department of Justice and Community Safety, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, pp. 8–9.

the causes of crime and enhance community safety. The Program encompasses four funding streams outlined in Table 3.1. Applications for the first round of grants had closed at the time of writing.[39]

Table 3.1 Building Safer Communities Program funding streams

Grant	Description of the grant and its aims
Creating safer places	Competitive grants of between $25,000 to $300,000 for councils to fund urban design and place activation initiatives to improve the safety and use of public places by a diverse range of community members.
Crime prevention innovation fund	Competitive grants of between $25,000 and $300,000 for councils, not for profit community organisations and other specialist organisations for partnership projects that deliver and evaluate innovative community safety and crime prevention initiatives.
Empowering communities grants	Competitive grants of up to $700,000 to priority communities to support the development of community-led crime prevention initiatives. Priority communities are identified based on an analysis of crime and social data to ensure investment is targeted to areas where it is needed most. These grants recognise that communities are well placed to deliver effective, innovative and sustainable crime prevention approaches when they have access to resources, expertise and practical tools, and are united by a common goal.
Youth engagement grants	The Youth Engagement Grants are open to small multicultural and Aboriginal clubs and organisations to support young people make positive life choices and reach their potential. Up to $50,000 per project over two years can be funded.

Source: Victorian Government, *Community Crime Prevention, Building Safer Communities Program*, <https://www.crimeprevention.vic.gov.au/buildingsafercommunities> accessed 6 January 2022.

A number of stakeholders generally welcomed the Victorian Government's approach to crime prevention. In written evidence to the Inquiry, WEstjustice said that the *Crime Prevention Strategy* and the Building Safer Communities Program are important steps towards 'addressing fragmented, siloed and uncoordinated' social support systems across government and community.[40] Victoria Legal Aid likewise viewed the *Crime Prevention Strategy* and common client reforms as 'necessary and important'. It submitted:

> We have also seen a welcome focus on crime-prevention activities and on common clients across government departments. These reforms are commendable and should continue to be implemented.[41]

The Australian Association for Restorative Justice viewed the *Crime Prevention Strategy* as a commitment from government to engage with community to make decisions about how best to prevent crime. It said that this aligns with restorative justice approaches and if implemented, will 'ameliorate harmful behaviour involving children, young people, and adults'.[42]

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39 Victorian Government, *Community Crime Prevention: Building Safer Communities*, <https://www.crimeprevention.vic.gov.au/buildingsafercommunities> accessed 6 January 2022.

40 WEstjustice, *Submission 141*, p. 12.

41 Victoria Legal Aid, *Submission 159*, p. 4.

42 Australian Association for Restorative Justice, *Submission 63*, pp. 4–5.

Jesuit Social Services noted that it advocates for criminal justice system reform centred on crime prevention and early intervention and therefore welcomes the launch of the *Crime Prevention Strategy*. It hoped that the Victorian Government would continue to pursue 'stronger and more ambitious commitments' in line with the Strategy, 'particularly specific to reducing the criminalisation of children and young people in care and raising the age of criminal responsibility, as these are currently omitted'.[43]

The Committee received similar commentary on the *Crime Prevention Strategy* from Tiffany Overall, Policy, Advocacy and Human Rights Officer at Youthlaw and Co-Convenor of Smart Justice for Young People, during a public hearing. Tiffany Overall said:

> I think it is a really important starting foundation to start that sort of work where government is really partnering with and supporting and investing in communities to innovate and deliver those local solutions that address underlying causes of crime and improve safety for Victorians. As I said before, we are really encouraged by that approach. I think it is a great start. I think we can really build on that and roll it out statewide.[44]

Smart Justice for Young People said it welcomed 'recent steps taken by the Victorian Government towards overcoming policy responses that are fragmented and siloed and lack coordination across government and community'. It noted that it is looking to the *Crime Prevention Strategy* to 'provide coordination and a unified approach':

> The Crime Prevention Strategy promotes a shared responsibility across government, councils, community, business and other key sectors to address risk factors for offending, build on successful initiatives that are already underway and support Victoria's recovery from the pandemic. In doing so, the Strategy builds on existing investment in a number of key reforms across government in family violence, mental health support, housing, education, employment and community policing, that support Victorians to lead safe, secure and fulfilling lives.[45]

Smart Justice for Young People noted that the *Crime Prevention Strategy* takes a 'justice reinvestment' style approach to reducing disadvantage by supporting partnerships between government and communities:

> The approach involves supporting and investing in communities to identify, develop and implement their own local, place-based solutions tackling localised economic and social risk factors underlying the root causes of crime, preventing young people entering the criminal justice system in the first place (and reducing reoffending) …
>
> In essence the *Crime Prevention Strategy* adopts a justice reinvestment like approach. It has developed a framework for government to partner with communities and key organisations to deliver local solutions that address the underlying causes of crime and

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43 Jesuit Social Services, *Submission 119*, p. 9.

44 Tiffany Overall, Policy, Advocacy and Human Rights Officer, Youthlaw, and Co-convenor, Smart Justice for Young People, Public hearing, Mebourne, 6 September 2021, *Transcript of evidence*, p. 14.

45 Smart Justice for Young People, *Submission 88*, p. 7.

> improve safety for all Victorians. It will support and invest in Victorian communities to innovate and address issues at a local level to prevent crime before it occurs. It recognises that communities hold the expertise, knowledge and ideas to design the solutions that are right for them.[46]

However, some criticism of the Building Safer Communities Program was offered by the Australian Psychological Society. It observed that 'historically, there has been a paucity of attention and resources directed towards strategic primary and secondary prevention in comparison to the vast amounts of investment in correctional services, and particularly prisons'. It asserted that efforts at early intervention by the Victorian Government could be improved. Specifically, it was critical of the uncoordinated approach to grants being offered as part of the Building Safer Communities Program:

> Crime Prevention Victoria currently offers funding grants to organisations who submit proposals under their Building Safer Communities Program. Examination of the proposals which have currently received funding indicates a broad range of projects which have received support, from improving lighting in some areas to engagement with youth and specific community groups. It appears, however, that the outcome of providing funding in this manner is the lack of a coordinated strategic approach to the prevention of crime. Rather, funding is contingent on councils and other organisations applying for standalone projects.[47]

It is clear to the Committee that generally, stakeholders are cautiously optimistic about the positive impact the Victorian Government's *Crime Prevention Strategy* is hoped to have on the socioeconomic disadvantage that places people at risk of entering the criminal justice system. The Committee also welcomes the Victorian Government's renewed focus on an early intervention approach to crime prevention. It encourages the Victorian Government to undertake regular evaluation of its strategy to assess the impact of its programs and policies, and to inform the refinement of its approach.

3.2.2 Legal assistance

In its submission to the Inquiry, the Victorian Government explained that timely access to legal services 'can provide opportunities for prevention and early intervention' and is a fundamental human right protected by international treaty, Victorian legislation, and Australian case law. It noted that 'access to necessary support services can help divert a person away from contact with the criminal justice system':

> Legal assistance can help with this, by supporting people to resolve civil matters such as debt, housing and tenancy matters, before they escalate into more complex and expensive issues. Legal assistance can also help to advocate for people to receive cautions or diversions when appropriate and refer people to services that help address the underlying causes of offending. [48]

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46 Ibid., pp. 7–8.

47 Australian Psychological Society, *Submission 90*, p. 6.

48 Victorian Government, *Submission 93*, p. 15.

However, as pointed out by the Victorian Council of Social Services in its submission, the 'people most vulnerable to legal problems often have fewer skills and resources to deal with them without assistance'. It noted that:

> targeted legal assistance delivered at the right time and the earliest possible opportunity, can help resolve problems that can otherwise escalate, leading to more problems, greater disadvantage and higher costs.[49]

In Victoria, vulnerable people who cannot afford a private lawyer can seek legal assistance through Victoria Legal Aid or through a community legal centre. Aboriginal Victorians may also seek assistance from Aboriginal Community Controlled Organisations which offer legal services, such as the Victorian Aboriginal Legal Service.

Victoria Legal Aid assists people in all Victorian courts and tribunals across:

- criminal law
- family law
- family violence
- child protection
- mental health
- discrimination
- migration
- disability
- tenancy law.

It prioritises more intensive legal services and typically assists people appearing before a Magistrates' Court for a criminal matter 'where a conviction is likely to result in a term of immediate imprisonment'. Victoria Legal Aid also provides a court 'duty lawyer' to aid people who do not meet this threshold on the day of their appearance before a court.[50]

In a submission to the Inquiry, Victoria Legal Aid said that the assistance it provides clients 'plays a significant role in early intervention and the prevention of [and] escalation of legal issues':

> This includes through providing assistance with civil legal need, such as housing, income, mental and physical health, visa status, and the ability to live and work free from discrimination.
>
> Research has found a strong relationship between civil legal need and criminal offending …

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49 Victorian Council of Social Service, *Submission 137*, p. 20.

50 Brimbank Melton Community Legal Centre, *Submission 131*, p. 16; Victorian Legal Aid, *Submission 159*, p. 3; Victoria Legal Aid, *What we do*, 3 September 2020, <https://www.legalaid.vic.gov.au/about-us/what-we-do> accessed 10 January 2021.

> Properly funded legal services to assist with civil legal need would play a substantial role in reducing entry to the criminal justice system.[51]

In addition to its legal services, Victoria Legal Aid sets practice standards and funds community legal centres. Community legal centres are independent community organisations that provide free legal services. They offer important early intervention and assistance resolving a range of legal challenges—which, if left unresolved, could escalate into criminal law matters—including debt, family violence, homelessness, alcohol and other drug problems, mental health issues and civil law issues. They focus on helping people who face economic and social disadvantage and who are ineligible for legal aid and cannot afford a private lawyer. Their main areas of work are legal advice and casework, community legal education, and systemic advocacy.[52] For example, Brimbank Melton Community Legal Centre said that most of its clients have no, or little, prior involvement with the criminal justice system. It pursues an early intervention approach, 'by seeking to link [clients] in with appropriate support services and by seeking to find ways to divert them out of the criminal justice system, including by seeking diversion programs' (diversion programs are discussed in Chapter 5). Brimbank Melton Community Legal Centre said that in relation to criminal matters, it commonly assists people with complex vulnerabilities:

> We commonly assist clients experiencing multiple barriers and disadvantages, including mental illness, cognitive disabilities, language barriers and family violence. These barriers often make the thought of representing themselves in negotiations with police and appearing before a magistrate a terrifying prospect …[53]

Springvale Monash Legal Service provided the Committee with written information about the community legal education which legal centres, such as itself, provide to vulnerable young people:

> Our community engagement work with young people not only seeks to increase knowledge of the law, but also aims to de-mystify the justice system and encourage help-seeking behaviour. As an example of a preventative community development program, [Springvale Monash Legal Service] SMLS has been delivering *Sporting Change*. The program contributes to young people engaging constructively in their community and in society by using sport to teach young people about the law. The program also increases access to justice for young people through an integrated school lawyer based within the school environment.[54]

Aboriginal Community Controlled Organisations which offer legal services provide culturally safe legal assistance, advice, advocacy and community legal education to Aboriginal people around Victoria. For example, the Victorian Aboriginal Legal Service 'serves Aboriginal people of all ages and genders in the areas of criminal, family and

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51 Victoria Legal Aid, *Submission 159*, pp. 6–7.

52 Victorian Government, *Submission 93*, p. 98.

53 Brimbank Melton Community Legal Centre, *Submission 131*, p. 16.

54 Springvale Monash Legal Service, *Submission 146*, p. 7.

civil law'. Its submission to the Inquiry highlighted legal education as 'an essential tool in reducing contact with the criminal legal system for marginalised people in Victoria':

> A key driver of continuing contact with police and the legal system, and consequently of overincarceration, is people's uncertainty about their rights in the face of a complex and regularly changing legal landscape …
>
> [Community legal education] CLE can prompt individuals to recognise that they have existing legal issues, with which VALS [the Victorian Aboriginal Legal Service] can assist. This empowers individuals with the knowledge that they have rights, and that they can access culturally competent legal assistance in realising and protecting those rights. CLE can assist individuals already caught up in these legal systems to navigate their way with more confidence, taking proactive steps to mitigate risks and achieve better outcomes. CLE also has an important role to play in the prevention space, such as avoiding COVID-19 fines to begin with. Finally, CLE can play an important role in improving VALS' practice, as well as informing policy and law reform.[55]

Some community legal centres collaborate with other social or health services, such as financial counsellors, alcohol and other drug services and mental health providers, to provide more holistic support for clients with complex needs. Such collaborations are known as 'health justice partnerships'. The Victorian Government explained that health justice partnerships specialise in supporting individuals with complex needs:

> Health justice partnerships support populations that are particularly at risk of poor health and justice outcomes and provide support with issues where these needs intersect. For example, in assisting people with fines that act as a barrier to meeting health costs or advocating for public housing tenants who require handrails or aids installed due to disability so they can continue to live in their homes. This approach can help avoid the individual's needs escalating and ensure they are assisted to address important aspects of their lives in a sequence that best supports them. For example, ensuring someone is safe and has secure accommodation may be a necessary preliminary step before addressing legal matters.[56]

Several stakeholders expounded on the benefits of health justice partnerships. The Victorian Council of Social Services said that justice partnerships 'put lawyers into places where people can access them easily during their everyday lives, such as community health services, family violence services or schools':

> People experiencing legal problems are more likely to confide in a GP, a social worker or their teacher than go to a lawyer.
>
> Embedding lawyers in community settings gives people a chance to address their legal needs before they spiral out of control. It means non-legal professionals receiving information from someone can work with lawyers to jointly address that person's needs.[57]

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55 Victorian Aboriginal Legal Service, *Submission 139*, pp. 5, 167.

56 Victorian Government, *Submission 93*, pp. 15–16.

57 Victorian Council of Social Service, *Submission 137*, p. 20.

Louisa Gibbs, Chief Executive Officer of the Federation of Community Legal Centres Victoria Inc.—the peak body for Victoria's Community Legal Centres and Aboriginal Legal Services—spoke to the Committee at a public hearing. She said that legal issues shouldn't be siloed from other challenges impacting a client's wellbeing:

> [the] people who come to see us at community legal centres have a range of complex legal issues and other issues in their lives. Health professionals, social workers, schoolteachers, financial counsellors working together to support a person, I think, is a really great way to have a holistic and meaningful and full response to the issues that someone is facing in their lives. So not just saying, 'This is an offence, this is a legal issue', but saying it is part of someone's whole life and it has implications in their whole life. We need to think about how to support all those different elements around them so that the legal issue can also get solved.
>
> ...
>
> to sort through and be supported with not just the legal issues but everything that is happening, [ ] creates meaningful change in the whole structure of their life, which helps them then to bounce into greater things and go forward and upward.[58]

Charlotte Jones, General Manager of the Mental Health Legal Centre, also appeared before the Committee at a public hearing. She explained that a health justice partnership approach can also ensure a more complete picture of a client is presented at court and can assist them to secure better legal outcomes:

> Since November 2015 [our health justice partnership] has managed more than 1,000 legal problems. About 20 per cent of these are criminal. Not one client who has been represented by Lucy, our health justice partnership lawyer, has been returned to prison. So why does it work? The consistency of the legal practitioner, the easy and direct contact, the trust relationship with the medical team, the ability to obtain supporting documents and the work of the team in seeking stable accommodation—when all these factors come together, futures are changed. The most common criminal legal issues for HJP clients are escalated civil law matters, intervention order breaches, shoplifting, minor theft, assault, drug possession and property damage.
>
> The use of reports and information at court is essential ... we gather all the evidence available, all of the resources we have, because we have a dedicated lawyer who has got direct access to many members of the medical team. As such, we have a complete picture. We understand what the acquired brain injury looks like and their intellectual capacity, alongside their mental health issues with the impacts of drugs, alcohol and medication.[59]

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58 Louisa Gibbs, *Transcript of evidence*, p. 39.

59 Charlotte Jones, General Manager, Mental Heath Legal Centre, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, pp. 27–28.

BOX 3.1: Example of advantages of health justice partnerships

The Law and Advocacy Centre for Women (LACW) is a community legal centre specialising in criminal defence advocacy for women who are imprisoned, or at risk of entering the criminal legal system. It has an in-house case management team, including an in-house social worker, providing wrap-around support to clients. In many cases, women are at risk of criminalisation because of social, health and family challenges that they experience because of entrenched disadvantage and family violence.

In one matter, the lawyer and social worker assisted Jane who had criminal charges against her. Among other factors, Jane was homeless, had an acquired brain injury and experienced mental ill health as a sexual assault survivor. The social worker put in place important supports for Jane which made her well enough to engage with the legal process and then proceeded to set up longer-term plans for ongoing support from services that the client had previously struggled to engage with.

As the court could see that there was a detailed support plan in place for Jane, she was allowed to continue to engage with support services, rather than receiving a custodial sentence. The integrated approach not only led to a successful legal outcome, but also enabled Jane to address the underlying causes of her offending.

Source: Federation of Community Legal Centres Victoria Inc., *Submission 132*, p. 18.

In a submission to the Inquiry, First Step Legal noted that there are currently 40 health justice partnerships operating in Victoria and suggested that they are key to addressing complex disadvantage:

> they support people who are particularly vulnerable to multiple and intersecting problems including family violence, homelessness, mental illness and addiction. This is the same cohort that cycles in and out of the justice system, contributing to high recidivism rates and multiple contacts over time.[60]

First Steps Legal said that the 'integrated, holistic response to [an] individual's health and legal needs' delivered by health justice partnerships results in better outcomes than standard services operating in legal or health silos.[61] It explained that health justice partnerships can intervene early to prevent clients from ongoing engagement with the criminal justice system and connect them with services that support desistance from criminal behaviours:

> First Step Legal has an established track record of securing diversionary outcomes for clients whose criminal matters, though serious, may not qualify for Legal Aid. More than half of all criminal matters finalised by First Step Legal result in either an adjourned undertaking, diversion or discharge, dismissal or withdrawal of charges. However, these

60 First Steps Legal, *Submission 113*, p. 3.

61 Ibid., p. 2.

> legal outcomes do not reflect the whole story: at the point of finalisation most clients are connected with treatment and supports that will actively support their desistance from crime long into the future.[62]

Justice Connect also provides an integrated legal and social support service. It said in a submission to the Inquiry that this approach 'really reduces the emergence of new legal issues and increases the potential for positive and sustainable outcomes for clients'.[63]

There was some suggestion throughout the Inquiry that legal services for vulnerable people, including health justice partnerships, are currently underfunded and that further support will assist more vulnerable Victorians to access legal assistance and participate in community legal education.

The Victorian Council of Social Services submitted that community legal centres have experienced a surge in demand since the beginning of the COVID-19 pandemic. It suggested that the Victorian Government work with legal centres to model future demand and match funding to expected service requirements. It also recommended ongoing funding for health justice partnerships.[64]

Brimbank Melton Community Legal Centre said that it has been forced to turn away many vulnerable people seeking assistance due to funding inadequacies:

> Due to resource constraints, we are very rarely able to assist in criminal matters beyond the initial advice stage. We are regularly forced to make the difficult decision to not assist a client, knowing that this risks them not being able to obtain an outcome as good as they may have with our assistance. We are forced to assess their capacity to self-advocate, and to weigh that up against the needs of our other clients, and a never-ending demand for services that we cannot come close to satisfying.[65]

Moreover, the Legal Centre noted that much of its funding is project based and insecure, making it difficult to retain experienced staff capable of undertaking the complex work required. It therefore recommended that the Victorian Government 'commit additional long-term core funding to community legal centres, focusing on early intervention for vulnerable clients involved in the criminal justice system'.[66]

First Steps Legal said that health justice partnerships are a 'vital element of the Victorian criminal justice landscape' with a 'proven track record in reducing recidivism'. It argued that they are 'strongly supported by international evidence regarding effective modalities for people facing persistent and long-term contact with the criminal justice system' and urged the Committee to recommend:

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62 Ibid., p. 6.

63 Samantha Sowerwine, *Transcript of evidence*, p. 27.

64 Victorian Council of Social Service, *Submission 137*, p. 20.

65 Brimbank Melton Community Legal Centre, *Submission 131*, p. 16.

66 Ibid.

> Significant expansion of health justice partnerships that embed legal services in therapeutic settings such as mental health, drug and alcohol and family violence services.[67]

The Federation of Community Legal Centres Victoria Inc. said that 'adopting early intervention approaches that reduce the risk of future engagement with the criminal legal system; and increasing access to government funded legal assistance, including through community legal centres' is a 'cost effective way of preventing crime and tackling its causes':

> Legal advice and representation are critical for people who are in contact with the criminal legal system or at risk of incarceration. Access to legal assistance at an early stage, alongside other wraparound supports, can seek to address underlying causes of offending and then decrease the risk of incarceration. Because incarceration increases the risk of reoffending, early intervention can disrupt these cascading impacts. That is why the Federation strongly recommends additional investment in community legal assistance. This will provide legal advice and holistic, wraparound support to people at risk of coming into contact with the criminal legal system, and this is a good outcome for all of us in our community.[68]

Victoria Legal Aid also suggested that entry into the criminal justice system could be prevented by strengthening access to legal assistance to address civil law matters.[69]

The Aboriginal Justice Caucus noted that the Victorian Aboriginal Legal Service provides legal assistance to Aboriginal Victorians and that demand for services has increased by more than 20% in recent years. It asserted that the service is 'chronically underfunded' and 'strongly recommended' that the Victorian Government increase ongoing funding to ensure that the service can continue to provide culturally safe legal assistance to Aboriginal Victorians wherever they live.[70] Christopher Harrison, Co-Chair of the Aboriginal Justice Caucus, told the Committee at a public hearing that this includes Aboriginal people living outside of Melbourne:

> Aboriginal people need access to adequate culturally appropriate legal assistance across the whole state, not just in metropolitan areas. This includes the provision of legal information, advice and client support so that the Aboriginal people across the state have equal access to culturally appropriate legal assistance and justice supports. This promotes early intervention and reduces the likelihood of more serious involvement in the justice system. Aboriginal people need the best possible legal representation in both civil and criminal justice matters.[71]

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67 First Steps Legal, *Submission 113*, pp. 2, 8.

68 Louisa Gibbs, *Transcript of evidence*, p. 36.

69 Victoria Legal Aid, *Submission 159*, pp. 4–5.

70 Aboriginal Justice Caucus, *Submission 106*, p. 6.

71 Christopher Harrison, Co-Chair, Aboriginal Justice Caucus, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 41.

Moreover, the Victorian Aboriginal Legal Service submitted that 'maintaining and advancing Aboriginal people's knowledge of their legal rights and responsibilities is essential to minimising unnecessary contact with the justice system and reducing overincarceration'. It argued that 'sustainable, ongoing funding is crucial' to enable it to continue offering culturally safe services, including community legal education, to Aboriginal people around the state. It recommended:

> The Victorian Government should significantly increase funding for VALS' [the Victorian Aboriginal Legal Service's] Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community). The funding should be sufficient to enable CLE delivery across the state, including in places of detention.[72]

The Springvale Monash Legal Service said that the COVID-19 pandemic has exacerbated the risk that disadvantaged young people may encounter the criminal justice system. It argued that 'now more than ever, there is an urgent need for young people to access legal education' and recommended resourcing community legal centres to meet this need. They recommended:

> That the Victorian Government prioritise supporting community legal centres to deliver tailored community legal education and engagement to young people, in order to:
>
> a. empower young people with increased knowledge of their legal rights and responsibilities,
>
> b. empower young people to make more informed choices, and
>
> c. Increase young people's knowledge of where to go to get help if needed.[73]

The Committee appreciates that timely access to legal education and assistance can prevent issues such as debt, alcohol and drug issues, civil law matters or tenancy issues from escalating into criminal justice system involvement, particularly when it is paired with other types of assistance through a health justice partnership.

FINDING 3: Access to timely legal education and assistance can prevent issues related to housing, alcohol and other drugs, civil law matters, mental illness, or debt from escalating into criminal matters. Particularly where legal advice is provided in conjunction with health and social support through a health justice partnership.

The work of Victoria Legal Aid and community legal centres, including through health justice partnerships, is critical to ensuring that people experiencing disadvantage can gain access to legal assistance as soon as a need arises. The Committee therefore believes that it is incumbent on the Victorian Government to ensure that community legal centres are adequately funded to meet demand. The Committee believes that

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72 Victorian Aboriginal Legal Service, *Submission 139*, p. 168.

73 Springvale Monash Legal Service, *Submission 146*, pp. 7–8.

funding early legal intervention may save money downstream by assisting Victorians who are experiencing disadvantage, therefore reducing the likelihood of them entering the criminal justice system.

RECOMMENDATION 2: That the Victorian Government consult Victoria Legal Aid, community legal centres and providers involved in health justice partnerships to design and implement long-term funding mechanisms capable of supporting service provision commensurate to evolving demand.

Further, it is apparent to the Committee that co-locating legal services with health and social support providers assists vulnerable Victorians to access the holistic assistance required to increase their wellbeing and reduce their risk of entering the criminal justice system. It would like to see the Victorian Government provide seed funding and resources to support the establishment of new health justice partnerships in communities experiencing disadvantage around the state.

RECOMMENDATION 3: That the Victorian Government provide seed funding and other resources to assist community legal centres, health and social support providers to investigate and facilitate the establishment of additional health justice partnerships in communities experiencing socioeconomic disadvantage around Victoria.

3.2.3 Common clients reform

The Victorian Government is pursuing reform specifically targeted at enhancing early intervention to address complex or intersectional disadvantage, to reduce contact with the criminal justice system. The 'common clients' reform seeks to shift the way that government departments collaborate and work with other organisations in the social services sector to 'more effectively deliver integrated, person-centred services that prioritise client's needs in a holistic and accessible way'. The Victorian Government said the reform recognises that individuals with complex needs need help coordinating support from multiple services:

> Lack of access to culturally appropriate housing, mental health, AOD and family violence supports for example can significantly impact on an individual's ability to avoid contact with the justice system and reduce their reliance on acute services. Often their needs intersect and compound each other making it difficult for them break the cycle of offending and reoffending. While the provision of individual services for a person may help address specific needs at a point it time, it does not address the interaction between their needs, or focus on the areas that a person knows is their priority. Navigating the system and coordinating their service needs may also be so overwhelming and confusing that they do not effectively connect with service providers.[74]

74 Victorian Government, *Community Crime Prevention*.

Rebecca Falkingham, Secretary of DJCS, said that the common clients reforms will be particularly beneficial to clients during difficult life moments, such as the transition from prison back into the community:

> This work acknowledges the crucial points in our client's lives when they need coordinated support across a number of areas. For example, we know that people exiting prison need a range of supports to integrate back into the community and limit the likelihood they will reoffend. This can involve addressing the factors that led to their offending, such as alcohol or substance abuse, and providing opportunities with access to housing and education support. In practice this has meant better coordination and case management of high-priority groups in our community all accessing multiple government services across justice, health and social services.[75]

DJCS and the Department of Families, Fairness and Housing (DFFH) have collaborated to develop a *Common Client Outcomes Framework* to steer reform and:

> enable government and sector partners to focus holistically on a client and the supports they may require across the service system to improve their outcomes, rather than focusing only on a single service or priority.[76]

The Framework also outlines accountability measures to ensure that success is assessed 'based on whether individual outcomes have been achieved – including whether a person has received the right mix of supports, at the right time, to help them reduce their contact with the justice system'.[77]

The 2021–22 State Budget included funding to pilot integrated service responses for vulnerable cohorts to inform common clients reform. Pilot programs are described in Table 3.2. The Victorian Government submitted that 'outcomes from trialling these responses will inform future service design and the potential scaling of integrated service delivery for more systemic changes under the common clients reform'.[78]

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75 Rebecca Falkingham, *Transcript of evidence*, p. 4.

76 Ibid.

77 Victorian Government, *Community Crime Prevention*.

78 Ibid.

Table 3.2 Common clients reform pilot programs

Program name	Target group	Description	Status and funding information	Responsible agency(s)
State-wide roll out of Local Site Executive Committees (LSECs)	People in contact or at risk of contact with the justice system	LSECs aim to bring together government and other agencies to provide leadership and a coordinated, place-based approach to responding to local challenges and priorities. LSECs will include representation from the DJCS (e.g. Youth Justice, Corrections), DFFH (e.g. Child Protection, Housing), Victoria Police, the Department of Education and Training (DET) and local funded service and sector agencies such as mental health, drug and alcohol services and Aboriginal Community Controlled Organisations (ACCOs).	LSECs have been established in eight areas to date and a total of 17 sites will be rolled-out state-wide throughout 2021. As each LSEC is established, they will develop an Action Plan that set out local key priority outcomes and cohorts for focused effort.	DJCS/DFFH
Putting families first	Families with multiple and complex needs	Putting families first will trial multidisciplinary case management teams, working directly with 200 families in Goulburn and Brimbank-Melton with multiple and complex needs to provide practical, personalised and targeted support. Target cohorts for the pilot program include families where a member has been in contact with the criminal justice system. It will embed the learnings from work on lived experience and principles of self-determination. Outcomes from the pilot will be collected and reported through the *Common Clients Outcomes Framework*.	DJCS and DFFH are working together to establish the pilot and inform and progress the development of the service model. The trial received funding of $17.8m over three years in the 2021–22 State Budget. While this is a joint DJCS-DFFH project, funding is held by DFFH.	DJCS/DFFH
People with disability	Just voices project	DJCS is partnering with the RMIT Centre for Innovative Justice and KPMG to deliver the Just voices project which aims to improve justice workforce capability to engage with the NDIS through lived experience. Through this project, DJCS is working with people with disability and lived experience of the criminal justice system to design workforce development initiatives to strengthen the capability of the mainstream justice workforce to: • understand the lived experience of people with disability • be aware of disability and able to identify associated behaviours • communicate and interact effectively with people with disability • better understand and engage with the National Disability Insurance Scheme (NDIS).	This program is currently in progress. DJCS has been allocated $0.5m of Commonwealth funding for the Just voices project.	DJCS/NDIS

Program name	Target group	Description	Status and funding information	Responsible agency(s)
Expanding Aboriginal-led early intervention and diversion to keep Aboriginal children under 14 out of custody	Aboriginal people, young people and families	The project will trial Aboriginal-led early intervention family services and specialist family practitioners to keep children under 14 out of the criminal justice system. Funding will be provided to ACCOs to design and deliver this service. This initiative will trial integrated service delivery approaches to ensure Aboriginal children and families receive wraparound support. It will also support workforce collaboration and development and progress will be monitored using the *Common Clients Outcome Framework*. The trial will incorporate Aboriginal ways of knowing and doing to improve cultural safety and wellbeing and advance Aboriginal self-determination.	DJCS and DFFH are undertaking foundational analysis work to facilitate the service response and embed Aboriginal self-determination into the process, in consultation with Aboriginal communities. Funding received as a component of the $33.1m for Preventing Aboriginal Deaths in Custody in the 2021–22 State Budget.	DJCS/DFFH

Source: Victorian Government, *Submission 93*, Attachment 1.

Stakeholder views on common clients reforms

While few stakeholders commented specifically on the common clients reforms currently being pursued by the Victorian Government, several witnesses and submitters supported the provision of more integrated social support for people at risk of, or already engaged with, the criminal justice system who are experiencing complex or multifaceted disadvantage.

For example, Mallee Family Care argued that the benefits of what it termed a 'whole of system approach' are well recognised. It asserted that 'A 'whole of system' approach utilising evidence-based interventions is crucial to reduce the social and economic drivers of crime and identify the structural changes required to improve opportunities for individual and community success'. It provided an example:

> For example, we know that homelessness can lead to criminal offending and the cause of homelessness can be the result of debt or fleeing family or domestic violence.
>
> A system where all stakeholders work together to deliver integrated solutions will be a fundamental mechanism in reducing prison populations and rates of recidivism.[79]

Likewise, Uniting Vic. Tas said it 'strongly supports' early intervention in the form of 'wrap-around' holistic care:

> We need to continue to invest in all facets of early intervention and provide robust wrap-around social and health services and programs that target the factors that

79 Mallee Family Care, *Submission 126*, p. 10.

> unfortunately amplify the chances of people engaging in anti-social behaviour that leads to involvement in the criminal justice system and the harm it involves.[80]

It recommended that the Victorian Government 'invest in earlier intervention and prioritise integrated wrap-around services that support people to address compounding needs and issues, to reduce their likelihood of interaction with the criminal justice system'. [81]

Speaking specifically about children and young people at risk of entering the criminal justice system, Smart Justice for Young People submitted that 'holistic and integrated systems are required to address the various social, health, wellbeing and personal issues that contribute to the risk of a young person engaging in criminal behaviour':

> We need to assume shared accountability and responsibility for offending: Government (as State parents), education, health, social services and communities all have a role to play in supporting families and children. There must be collective responsibility for offending. A child should not be held solely accountable for their behaviour as their behaviour is often a symptom of the failings of these institutions and they are reliant on adult caregivers.[82]

The Australian Psychological Association submitted that 'systemic changes in policy and correctional practice are required … [to] ensure an integrated and continuum of care, focussed on rehabilitation and reintegration'. It argued that such reform would help achieve a criminal justice system which is focused on rehabilitation and reintegration with the community through the provision of trauma-informed, culturally safe support services.[83]

The Committee shared the stakeholders' view that a more integrated, holistic approach to the provision of social support to Victorians experiencing compounding or intersectional disadvantage can increase the efficacy of early intervention aimed at preventing contact with the criminal justice system.

FINDING 4: Integrated social support services which holistically address compounding or intersectional disadvantage can increase the efficacy of early intervention aimed at preventing contact with the criminal justice system.

The Committee notes that the evaluation of pilot programs will inform the Victorian Government's ongoing approach to this reform. The Committee encourages the Victorian Government to maintain its commitment and financial support of more joined-up social services.

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80 Uniting Vic. Tas, *Submission 129*, p. 2.

81 Ibid.

82 Smart Justice for Young People, *Submission 88*, p. 10.

83 Australian Psychological Society, *Submission 90*, p. 8.

3.3 Children and young people in the criminal justice system

As noted in Chapter 2, the number of children and young people aged from 10 to 17 years old committing recorded offences has declined by approximately a third from 2011 to 2020.[84] In 2017, the Youth Justice Review and Strategy attributed this decline to improvements in the public education and health systems, as well as Victoria Police's proactive approach to diverting children and young people away from the criminal justice system. However, the Committee notes that this analysis is based on data from 2010 to 2015 and it has received evidence that Victoria Police's use of diversionary measures has since declined.[85] This evidence is discussed further in Chapter 5.

According to Fiona Dowsley, Chief Statistician at the Crime Statistic Agency, most young people who come into contact with the criminal justice system today commit one or two offences and then grow out of their criminal behaviour:

> By far the most voluminous group … is the young people who have one or two contacts with police and then that is it—they never come back. They move on their life, they go in a different direction and they are not seen again by the system. That is the majority of young people.[86]

However, she also noted that there are two other common trajectories into the criminal justice system that involve young people committing numerous offences and having longer-term engagement which can culminate in incarceration. The first trajectory involves children who begin offending very young, from age 10 to 14, and continue offending throughout their teenage years. Fiona Dowsley noted that this cohort of young people 'are likely to become … youth justice clients and likely to commence into adult offending'. There are also young people who begin offending late in their teens with more serious crimes. Fiona Dowsley reported that these young people 'are probably a bit more likely to then head into more serious justice involvement because of the nature of their offending, the nature of their age'.[87]

Evidence submitted to the Inquiry indicated that, as with adults, children and young people experiencing disadvantage—particularly trauma—are at greater risk of encountering the criminal justice system as either a victim or offender. For example, Smart Justice for Young People drew the Committee's attention to annual Youth Parole Board surveys, which provide insight into the experiences and backgrounds of young people in youth detention. Smart Justice for Young People explained that these surveys revealed that intersecting and complex disadvantage are often at play:

> Last year's survey showed that children in out-of-home care, Aboriginal children, girls and children from refugee backgrounds and newly emerging CALD [culturally and

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84 Fiona Dowsley, Chief Statistician, Crime Statistic Agency, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 2.

85 Penny Armytage and Professor James Ogloff AM, Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive Summary, July 2017, p. 8.

86 Fiona Dowsley, *Transcript of evidence*, pp. 3–4.

87 Ibid.

> linguistically diverse] communities continue to be disproportionately overrepresented in the youth justice system. It told us that 71 per cent of children in custody had a history of trauma, abuse and neglect; 68 per cent were suspended or expelled from school; 68 per cent had mental health issues; 55 per cent had a history of drug or alcohol abuse; and 38 per cent had cognitive difficulties, which affect their daily functioning.[88]

Smart Justice for Young People encouraged the Committee to view the criminalisation of children and young people as evidence of early-life social support systems 'not working as well as it could rather than holding that child or their family solely accountable'.[89] Sergeant Wayne Gatt of the Police Association Victoria made a similar point:

> I think it is important to highlight that by the time you actually have somebody who is incarcerated at that age, we have failed them, looking backwards, so many times. It is an absolute measure of failure, because that is not the first time. Nobody goes to prison in Victoria under the age of 18 because they have had one trip up. They have tripped up so many times they are bruised and battered all over their body, and I think that is the important point to this here. That is not one missed opportunity; for those people it is 10, 20, 30, 40, 100 missed opportunities to intervene. And that is not the role of the police; that is the role of the broader system of support that exists in Victoria.[90]

Julie Baron, Policy and Advocacy Manager of the Youth Affairs Council, shared a conversation she had with one young person in youth detention which illustrates how a lack of social support can enable disadvantage to culminate in engagement with the criminal justice system.[91]

> **One young person that we spoke to was from a regional and rural area, and I could not tell you if what he has is an acquired brain injury or an intellectual disability. He spoke quite openly about how going through the school system in primary school in particular he had some behavioural issues, and none of the adults in his life picked up that it had to do with a condition. As an adult now, because he was over the age of 18 when I spoke to him, he can see that he was failed by people who knew better. For him, he talked about, I guess, lashing out in the classroom at other students and sometimes at teachers, and so often he was either suspended or just expelled. He just kept getting kind of pushed around his community and being told that he was someone else's problem, and no-one really supported him properly. So he was able to speak quite articulately about the fact that if someone at that early stage in his life when he was in primary school had actually said to him, 'Hey, we think you might be able to benefit from X, Y or Z. Would you like to speak to this person who might be able to help you?', that could have really helped him in his journey.**
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> Julie Baron, Policy and Advocacy Manager, Youth Affairs Council Victoria, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 12.

88 Tiffany Overall, *Transcript of evidence*, pp. 9–10.

89 Ibid.

90 Sergeant Wayne Gatt, Secretary and Chief Executive Officer, Police Association Victoria, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 23.

91 Julie Baron, Policy and Advocacy Manager, Youth Affairs Council Victoria, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 12.

At a public hearing, Professor James Ogloff, Professor of Forensic Behavioural Science and Director of the Centre for Forensic Behavioural Science at Swinburne University of Technology, said that even though recorded child and youth offences are declining, the complexity and severity of the disadvantage of those who do offend has increased. He suggested that this indicates that social and forensic support services are not providing the early intervention that these children need to avoid or disengage from the criminal justice system.[92]

The Committee heard that adverse childhood experiences, such as violence and neglect, which result in trauma are particularly associated with a heightened risk of engagement with the youth or criminal justice systems. As the Sentencing Advisory Council explains in its June 2020 report *'Crossover Kids': Vulnerable Children in the Youth Justice System*, trauma interrupts the neurological development of children with common consequences that increase a child's likelihood of entering the criminal justice system, including:

- emotional dysregulation, such that a child may have difficulty recognising their own and others' emotions and controlling their own;
- increased threat response, such that a child habituated to emotional or physical danger may be hypersensitive to risk, perceiving neutral or ambiguous situations as dangerous;
- altered reward sensitivity and attachment issues, which can affect a child's experience of social interactions and expectation and experience of others' approval, potentially resulting in the child's isolation and difficulty reinforcing good behaviour in the child; and
- difficulties with executive functioning, which can reduce children's ability to consider the consequences of their actions, control their impulses and follow instructions.[93]

Similar observations were made by other witnesses to the Inquiry. The Centre for Drug Use Addictive and Anti-social Behaviour Research explained that childhood exposure to violence is 'a consistent and key predictor of all forms of violence':

> Experiencing one type of violence as a child not only increases the risk of victimisation or perpetration of that type of violence as an adult, but also of other types of violence. For example, previous research has found that:
>
> (a) a child who grows up being hit by his father is up to 1.9 times as likely to be the perpetrator of an assault in a bar
>
> (b) experience of violence and other adverse experiences in childhood (e.g. bullying, neglect, etc.) are associated with a greater likelihood of engaging in violence. The effect is additive and each additional type of adverse event experienced by a young person, multiplies the risk.[94]

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92 Professor James Ogloff, *Transcript of evidence*, p. 27.

93 Sentencing Advisory Council, *'Crossover Kids': Vulnerable Children in the Youth Justice System: Report 3: Sentencing Children Who Have Experienced Trauma*, June 2020.

94 Centre for Drug Use Addictive and Anti-social Behaviour Research, *Submission 165*, pp. 11–12.

Professor Felicity Gerry QC, Professor Andrew Rowland, Dr Laura Connelly and Dr Jeanette Roddy made a group submission to the Inquiry centred on a health, law and educational approach to criminal justice. They asserted that there is a clear link between adverse childhood experiences and both victimisation and criminality in adult life. They outlined examples of adverse childhood experiences including:

- Physical abuse
- Sexual Abuse
- Emotional Abuse
- Living with someone who abused drugs
- Living with someone who abused alcohol
- Exposure to domestic violence
- Living with someone who has gone to prison
- Living with someone with serious mental illness
- Losing a parent through divorce, death, or abandonment[95]

They asserted that adverse childhood experiences 'have a tremendous impact on future violence victimisation and perpetration, and lifelong health and opportunity'. Moreover, they explained that 'people who experience multiple [adverse childhood experiences] are more likely to engage in risk taking behaviours which are harmful to health and—significantly for Justice—sometimes associated with criminal behaviour':

> A national household survey of adverse childhood experiences (overseas) has demonstrated that over half of cases of violence perpetration, violence victimization, incarceration, and heroin/crack cocaine use could be explained by ACEs.[25] Similar findings were made on the Royal Commission into Family Violence in ...[96]

The Committee heard that the risk of a child or young person entering the criminal justice system increases when multiple forms of disadvantage, particularly childhood trauma, compound or intersect. For example, Professor Gerry and her colleagues explained that not all children who have adverse childhood experiences will become perpetrators or victims of crime in adulthood.[97] However, when compared to people who had no adverse experiences in childhood, overseas studies demonstrated that people who had four or more were:

- 14 times more likely to be a victim of violence in the last 12 months;
- 15 times more likely to be a perpetrator of violence in the last 12 months; and
- 20 times more likely to have been incarcerated in their lives.[98]

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95 Professor Felicity Gerry QC, Professor Andrew Rowland, Dr Laura Connelly and Dr Jeanette Roddy, *Submission 86*, p. 14.

96 Ibid.

97 Ibid., p. 15.

98 Ibid., p. 14.

3.3.1 Early intervention targeting children and young people

As discussed in Section 3.1, there are many possible points of intervention and diversion along an individual's pathway into the criminal justice system. However, the earlier an intervention is made, the more likely it is to be effective and prevent engagement with the criminal justice system in the long-term.

The Victorian Government supports a range of strategies, programs and initiatives aimed at providing children and young people with the support they need to overcome disadvantage, lead fulfilling lives and avoid encountering the criminal justice system. It is currently developing an overarching state-wide youth strategy to inform its work and investment to make Victoria 'the best place to be for young people'.[99]

It explained that the Victorian Youth Strategy is being designed to direct the Victorian Government's work in the youth space, including how it will meet the needs of young Victorians experiencing disadvantage:

> Young people respond to challenges in very different ways. Some young people are supported by strong social networks, stable housing and family life. They are engaged in education and have easy access to health and community services.
>
> In contrast, some young people face discrimination and lack access to basic social and family supports – at no fault of their own. They are left vulnerable and disengaged from education and community, and this can go on to affect them for their entire lives. Most young people's experiences fall between these two extremes, and a lot of work needs to be done to nurture their potential. Young Victorians need a plan that will help them to be their very best – and this government will listen and learn from them to build that plan.[100]

Public consultation on the strategy closed on 21 December 2020. The Victorian Government heard from over 1,800 Victorians and organisations through online forums, a survey, written submissions and social media. The Strategy is under development and was expected to be launched mid-late 2021.[101]

Anoushka Jeronimus, Director of the Youth Law Program at WEstjustice, reflected positively on the Victorian Government's approach to developing the Victorian Youth Strategy, but said her organisation is disappointed it doesn't incorporate children. She noted that WEstjustice advocated for a companion childhood strategy during the consultations for the youth strategy:

> a companion childhood strategy from zero to 12 … would complement the youth strategies to make sure that every single adult and service system is kind of in charge of guiding and making sure that kids and families are doing okay at any point in time from

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99 Victorian Government, *Victorian Youth Strategy*, <https://engage.vic.gov.au/victorian-youth-strategy> accessed 19 January 2022.

100 Department fo Premier and Cabinet, *What matters to young people in Victoria?: Victorian Youth Strategy discussion paper*, 2020, p. 7.

101 Victorian Government, *Victorian Youth Strategy*.

> zero to 25 [years old]. You need a longitudinal approach. We do not want to find out at 16 that a young person has a cognitive impairment. We do not want to find out at 14 that they have got a disability when we could have found out at four. Can you imagine how we could have changed that life course.[102]

Anoushka Jeronimus also advocated for the appointment of a Minister for Children and their families:

> But also supporting a childhood strategy—imagine if we had a minister for children and their families as well. At the moment we have got a Minister for Child Protection, so it is at the crisis point again. Imagine if it was kind of redirected to early on and when you are making sure and there is beautiful coordination across government, the whole of government, and you have got this kind of strategy—with shared outcomes. Then everybody would be able to keep doing what they are doing but have a shared view of what 'good' looks like—ideally great.[103]

Smart Justice for Young People understood the aim of the Victorian Youth Strategy as promoting a more 'joined up cross government approach' to youth issues and said it is looking to the Strategy to improve coordination.[104] The Human Rights Law Centre submitted that:

> while proposed measures in the Victorian Youth Strategy are a first step to strengthen diversion and early intervention opportunities for young people, raising the age of criminal responsibility is the only way to ensure that children stay out of the criminal legal system.[105]

Stakeholder evidence in relation to raising the minimum age of criminal responsibility is discussed in Section 3.3.3.

While those stakeholders who commented on the Victorian Youth Strategy under development viewed it positively, many also advocated for specific early intervention measures aimed at children and young people to address risk factors for criminal behaviour and enhance protective factors for productive engagement in the community. They argued that the following four key areas of support are critical:

- education
- employment
- culturally appropriate services
- community led, place-based support.

This evidence is explored in the following sections.

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102 Tiffany Overall, *Transcript of evidence*, p. 14.

103 Anoushka Jeronimus, Director, Youth Law Program, WEstjustice, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, pp. 16–17.

104 Smart Justice for Young People, *Submission 88*, p. 7.

105 Human Rights Law Centre, *Submission 58*, p. 20.

Education

The Committee heard that improving the ability of mainstream schools to manage antisocial behaviour and expanding the range of alternative education programs would support children and young people to stay engaged in their studies and reduce the likelihood of offending.

Australian Red Cross said that alternative education options support disadvantaged children to realise their potential, participate meaningfully in society and reduce their risk of engaging with the criminal justice system:

> Young people want to learn, grow, and contribute to society. Mainstream education is not for everybody and feeling like a failure at school can impact a young person's drive and willingness to strive. There is significant recognition that young people who engage in antisocial behaviours are often disengaged from traditional education.[106]

It recommended that the Victorian Government invest in alternative education pathways outside of mainstream schooling for young people at risk of, or who have already experienced, the criminal justice system. It argued that these alternatives must be 'flexible, engaging and developmentally as well as culturally appropriate'.[107]

WEstjustice suggested that when schools can't cope with children exhibiting anti-social behaviours due to complex disadvantage, they can resort to involving police and criminalising the individual. It noted that this can contribute to a young person's disengagement with education:

> Problematically, behaviour which could be perceived as a disciplinary issue is occasionally framed as a criminal issue in the school environment. This has far reaching impacts on the relationship between young people and the education system. For some children, particularly from complex or disadvantaged backgrounds, the school is a point of supervision and structure away from chaotic home lives. It can be a stabilising environment, and one which provides school staff with a point of insight into children's wellbeing. When this relationship is compromised, either by police involvement or perceptions of being disliked by the administration, it jeopardises a young person's likelihood of continuing with education more broadly.
>
> This can result in increased levels of absenteeism or behavioural issues, which ultimately reinforces this narrative (for both the school and the children) that the child is not suited to formal education.[108]

WEstjustice recommended that the Victorian Government ensure schools are funded to 'better manage and prevent offending behaviours in a school setting' through mediation, restorative justice, trauma-informed practices and counselling services.[109]

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106 Red Cross Australia, *Submission 83*, p. 6.

107 Ibid., p. 7.

108 WEstjustice, *Submission 141*, p. 15.

109 Ibid., pp. 15–16.

Smart Justice for Young People called for mainstream schools to be incentivised to ensure that vulnerable young people are supported to complete their education:

> We must incentivise mainstream schools in today's narrow and competitive educational environment to take early intervention to prevent disengagement and detachment, support for teachers and schools to identify and intervene for those students at risk, rehabilitate detached and disengaged young people and increased investment in psychology, mental health and allied support services.[110]

WEstjustice, Smart Justice for Young People and Jesuit Social Services all highlighted the importance of the Victorian Government's Navigator Program. Navigator supports disengaged young people between the ages of 12 and 17 years old to return to education and learning. Participation is by referral and young people must have attended 30% or less of the previous school term, or not be attending at all, to be eligible.[111] WEstjustice recommended that this program be expanded to all primary and secondary school students at risk of, or with high levels of absenteeism.[112] Smart Justice for Young People and Jesuit Social Services supported expanding the program to 10 and 11 year old children to ensure that it encompasses 'the critical transition period from primary to secondary schooling'.[113] In addition, Jesuit Social Services called for the Victorian Government to ensure that 'school budgets have equitable distribution of funding that is dedicated to supporting vulnerable children and families as well as additional resources and programs dedicated to keeping children engaged in school'.[114]

> **When Steven, a young Aboriginal boy, engaged with Jesuit Social Services' Navigator program he was experiencing significant challenges. In the year before he engaged with Navigator, Steven only attended three days of school. He has a diagnosed learning disability and was not receiving any extra assistance in the classroom. Although his mother tried several times to seek extra support for him in the classroom, he was never provided with an Individual Learning Plan. He was also struggling with family conflict, low confidence, and those around him not understanding his complex needs.**
>
> **Steven's Navigator caseworker was able to gain a deep understanding of his personal challenges, build a sense of trust, and link him to culturally safe services. Steven was also supported to enrol in a flexible learning centre where his individual needs were better supported, and where he could benefit from an Individual Learning Plan. Two years later, Steven was attending approximately 80 per cent of his school timetable. His confidence had grown to the point that he had applied for casual work and he was engaged with work experience through his school. Steven's story demonstrates the importance of long-term case management with a focus on health and wellbeing, and the need for culturally sensitive and respectful work.**
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> Jesuit Social Services, *Submission 119*, p. 16.

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110 Smart Justice for Young People, *Submission 88*, p. 11.

111 Victorian Government, *Navigator Program*, <https://www2.education.vic.gov.au/pal/navigator-program/policy> accessed 24 January 2022.

112 WEstjustice, *Submission 141*, pp. 15–16.

113 Smart Justice for Young People, *Submission 88*, p. 11; Jesuit Social Services, *Submission 119*, p. 17.

114 Jesuit Social Services, *Submission 119*, p. 17.

Karin Williams, Team Manager of the Bert William's Aboriginal Youth Hostel, said access to 'education is a really, really important part of making sure [Aboriginal] young people fit within communities'. She noted that maintaining children's engagement with school is a focus of the Youth Hostel and that staff work with the whole family towards this end:

> we really try to work with the whole family. You cannot fix a child without having the family involvement. So we have the case plans and the care teams, and we make sure everybody that is involved with young people come together to actually make sure that we can build upon what they want for their needs. Education is a really, really important part of making sure our young people fit within communities, so we focus on the education part … so you are not just working with that young person, you are working with the whole family to keep them together, to keep them in school together.[115]

At a public hearing, Sean Newton, Team Leader Youth Services of the Les Twentyman Foundation, also observed young people who are disengaging from school need wrap-around support that extends into their family environment:

> we have young people who are going to schools—they are chatting with their teachers, they are chatting to the wellbeing staff and then they are going home. They are relearning what is happening in the home environment, and they are being retraumatized by what is happening in the home environment. They are coming back to school the following day, and their behaviours have reversed[116]

He supported the provision of youth workers through schools to ensure that children experiencing challenges at home stay engaged with their education and are connected with other support services. He noted the Foundation's Positive Futures Program which 'embeds trained youth workers in schools to deliver a personal development program to a broad range of students, while also providing intensive case management to students who need it most'.[117] He said that the role of a youth worker is to engage in 'assertive outreach' and help connect a young person to other support services:

> Youth work is often seen as an industry where we go out there and just do activities with them. It is really to hold them while they are on the waitlist to get other services as well and to allow them to keep challenging themselves and growing as individuals even though the wait time to reach other services might be 12 months, it might be 18 months, it might be two years.[118]

Sean Newton also observed that the transition from primary school to secondary is a particularly challenging time for young people. He said that investment in mental health

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115 Karin Williams, Team Manager, Bert William's Aboriginal Youth Hostel, Victorian Aboriginal Community Service Association Ltd public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 12.

116 Sean Newton, Team Leader Youth Services, Les Twentyman Foundation public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 8.

117 Ibid.; Les Twentyman Foundation, *About Positive Futures*, <https://ltfoundation.com.au/our-services/positive-futures> accessed 24 January 2022.

118 Sean Newton, *Transcript of evidence*, p. 5.

and welfare support in schools to support students through this transition would help prevent young people from falling away from their education.[119]

At a public hearing, Gum Mamur, Youth Worker with the Les Twentyman Foundation, described the transformative role a Les Twentyman youth worker had in his life.

> I thought I should start by telling you a little bit about myself and how I have got to where I am today. My name is Gum Mamur. I am a youth worker at the Les Twentyman Foundation. I was born in Kenya and spent the first couple of years of my life in a refugee camp in Kenya before moving to Australia in 2004. During that period we did not know anyone here. There was no-one to connect to that could speak English, and it was an extremely difficult time for me and my family. During that period I went to language school, two weeks; to a high school; all sorts of primary schools—spent roughly four months there until being shifted to a high school, and that was a very difficult time for me personally. It was extremely difficult for me to connect to anyone, and during that period I kind of like ended up with the wrong crowd, started taking those risk-taking behaviours, started hanging out with the wrong people. During that period I found it extremely hard for me to connect with anyone but the people that possibly were not the right people for me, and during that period we would fight—going out to parties and spending a lot of time outside of school, and during school there was no-one to connect to.
>
> I was lucky to be able to be introduced to a youth worker from the Les Twentyman Foundation through their basketball program. During that time a lot of my friends, let us say, two in four were either with youth justice or were going through or having first contact with or making contact with police. Some of them were getting pregnant or getting girls pregnant, and they were going through a lot of mental health. But there were no supports around us, and we found ourselves just going back and forth through the same cycle. We were not connecting with anyone at school, not being able to accomplish anything—any of the goals that we might have had or dreams we might have had.
>
> Luckily for me through the basketball program I was able to be in a diverse community, and there was a youth worker in my face every day challenging me, connecting with my family, finding a new community for me and my family and connecting me to, let us say, as people say, stay on the way of life. During that period I started to see subtle changes in my life and it related to me being selected into a personal development program called EMBRACE. During that period I was able to dig deep within myself through the program to get to know who I am, who I was first. As I was looking at myself develop, I saw everyone around me not getting the same support, just moving further and further away, being in and out of jail, and sadly some of them are not here with us anymore. As I was reaping the benefits and my family was actually getting the support it needed, I saw all of my friends and people that were around me not getting the same deal. And as I moved forward, everything that I got from that youth worker being with me and connecting with my family—I was getting schoolbooks, I was being supported in all the right spaces, I was being supported with everything that my family needed …

119 Ibid., p. 4.

> **So to end, I just feel that I think all of us want every young person to have a successful life and a rewarding life, and the best way to really go forward with that is being able to continuously support them individually, because mental health does not discriminate and drugs do not discriminate and obviously poverty does not discriminate, and I think we need to give every single person the same opportunity as early as possible and follow them throughout life.**
>
> Gum Mumur, Youth Worker, Les Twentyman Foundation, public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, pp. 2–3.

Indi Clarke, Executive Officer of the Koori Youth Council, also highlighted the positive outcomes which can be achieved through assertive outreach. At a public hearing he described the powerful work of the Marram Nganyin (We are strong) Aboriginal youth mentoring program. The mentoring program operates across Victoria and supports young people aged between 12 and 25 years old 'to be healthy and well, to be confident and strong in their identity and culture, and to achieve their goals through education, training and employment'. Indi Clarke stated:

> our education system needs greater supports to make sure that we are wrapping around children and young people who might start to disengage from the education system … we can see when children start to disengage, how are we truly wrapping around them then and there to make sure that disengagement from school does not lead to expulsion and/or, as we know, normally a pathway to the justice system …
>
> Marram Nganyin [shows] the power in mentoring programs. Not only is it highlighted in Ngaga-dji, it is also highlighted in Our Youth, Our Way, the great impact that mentoring programs have in supporting children and young people who might start to disengage—and/or in schooling. It keeps them in school with a supportive system into pathways of employment as well and to staying in education.[120]

Employment

In addition to education, stakeholders highlighted the importance of supporting young people experiencing disadvantage to gain employment that is sustainable and connected to their aspirations.

The Victorian Government recognised the protective influence of stable employment in its submission to the Inquiry. It explained that its Jobs Victoria initiative 'supports employment outcomes for young people and contributes to preventing offending behaviour and reducing recidivism':

> Young people are a priority cohort for Jobs Victoria employment services and the Jobs Victoria Fund which provides wage subsidies of up to $20,000 to employers who employ eligible young people.
>
> Jobs Victoria Mentors help people to become work-ready, find a job that suits them, and support them in their role for at least six months. Four Jobs Victoria Mentors also

120 Indi Clarke, Executive Officer, Koorie Youth Council, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 14; Youth Central, *Marram Nganyin Aboriginal Youth Mentoring Program*, <https://www.youthcentral.vic.gov.au/get-involved/funding-opportunities/marram-nganyin-aboriginal-youth-mentoring-program> accessed 25 January 2022.

> exclusively support young people including those who may be at risk of coming into contact with the criminal justice system.[121]

However, the Australian Red Cross was critical of the Victorian Government's employment initiatives for young people, arguing that they do not facilitate the attainment of ongoing work:

> Despite the existing employment-related services available to young people in Victoria, these often amount to seemingly unending referral pathways that assist young people to constantly 'prepare' for work that is not actually available for them to access. There are very limited linkages to the private sector and businesses who have the decision-making power to employ and provide real employment opportunities for young people.[122]

It therefore recommended that the Victorian Government evaluate the effectiveness of the youth employment services it funds. It also called for investment:

> in real, paid employment opportunities for young people who have had contact with the justice system in a variety of industries including sport coaching and the arts, as well as alternative employment options such as business mentorship and start-up funding.[123]

It recommended incentivising businesses to hire young people who have had contact with the criminal justice system through the provision of a subsidy or training grant.[124]

Smart Justice for Young People expressed concern that job losses as a result of the COVID-19 pandemic are particularly impacting young people from culturally and linguistically diverse backgrounds. It called for Victorian Government intervention to support these young people to gain sustainable employment:

> The increased barriers to employment that many young people, especially from refugee and migrant backgrounds will face as a result of COVID-19 requires a tailored response in order to level the playing field, support them to reach their full potential and enable them to make meaningful contributions to the community. Without intervention, many young people from refugee and migrant backgrounds are at serious risk of being crowded out of the labour market.[125]

Gum Mamur, Youth Worker with the Les Twentyman Foundation, described the challenges he faced seeking employment as a migrant in Victoria during a public hearing.

> **everywhere I went, everywhere I turned as a young person, also as being a young black man, I was always told to be Australian. No-one teaches you how to be Australian. I was always challenged to go and find a job and do this—but the same opportunities were never offered; I only got those opportunities through the youth**

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121 Victorian Government, *Submission 93*, p. 23.

122 Red Cross Australia, *Submission 83*, p. 7.

123 Ibid.

124 Ibid., pp. 8–9.

125 Smart Justice for Young People, *Submission 88*, pp. 11–12.

> **worker that was supporting me and my family. And as I will say to you now, alluding to the story that I told you guys previously, the streets were always recruiting me, but no-one else was recruiting me until that youth worker came into my life. So I think it should be as early as possible for every single person to help support them with family, school, possible jobs and everything else that comes up for them.**
>
> Gum Mamur, Youth Worker, Les Twentyman Foundation, public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 3.

Culturally appropriate services

Several stakeholders highlighted the importance of ensuring that social support services for children and young people are culturally appropriate.

Australian Red Cross observed that Aboriginal and culturally and linguistically diverse children and young people can feel marginalised and excluded by mainstream social services. It recommended that Aboriginal communities be empowered to develop, lead, and implement services to support Aboriginal children and young people who are at risk, or have had contact with the criminal justice system.[126]

The Victorian Aboriginal Community Service Association observed that Aboriginal families 'often do not access mainstream services due [to] apprehension that these services are not culturally safe'. In addition, it asserted that there is a scarcity of social services that are culturally appropriate for Aboriginal children, young people and families due to short term and inadequate funding for Aboriginal Community Controlled Organisations:

> At present, there is an exasperating lack of early intervention and prevention programs for Aboriginal children and young people, and ones that do exist operate on short-term funding agreements with little financial support. Programs run though Aboriginal Community Controlled Organisations (ACCOs) rely on competitive tenders and temporary investment to run their programs. Aboriginal staff who work in these programs possess a huge amount of cultural knowledge and expertise, and in ACCOs they must work on short-term contracts governed by funding agreements, with lower salary commitments than their mainstream counterparts. Staff are often lost to mainstream organisations and government due to the need for higher earning potential and certainty in their contracts, jeopardising the programs run by ACCOs.[127]

Aunty Linda Bamblett, Chief Executive Officer of the Victorian Aboriginal Community Service Association, said that empowering young Aboriginal people to feel connected to their culture has the biggest protective influence:

> whatever we can do to empower our mob and particularly our young people and to make them feel confident and connected to their culture and have that strong sense of identity—they are the keys because they are the greatest protective factors for diverting young people away from the criminal justice system.[128]

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126 Red Cross Australia, *Submission 83*, p. 9.

127 Victorian Aboriginal Community Service Association, *Submission 81*, pp. 6–7.

128 Aunty Linda Bamblett, Transcript of Evidence, p. 11.

In its submission to the Inquiry, the Victorian Aboriginal Community Service Association recommended that the Victorian Government provide long-term funding to Aboriginal Community Controlled Organisations to align with mainstream service sector funding arrangements. This would help to ensure that these organisations can attract and retain skilled Aboriginal staff.[129]

Indi Clarke of the Koorie Youth Council also argued that Aboriginal people need Aboriginal-designed support services to ensure early intervention is successful:

> For us, understanding children's lives is the first step to supporting them to be happy and healthy, and when supports for Aboriginal children use non-Aboriginal frameworks to understand their needs, they are unsuccessful. Aboriginal children are best supported by Aboriginal definitions of identity, wellbeing and support systems … Through our guiding principles of self-determination, youth participation and connection to culture, family, elders and communities we can achieve this … the four solutions to that are giving children services that work; keeping children safe and strong in their culture, families and communities; ensuring that we have community designed and led youth support systems; and also creating just and equitable systems.[130]

Community led, place-based support

The Committee heard that when disadvantage is compounded within particular communities, it is best addressed by empowering those communities to develop and implement their own local responses to these issues. This approach has positive flow on effects for children and young people in the community.

Smart Justice for Young People characterised this approach as 'justice reinvestment' and argued that over time, it will prevent children and young people from becoming engaged with the criminal justice system:

> The approach involves supporting and investing in communities to identify, develop and implement their own local, place-based solutions tackling localised economic and social risk factors underlying the root causes of crime, preventing young people entering the criminal justice system in the first place (and reducing reoffending).
>
> Over time, these approaches will help reduce the number of children at risk of offending and becoming adults who offend, save public funds spent on the criminal justice system, policing and prisons. These savings can be redirected to disadvantaged communities.[131]

The Youth Affairs Council Victoria also advocated for a 'justice reinvestment' approach and suggested that this should involve the Victorian Government resourcing 'community- and place-based partnerships with schools and service providers which support young people and their families holistically'. It argued that it is important to involve both schools and services which support families in this approach as family circumstances can impact educational engagement. It also noted the importance of

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129 Victorian Aboriginal Community Service Association, *Submission 81*, p. 8.

130 Indi Clarke, *Transcript of evidence*, pp. 10–11.

131 Smart Justice for Young People, *Submission 88*, p. 7.

embedding broader strategies to alleviate poverty as it is a factor informing risk of entering the criminal justice system.[132]

Catholic Social Services stated that there is strong correlation between a child's development at six or seven years old and whether or not they attended an eight-month paediatric check-up. It argued that the 'earlier the remedial investment in children the better their life prospects' and advocated for 'placed based community development'. It envisioned this form of early intervention to involve community collaboration to design and implement initiatives to address disadvantage. It noted that this requires long-term government funding[133] and recommended that:

> There should be a commitment to and funding towards increased community-led, long-term, intensive place/post-code-based projects and programs to tackle generational and intersectional disadvantage as causes of offending. Early interventions to build better support systems are highly effective and economically efficient.[134]

The Victorian Aboriginal Community Service Association Ltd. also recommended that the Victorian Government 'invest in place-based early intervention and prevention approaches to address disadvantage within communities where there is the highest level of Aboriginal population growth and demand for services'.[135]

While not advocating specifically for place-based early intervention, Melissa Hardham, Chief Executive Officer of WEstjustice, did speak to the Committee about the importance of ensuring that intervention to support a young person to avoid the criminal justice system addresses environmental factors:

> it is not just focusing necessarily on the young person but also on those influences and components, such as what is happening with the families, what is happening within the community, what is happening within the society they live in and what is happening within the systems the interface with. So we are looking at programs across Westjustice that also support mortgage stress, tenancy issues and eviction rates, family violence and family law issues, consumer exploitation, particularly in the workforce.[136]

The Victorian Government noted in its submission that it is pursuing community led, place-based early intervention initiatives through its Youth Crime Prevention Grants. The Grants are available to support community initiatives which intervene to address criminal behaviours in children and young people (aged 10–24) who are at risk of interacting with, or who have had contact with, the criminal justice system. The Grants target communities experiencing socioeconomic disadvantage with high levels of crime and recidivism amongst youths who have offended. It supports initiatives aimed at:

- decreasing known crime-related risk factors and increasing protective factors of at risk children and youths

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132 Youth Affairs Council Victoria, *Submission 118*, pp. 28–30.

133 Catholic Social Services, *Submission 124*, pp. 20–21.

134 Ibid., p. 23.

135 Victorian Aboriginal Community Service Association, *Submission 81*, p. 8.

136 Melissa Hardham, Chief Executive Officer, WEstjustice, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 13.

- linking at risk youths with sustained employment, training and education opportunities
- increasing at risk children and youths' connectedness with the community.[137]

Since 2016, the Victorian Government has invested over $22 million in the Grants Program, including an additional approximately $4.5 million provided as part of the 2021–22 State Budget. The recent injection of funds will enable 15 projects commenced under the Grants Program to be extended for 12 months to 30 June 2022.[138]

Like a number of stakeholders to the Inquiry, the Committee believes that the Victorian Youth Strategy has the potential to facilitate a more joined-up approach to youth policy and programs and generate better outcomes. The Committee encourages the Victorian Government to ensure that the strategy is underpinned by investment commensurate to the importance of intervening early. This would support Victorians to overcome challenges which have the potential to propel them into the criminal justice system. Intervening early with the support young people need to flourish will improve lives and deliver savings in the long run, in the form of reduced criminal justice system costs.

That being said, the Committee notes evidence from WEstjustice that even earlier intervention to address challenges associated with disadvantage could be facilitated through the development of a complementary Victorian Childhood Strategy.

RECOMMENDATION 4: That the Victorian Government develop a Victorian Childhood Strategy to complement the objectives of the Victorian Youth Strategy currently being drafted and facilitate cross-portfolio collaboration in relation to policies and programs aimed at supporting children and their families.

In addition to the finalisation of the Victorian Youth Strategy, the Committee shares stakeholder aspirations to ensure children and young people experiencing disadvantage are empowered to overcome these challenges and lead productive and fulfilling lives through the early provision of social support which:

- assists young people to complete their education
- helps young people gain stable and fulfilling employment
- is culturally supportive and promotes connection to family and history
- empowers communities to design and lead local solutions to address widespread disadvantage.

FINDING 5: Education reduces young people's risk of engaging with the criminal justice system by enhancing their wellbeing and self-esteem and expanding their opportunities and choices in life.

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137 Victorian Government, *Submission 93*, p. 23.

138 Victorian Government, *Youth Crime Prevention Grants*, <https://www.crimeprevention.vic.gov.au/grants/youth-crime-prevention-grants> accessed 25 January 2022.

In the Committee's view, it is critical that early intervention targeting at risk children promotes educational attainment and addresses disengagement and absenteeism as soon as it manifests. The Committee is concerned to hear that some mainstream schools may be involving police in the management of behavioural issues, which would be better addressed through the provision of social support or restorative justice mechanisms. It acknowledges that mainstream schools may not have the expertise or resources to engage and support children experiencing complex disadvantage and exhibiting difficult antisocial behaviours. In these cases, it is critical that alternative educational pathways or assertive outreach services—such as youth workers or mentoring programs—are available to encourage and support young people to continue to pursue their education. The Committee would like to see these services extended to younger children and be made available across the state.

RECOMMENDATION 5: That the Victorian Government fund the expansion of relevant programs and the provision of youth workers and youth mentors to young people in primary and secondary schools in disadvantaged communities across Victoria.

Like education, meaningful and stable employment is an important protective factor reducing a young person's risk of entering the criminal justice system.

FINDING 6: Stable employment which aligns with a young person's aspirations reduces their risk of engaging with the criminal justice system by providing a meaningful focus for their life, promoting a positive self-image and providing regular income.

The Committee commends the Victorian Government for investing in youth-focused employment services through its Jobs Victoria Program, but notes evidence that these initiatives may not be delivering the desired employment outcomes. The Committee would like to see the Victorian Government assess the efficacy of these programs and refine its approach and focus following the finalisation of the Victorian Youth Strategy. It may be that an alternative approach to ensuring young people can access meaningful and stable employment is identified through the finalisation of the strategy.

RECOMMENDATION 6: That the Victorian Government review its policy and programs assisting young people from disadvantaged backgrounds to gain meaningful and stable employment in light of the finalised Victorian Youth Strategy. This review should assess whether these programs reflect best practice and achieve results with a view to informing improvements.

The importance of culturally informed and responsive social support is noted throughout this Chapter and the remainder of the report.

Throughout the Inquiry, submitters—including the Victorian Government—recognised that disadvantage compounded within specific communities can be effectively addressed through place-based, community led initiatives, with flow on benefits for children and families.

FINDING 7: Place-based early intervention initiatives which are community designed and led, and which facilitate collaboration between schools, social support and legal services, can effectively address socioeconomic disadvantage compounded within a geographical area, with flow on benefits for young people.

The Committee supports the aims of the Victorian Government's Youth Crime Prevention Grants. It notes that funding for initiatives which commenced under the Grants was extended during the last budget. It encourages the Victorian Government to continue to support community led, place-based initiatives begun under this Grants Program which are achieving demonstrable outcomes for young people experiencing disadvantage.

RECOMMENDATION 7: That the Victorian Government extend the Youth Crime Prevention Grants to enable community led place-based early intervention initiatives which are achieving demonstrable benefits to continue, and to expand access to the Grants Program to additional communities.

The Committee recommends the further expansion of the Grants Program to enable justice reinvestment initiatives in Aboriginal communities in Chapter 4 of the report.

In addition to these early intervention initiatives aimed at supporting children at risk of encountering the justice system to overcome challenges associated with disadvantage, stakeholders advocated for two specific areas of reform, including:

- reducing the criminogenic nature of out of home care
- raising the minimum age of criminal responsibility to at least 14 years old.

These specific proposals are addressed in the following two sections of the report.

3.3.2 Children and young people in out of home care

One group of children and young people who are typically experiencing multiple forms of compounding disadvantage and trauma, and who are at high risk of entering the youth and criminal justice systems, are those in out of home care.

In recent years there been several reports exploring the link between disadvantage, childhood trauma and the subsequent overrepresentation of children and young people in out of home care within the criminal justice system, including:

- the Sentencing Advisory Council's three 2020 '*Crossover kids': Vulnerable children in the youth justice system* reports
- Victoria Legal Aid's 2016 report, *Care not custody: a new approach to keep kids in residential care out of the criminal justice system*
- the Create Foundation's 2018 report, *Youth justice report: Consultation with young people in out-of-home care about their experiences with police, courts and detention*

- DJCS's 2017 report, *Youth Justice review and strategy: Meeting needs and reducing offending*
- the Koorie Youth Council's 2018 report, *Ngaga-dji (hear me): Young voices creating a change for justice.*

These reports found that children placed in out of home care are some of the most disadvantaged in Victoria and many have been exposed to multiple traumas, including:

- family violence
- neglect
- sexual, physical or substance abuse
- abandonment.

Despite the removal of these children from unsafe family environments and their placement in out of home care, these young people remained 19 times more likely to have contact with the criminal justice system (including police) as a victim or offender, or to be reported as a missing person. Moreover, the Sentencing Advisory Council identified in its report that over half of the children living in an out of home care facility offended only after being removed from their homes. This suggests that the experience of being placed in care was a contributing factor to encounters with the criminal justice system.[139]

Evidence received by the Committee confirmed these points. For example, Jesuit Social Services noted that there 'are strong links between children's involvement in the child protection and out-of-home care systems and involvement in the justice system':

> Children in out-of-home care are among some of the most vulnerable having often experienced multiple and overlapping challenges including trauma, mental health concerns, experiences of family violence, substance misuse or entrenched intergenerational disadvantage. The children who are placed in residential care (rather than foster or kinship care placements) often have the highest and most complex needs, and most challenging behaviours, and have experienced significant neglect and trauma. A contributing factor to contact with the youth justice system for some of these highly vulnerable children is being placed in an environment that often exacerbates the underlying challenges they are facing.[140]

Fiona Dowsley of the Crime Statistics Agency said that children subject to child protection orders, such as those in residential care, often begin offending early and frequently, quickly propelling them into the criminal justice system:

> So there is a cohort there who have early trauma in their lives and then we are seeing them coming to the attention of the criminal justice system at a very early age, often

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139 Victorian Government, *Framework to reduce criminalisation of young people in residential care*, 2020, pp. 6–7; Victoria Legal Aid, *Care not Custody – keeping kids in residential care out of the courts*, 24 December 2021, <https://www.legalaid.vic.gov.au/about-us/research-and-evaluation/evaluation-projects/care-not-custody-report> accessed 21 January 2021; Jesuit Social Services, *Submission 119*, p. 18.

140 Jesuit Social Services, *Submission 119*, p. 18.

> with lots of different contacts, lots of high-intensity offending, not necessarily all very serious—a lot of it is still property crime in there—but a lot of frequent contacts, and that tends to build into a pretty determined criminal pathway quite quickly.[141]

Victoria Legal Aid explained that residential care can be a challenging environment for children and young people and 'care providers default to law enforcement responses to manage challenging behaviours'.[142] Its *Care Not Custody* report found that:

- a clear factor pushing children from care into custody is an over-reliance by some residential care facilities on call-outs to police to manage challenging behaviour by vulnerable children, including those who have been victims of family violence
- children are being charged with minor offences, such as smashing a coffee mug, throwing a phone or spreading food around. These would be very unlikely to attract police attention if they happened in a family home
- these practices are entrenching children, often from a very young age, in a cycle of involvement with the police and the courts.[143]

Victoria Legal Aid also shared a client's experience of residential care which illustrates these issues.

> **Mia (not her real name) is hoping to get a job and one day travel the world. "My dream is to go travel the country. I just want to see the whole world. I want to swim with the turtles."**
>
> **Mia grew up living with her mother after her parents separated. She loved her mum, but her mum experienced mental health issues and sometimes tried to harm herself in front of Mia. Mia went to live with her father who was also looking after four of Mia's siblings, but she found it hard to settle at her dad's place. She was diagnosed with an intellectual disability and complex post-traumatic stress disorder. After a few months, her dad decided that he was not able to care for her anymore, so Mia was moved to residential care.**
>
> **Now 15, Mia says residential care doesn't provide the support and care she craves. 'It's bad because you don't get love there. People just come to work to get the money and go home. There's not many carers that like you and stuff gets locked away, so you can't even get metal forks or glass cups,' she said. When Mia first moved, a lot of her workers weren't told about her background, disabilities and mental health issues and weren't provided with training on how to manage and support these conditions.**
>
> **"In three years, I've had two good workers. One of them treats me like her own daughter, she understands and she listens. If you get upset or angry the good ones don't get mad or threaten to call the police on you. They give you a hug, then you get better." said Mia.**

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141 Fiona Dowsley, *Transcript of evidence*, p. 7.

142 Victoria Legal Aid, *Submission 159*, pp. 5–6.

143 Victoria Legal Aid, *Care not Custody – keeping kids in residential care out of the courts*.

> She said workers often called police for minor things. "I was going through a lot of stuff and I got in trouble for stupid things like breaking a plate. It's like the workers thought they had to punish me. It's not fair, it's like they gang up on the kids." Mia said while some police treated her with kindness, others were not sympathetic. "All they think about is, when the police come, charge, charge, charge. The police can be mean. They say 'calm the **** down' and when kids are upset and crying they say 'stop crying, you're just being a sook'."
>
> But she believes there are other ways to deal with misbehaviour. Mia says young people in out of home care need more understanding. 'Kids in resi want love and to feel welcomed. Not like you're in the gutter just because you're in resi because your family has issues. It shouldn't be like this. Kids are going through hard stuff and if they act badly, they're doing it for a reason.'
>
> Victorian Legal Aid, *Submission 159*, p.1.

Similar evidence was provided by Kevin Mackin, Secretary of the Royal Victorian Association of Honorary Justices and Victorian Bail Justice, during a public hearing in Melbourne. He told the Committee about a child staying in residential care which he regularly encountered in the course of his work.

> I had a 14-year-old boy. I had seen him three or four times. We were on first-name basis. He was a nice kid, actually. So he was back in the resi [residential] care facility, and in the backyard there was the lawnmower shed and the lawnmower and there was a can of petrol. And he took the table tennis bats that they had been using to play table tennis, and he went out and poured petrol on the table tennis bats and set them on fire—and he was running around the backyard going 'woo-woo-woo-woo' with them. I have done stuff like that as a 14-year-old.
>
> There is no opportunity within the resi [residential] care system to deal with that activity. Their only opportunity is to call police. So they call police. Police come in and charge him with arson. He is already on four counts of bail for other silly things. Now he is facing a charge of arson. What are the chances of him reoffending? It is not something that as a bail justice I can address in a half-hour or hour hearing overnight, but there has got to be a way to break that nexus and do something that will help him get along or at least recognise that what he has done is just normal 14-year-old silliness, not a vicious crime—arson, for God's sake. I bailed that kid by the way and sent him back there. The alternative? I do not know.
>
> Kevin Mackin, Secretary of the Royal Victorian Association of Honorary Justices, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 47.

At a public hearing, Dr Karen Hart, Senior Lecturer at Victoria University, said out of home care providers are 'not coping' with the complex needs of the children and young people placed in their care:

> young people are facing harm, neglect and abuse within their homes and so the system responds by taking those young people out of their homes and placing them in a system that is, frankly, not coping, not functioning effectively, and for a number of reasons. The staff are ill-equipped to deal with them effectively, often the infrastructure is poor, the models of care are virtually non-existent and so really it is containment, but the

> young people are at liberty. These young people are often very traumatised and they have reached an age where they are at the point of risk-taking, and so invariably when they are left to their own devices, and often with peer influence and pressure, they will end up getting involved in antisocial and criminal activity.[144]

Uniting Vic. Tas made a similar observation:

> The people working in child protection, out-of-home care and family services are committed to providing children and young people with a safe and supportive home environment. This is especially true for those who directly care for the young people living in Uniting's 11 residential care homes. Yet, placement pressures and inadequate funding act as a barrier to some young people receiving the quality of care they need and deserve. This means children cannot be supported to create the strong and positive connections with education, community and pathways that provide them with hope and a supported transition to adulthood.[145]

The Justice Map referred to this as "care criminalisation' by which undertrained and poorly paid residential care staff regularly rely on police to discipline children':

> OOHC [out of home care] services more likely to resort to criminalisation and police to manage behaviours. Most seen in residential care, practitioners are instructed to respond to children's behaviour with punitive legal responses and overpolicing for relatively minor issues, or in some cases, mental health crises. As a result, children in OOHC, particularly those living in residential care, are more frequently cautioned, arrested and charged for minor offenses that would be unlikely to involve police in a family setting.[146]

Stakeholders pointed out that Aboriginal children and young people are disproportionately represented in out of home care and that a lack of culturally appropriate care is contributing to their risk of encountering the criminal justice system.

Uncle Robert Nicholls of the Hume Regional Aboriginal Justice Advisory Committee under the Aboriginal Justice Caucus described the prevalence of Aboriginal children being removed from families and the trauma they can experience when they are placed into out of home care:

> I have seen Aboriginal children—and I am going to be blunt here—ripped away from their parents or parent. Now, for various different reasons they have been taken away and the white social workers are saying, 'Okay, we're going to take four or five children', and when they take these four or five children they are going to say, 'One's going over here and another one's going over here and another one's going there', so the children are separated. All of a sudden we have got trauma within a young family. They do not have this consideration and mindset of saying, 'Okay, well what happens if we do split these children up? What's going to happen?'—because they have been so used to one unit together …

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144 Dr Karen Hart, *Transcript of evidence*, p. 31; ibid.

145 Uniting Vic. Tas, *Submission 129*, p. 3.

146 The Justice Map, *Submission 157*, p. 11.

> in the space of five years we have had more children removed than we had prior to colonisation.
>
> So what is child protection doing? Do they take into account the actions and the harm? And these young kids are being scarred for life. I talk to them. I say, 'Look, do you know the dynamics of this particular family?'.
>
> 'No, we don't'. 'Do you know the aunties, the uncles, the brothers, the sisters?'[147]

The Justice Map, Jesuit Social Services and Victoria Legal Aid both noted that Aboriginal children and young people are significantly overrepresented in the out of home care system and that this is increasing.[148]

Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer of the Victorian Aboriginal Child Care Agency, noted that the number of Aboriginal children and young people in out of home care continues to rise. She stated that a lack of culturally appropriate care is increasing the likelihood that these children are criminalised:

> The number of Aboriginal children being placed in out-of-home care is rising … They have been cut off from family, enculturated into a non-Aboriginal culture, without the links to Aboriginal communities …
>
> For children in out-of-home care, especially Aboriginal kids, there is an inevitable date with court. The data here does not lie. Our young people are 3 per cent of the population but 26 per cent of the youth justice system, and I am talking about children aged 10 years old being locked up.[149]

Adjunct Professor Bamblett AO shared a case study illustrating how out of home care can compound the disadvantages faced by children and young people.

> **I want to tell you about Jasmine. Jasmine is a 13-year-old Gunditjmara girl. She has been in a mainstream out-of-home care agency since she was eight. Her mother struggles with mental illness and had experienced family violence for a number of years. Jasmine has had three different placements, disrupting her education, and is disengaged from school. She has not received counselling for her trauma, has limited contact with her mother and siblings and, since her father left, has had no connection to her culture. Jasmine is beginning to become involved in risk-taking behaviours, and unfortunately this causes another placement breakdown. Jasmine's high-risk behaviour and that of other children in care is a rallying call for parents, teachers—helping professions—for us all to take action.**
>
> Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer, Victorian Aboriginal Child Care Agency, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 34.

147 Uncle Robert Nicholls, Hume Regional Aboriginal Justice Advisory Committee, Aboriginal Justice Caucus, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, pp. 47–48.

148 Victoria Legal Aid, *Submission 159*, pp. 5–6; Jesuit Social Services, *Submission 119*, p. 18; The Justice Map, *Submission 157*, p. 11.

149 Adjunct Professor Aunty Muriel Bamblett AO, *Transcript of evidence*, p. 34.

The Victorian Government also recognises that children and young people, particularly Aboriginal Victorians, in out of home care are at greater risk of criminalisation and entering the criminal justice system.[150] It has sought to intervene to reduce this risk by introducing:

- the *Framework to reduce criminalisation of young people in residential care*
- the Aboriginal Children in Aboriginal Care Program.

The *Framework to reduce criminalisation of young people in residential care* was launched in February 2020 to 'reduce the unnecessary and inappropriate contact of young people in residential care with the criminal justice system arising from behaviours manifesting from childhood traumatic experiences'. It encompasses:

- guiding principles that reinforce trauma-informed responses, connection to culture and a positive behaviour approach to inform local practices and procedures to support young people in residential care
- a decision-making guide for residential care workers to determine whether police involvement is required
- an agreed approach for police when responding to non-crisis events in residential care homes
- agreed roles and responsibilities across the Department of Health and Human Services, Department of Justice and Community Safety, Victoria Police and residential care service providers to ensure a more coordinated, consistent and collaborative response to young people in residential care.[151]

Within the Framework, the Victorian Government commits to developing an 18-month action plan to guide the initial implementation and undertaking a review at the end of this period to examine whether its objectives were achieved.[152] However, approximately two years on from the launch of the Framework, it is unclear whether the 18-month action plan was developed and implemented or whether a review took place.

The Aboriginal Children in Aboriginal Care Program concerns Aboriginal children and young people subject to a Children's Court protection order. The program authorises approved Aboriginal Community Controlled Organisations to take on responsibility for a child subject to a protection order, including their case management and case plan. This enables the organisation to assume responsibility for the child's care and work with the child's family, community and other professionals to develop and implement the child's case plan in a way that is culturally safe and in the best interests of the child.[153]

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150 Victorian Government, *Framework to reduce criminalisation of young people in residential care*, p. 6.

151 Victorian Government, *Submission 93*, p. 23; Victorian Government, *Framework to reduce criminalisation of young people in residential care*, p. 9.

152 Victorian Government, *Framework to reduce criminalisation of young people in residential care*, p. 34.

153 Victorian Government, *Aboriginal children in Aboriginal care program*, 28 August 2018, <https://www.dhhs.vic.gov.au/publications/aboriginal-children-aboriginal-care-program> accessed 21 January 2022.

WEstjustice welcomed the Victorian Government's Framework but noted that the 18-month action plan and review appear to be overdue. It therefore recommended finalising the action plan as a priority and resourcing both out of home care services and Victoria Police to provide the training required to ensure the Framework is put into practice. Furthermore, WEstjustice argued that regular progress reports detailing the implementation of the framework should be published to increase transparency of these reforms.[154]

Smart Justice for Young People also supported the Framework and called for it to be properly implemented, with progress towards its implementation monitored.[155]

Jesuit Social Services also commended the Victorian Government for its Framework but argued that additional reform is needed to ensure care services meet children's difficult behavioural needs, and do not rely on police and other punitive offences to manage. It observed that 'currently these children have limited access to a therapeutic, diversionary, restorative based process to work through the issues they face'. It recommended that 'restorative practices such as group conferencing' be made available to children in out of home care to address their behavioural issues and prevent criminalisation. Group conferencing involves a problem-solving approach to offending which encourages dialogue between the young person who offended and their victim to resolve the issue to everyone's satisfaction.[156]

Uniting Vic. Tas argued that government funding for out of home care providers should be increased to enable them to provide 'therapeutic level' support for all children and young people. It suggested that 'currently only 40% of places are therapeutically funded'.[157]

Dr Hart of Victoria University also suggested that funding for a more therapeutic approach would improve outcomes for disadvantaged children and young people in out of home care. Dr Hart suggested that social support services should collaborate more closely with out of home care services to provide wrap-around support:

> There is not enough interface between the out-of-home care system and the community sector, and that gap needs to be closed in the same way that the gap needs to be closed between the youth justice system and the not-for-profit sector. I think that with very valuable services like Berry Street, the Smith Family and many, many others if they were drawn closer to work and aligned better with the government out-of-home care system we would definitely see better outcomes for those young people. So it is a case of developing a new type of collaborative model that really brings both of those systems together to address these two issues, the one of out-of-home care and the one of youth justice and then that pipeline from out-of-home care to youth justice.[158]

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154 WEstjustice, *Submission 141*, pp. 16–17.

155 Smart Justice for Young People, *Submission 88*, p. 10.

156 Jesuit Social Services, *Submission 119*, p. 19; Department of Justice and Community Safety, *Youth Justice Group Conferencing*, <https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-group-conferencing> accessed 22 January 2022.

157 Uniting Vic. Tas, *Submission 129*, p. 3.

158 Dr Karen Hart, *Transcript of evidence*, p. 31; ibid.

Dr Hart described this type of collaboration as a 'sanctuary model' and argued that, although it is expensive to implement, it saves money in the longer term:

> There are models, like the sanctuary model, where there are very therapeutic trauma-informed models of care, where numbers within the environment are very small. Children are specifically selected to live there. There is a good staff ratio to young people, and they have also got wraparound care of psychologists, psychiatrists and others to support their model of care. That is incredibly expensive, but money spent at that end is money well spent to prevent the cost in human terms and in financial terms further down the line.[159]

The Justice Map argued that a 'radical overhaul' of the child removal system is required to better cater to the support needs of children who have had adverse experiences and trauma. It made a series of recommendations to this end, including:

- redirecting Victorian Government funding from out of home care services to 'measures that prevent children from entering the child removal system', including 'maternal and child health services, intensive family support services, and housing support for families'
- increasing investment in reunification social support services to limit the time children spend in out of home care, including support directed at parents while children are in care and family support following reunification
- providing training to encourage out of home care workers to manage trauma-informed behaviours without the involvement of police
- increasing investment in early intervention programs run by Aboriginal Community Controlled Organisations. This should be at a level commensurate to the overrepresentation of Aboriginal children in the child removal system. This aims to provide support to Aboriginal children and families and remove the necessity for them to enter out of home care.[160]

Victoria Legal Aid also made a range of recommendations to improve out of home care, including:

- improving children and young people's access to social support to overcome 'trauma, abuse or neglect'
- develop a 'culturally competent, safe and trauma informed education workforce' to reduce the use of suspension and expulsion for at risk children
- improve out of home care workers' responses to difficult behaviours.[161]

Adjunct Professor Bamblett of the Victorian Aboriginal Child Care Agency said that despite the Victorian Government's Aboriginal Children in Aboriginal Care Program, 'mainstream providers [are] refusing to give our children back, preferring to age them

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159 Ibid., p. 31.

160 The Justice Map, *Submission 157*, p. 23.

161 Victoria Legal Aid, *Submission 159*, pp. 5–6.

out, with many of them then ending up in the criminal justice system'.[162] She explained that there are multiple barriers to Aboriginal Community Controlled Organisations gaining caring responsibility for Aboriginal children, including:

- mainstream out of home care services being unwilling to relinquish responsibility for children and young people because they are a source of income
- disputes about the Aboriginality of children and young people in care and Aboriginal Community Controlled Organisations' right to take on responsibility for their care
- some Aboriginal Community Controlled Organisations hesitating to take on caring responsibility for Aboriginal children and young people due to the onerous staffing requirements and regulation.[163]

The Victorian Aboriginal Child Care Agency also made a submission to the Inquiry recommending that the Victorian Government increase funding to Aboriginal Community Controlled Organisations to:

- enable them to expand the delivery of early intervention, prevention and diversion programs
- 'transfer the care and custody of Aboriginal children and young people to [Aboriginal Community Controlled Organisations]'.[164]

The Committee acknowledges that the criminogenic nature of out of home care is well established; in seeking to protect children from unsafe home environments, the Victorian Government is exposing them to early criminalisation and increasing their risk of long-term engagement with the criminal justice system. The damage to Aboriginal children and their risk of criminalisation is particularly acute due to the lack of culturally appropriate care providers and social supports.

FINDING 8: Out of home care is criminogenic. Services are responding to children and young people experiencing complex disadvantage who exhibit difficult antisocial behaviours with punitive measures instead of providing the therapeutic and/or culturally appropriate support they require to overcome these challenges.

The Committee is heartened to observe that the Victorian Government appears to share its view that this situation is unacceptable and cannot be permitted to continue. The Committee urges the Victorian Government to complete and resource the comprehensive implementation of the *Framework to reduce criminalisation of young people in residential care* as a priority.

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162 Adjunct Professor Aunty Muriel Bamblett AO, *Transcript of evidence*, p. 34.

163 Ibid., pp. 34–39.

164 Victorian Aboriginal Child Care Agency, *Submission 121*, p. 3.

RECOMMENDATION 8: That the Victorian Government provide a public update on the implementation of the *Framework to reduce criminalisation of young people in residential care* to date and outline the next steps for improving outcomes for children in out of home care. The ongoing implementation of the framework should be supported by increased investment to:

- provide training to out of home care staff and police regarding the appropriate management of challenging antisocial behaviour through therapeutic and restorative justice responses
- improve out of home care services' links with, and access to, community-based social support, legal and culturally appropriate services.

The Committee would also like to see the Victorian Government evaluate its response to the overrepresentation and serious consequences experienced by Aboriginal children and young people in out of home care.

RECOMMENDATION 9: That the Victorian Government, in collaboration with the Aboriginal community, evaluate the operation of its Aboriginal Children in Aboriginal Care Program with a view to identifying:

- how it can be improved to support better outcomes for Aboriginal children and young people in out of home care
- how best to overcome barriers to, and resource, Aboriginal Community Controlled Organisations taking on responsibility for all Aboriginal children and young people in out of home care.

3.3.3 Proposal to raise the age of criminal responsibility

In Victoria, like the rest of Australia, the minimum age a child can be found guilty of committing a crime is 10 years old.[165] This is established by s 344 of the *Children, Youth and Families Act 2005* (Vic) which provides that 'it is conclusively presumed that a child under the age of 10 years cannot commit an offence'.

However, some measure of protection is afforded to children between the ages of 10 and 13 years old who are too developmentally immature to be justly held responsible for their criminal behaviour, through the rebuttable legal presumption of 'doli incapax'. Doli incapax is provided for by common law. It holds that where a child cannot understand the difference between actions that are 'naughty or mischievous' and those that are 'seriously wrong', they cannot be held criminally responsible for their offending.

165 Victoria Legal Aid, *Submission 159*, p. 7.

It seeks to divert those children whom it would be inappropriate to hold criminally responsible away from the criminal justice system.[166]

It is the responsibility of the prosecution to 'rebut' or demonstrate that doli incapax should not apply in cases where a child aged 10 to 13 years old has been charged with a criminal offence. The criteria for rebutting doli incapax include:

- the prosecution must demonstrate that the child understood their action was wrong as opposed to naughty
- the prosecution must provide strong and clear evidence that places this distinction beyond reasonable doubt
- the evidence must be more than the mere proof that the child did the criminal act
- the older a child is, the easier it is for the prosecution to rebut doli incapax.[167]

A prosecution seeking to rebut doli incapax may present evidence including:

> a psychological assessment of the child; a police interview transcript or recording; the child's prior criminal history; evidence given by parents, teachers, psychologists or psychiatrists; as well as evidence of the child's behaviour before and after the alleged criminal act.[168]

Despite the protection that doli incapax seeks to extend to developmentally immature 10 to 13-year-old children, state and territory governments around Australia have been considering whether to raise the age of criminal responsibility through legislation for many years. In 2018, the then Council of Attorneys-General (CAG) began investigating the possibility of this reform. The Australian Capital Territory confirmed its intention to raise the age of criminal responsibility to 14 years old in 2020, and the Northern Territory has committed to raising the age of criminal responsibility to 12 years old and only allowing children under 14 years to be detained for serious crimes.[169]

In July 2021, Smart Justice for Young People wrote to the Meeting of Attorney-Generals (MAG)—CAG's replacement body—on behalf of 47 organisations to advocate for raising the minimum age of criminal responsibility to at least 14 years old. The Hon. Michaelia Cash, Federal Attorney-General and Chair of MAG, stated in response that the decision to raise the age is a matter for each jurisdiction as the majority of offences committed by children and young people are state and territory offences, as opposed to Commonwealth offences.[170] However, this statement was followed by the release of a communique by the MAG in November 2021 which revealed their agreement

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166 Monash University Kate Fitz-Gibbon and Deakin University Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)', *International Journal for Crime, Justice and Social Democracy* vol. 8, no. 1, 2019, pp. 18–20.

167 Ibid.

168 Ibid., pp. 19–20.

169 Uniting Church of Australia, Synod of Victorian and Tasmania, *Submission 105*, p. 14.

170 Aboriginal Justice Caucus, *Submission 106*, p. 9.

to 'develop a proposal to increase the minimum age of criminal responsibility from 10 to 12 years old':

> State Attorneys-General supported development of a proposal to increase the minimum age of criminal responsibility from 10 to 12, including with regard to any carve outs, timing and discussion of implementation requirements. The Northern Territory has committed to raising the age to 12, and will continue to work on reforms including adequate and effective diversion programs and services. The Australian Capital Territory has also committed to raising the age, and is working on its own reforms.[171]

The Committee observes that the MAG's commitment to developing a proposal to raise the minimum age of criminal responsibility across Australia to 12 years old is out of step with the views and evidence presented by stakeholders who contributed to its Inquiry.

Amongst Inquiry stakeholders, there is overwhelming support for amending s 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the minimum age of criminal responsibility in Victoria to at least 14 years old to reduce the early engagement of children with the criminal justice system.[172] Evidence also indicated that this reform should be accompanied by greater investment in community-based social services, including services culturally specific to Aboriginal children, to address the criminal behaviours of young children.

For example, Victoria Legal Aid, Smart Justice for Young People and the Uniting Church of Australia, Synod of Victoria and Tasmania all argued that the minimum age of responsibility should be raised to at least 14 years old. Victoria Legal Aid asserted that there is consensus amongst psychological, medical and legal peak bodies that children under this age 'do not have the maturity to be held criminally responsible for their actions' and that raising the age to 14 years old would align Australia with comparable countries and international human rights law.[173] Smart Justice for Young People submitted that medical research demonstrates that it is inappropriate to hold young children criminally responsible for antisocial behaviours because their brains are still developing and they have limited capacity for reflection before action. It also claimed that the median age of criminal responsibility worldwide is 14 years old and that the United Nations recommends that children under the age of 16 years old are not incarcerated.[174] The Uniting Church of Australia, Synod of Victoria and Tasmania reiterated these points in its submission to the Inquiry. It added that 'the United Nations Convention on the Rights of the Child places a significant emphasis on the need for rehabilitation and diversion from the judicial process'.[175]

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171 Meeting of Attorneys-General, 'Communique', paper presented at November 2021.

172 For example see: Jesuit Social Services, *Submission 119*, p. 26; WEstjustice, *Submission 141*, p. 10; Law and Advocacy Centre for Women, *Submission 135*, pp. 20–21; Youth Affairs Council Victoria, *Submission 118*, pp. 40–41; Anglicare Victoria, *Submission 123*, p. 16; Victorian Greens, *Submission 150*, p. 1; Dr Duncan Rouch, *Submission 19*.

173 Victoria Legal Aid, *Submission 159*, p. 7.

174 Smart Justice for Young People, *Submission 88*, p. 14.

175 Uniting Church of Australia, *Submission 105*, p. 13.

Amnesty International and the Law Institute of Victoria also advocated for setting the minimum age of criminal responsibility at 14 years old. Amnesty International claimed that Victoria, and Australia more broadly, is out of step with 'most European countries [which] set their ages of criminal responsibility at between 14 and 16 years and China, Russia, Kazakhstan, Japan, Sierra Leone and Azerbaijan have 14 years as the age'. Furthermore, it notes that Australia is attracting international criticism for failing to raise the minimum age to 14 years old and for incarcerating young children:

> Australia has been repeatedly criticised by the UN, including long-standing criticism from the UN Committee on the Rights of the Child, and by the Committee on the Elimination of Racial Discrimination, for failing to reform the current minimum age of criminal responsibility.[176] During its Universal Periodic Review, 31 countries called on Australia to raise the minimum age of criminal responsibility.[177]

The Law Institute of Victoria noted that 'as of 2016, an international study of 90 countries revealed that 68 per cent had a minimum criminal responsibility age of 12 years or higher, with the most common minimum age being 14 years'.[178]

Mallee Family Care informed the Committee that many children who come into contact with the criminal justice system before the age of 14 are experiencing disadvantage and trauma. It argued that these children require support rather than criminalisation. It submitted:

> For many children, criminal offending is the result of underlying issues such as family violence, separation, housing instability, mental or physical health problems. These children do not deserve to be in prison, it is our duty to address the underlying resources that support them.[179]

Several submitters pointed out that early contact with the criminal justice system is criminogenic and suggested that raising the age of criminal responsibility to at least 14 years old will reduce recidivism. As Victoria Legal Aid explained:

> [the] younger a child is at their first sentence, the more likely they are to reoffend generally, reoffend more frequently, reoffend violently, continue offending and be sentenced to an adult sentence of imprisonment before their twenty-second birthday.[180]

Amnesty International suggested that this is because contact with the criminal justice system can result in 'stigmatisation and trauma'.[181] The Uniting Church of Australia, Synod of Victoria and Tasmania noted that a study of incarcerated children completed in Oregon, USA, found that those arrested before the age of 14 were three times more

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176 See United Nations Committee on the Rights of the Child, Sessions of the Committee, 1997: paragraphs 11 and 29, 2005: paragraph 73; 2012: paragraph 82(a).

177 Amnesty International, *Submission 89*, p. 8.

178 Law Institute of Victoria, *Submission 112*, p. 30.

179 Mallee Family Care, *Submission 126*, p. 6.

180 Victoria Legal Aid, *Submission 159*, p. 7.

181 Amnesty International, *Submission 89*, p. 9.

likely to reoffend as adults than those first arrested over the age of 14.[182] All three organisations argued that children exhibiting criminal behaviours should be supported to address these behaviours through a health and welfare response.

The Sentencing Advisory Council's 2016 report, *Reoffending by Children and Young People* supports these claims. It examined the recidivism of 5,385 young people sentenced in the Children's Court in 2008–09 and identified that 'the six-year reoffending rate of offenders who were first sentenced at 10–12 years old (86%) was more than double that of those who were first sentenced at 19–20 years old (33%)'.[183]

According to the Council, the number of young people (aged 10 to 17 years old) incarcerated in Victoria increased from 560 people in 2018–19 to 623 people in 2019–20. However, Victoria has the lowest rate of incarcerated young people of any Australian state at approximately 10 per 10,000 young people. By way of contrast, the Northern Territory has the highest rate of incarcerated young people at approximately 56 per 10,000 young people.[184] Young people's engagement with the criminal justice system is explored further in Chapter 12 of the report.

Victoria Legal Aid described the experiences of one of its child clients to illustrate how convicting young children is inappropriate and can quickly escalate to incarceration.

> **Ezra (not his real name) is an 11-year-old boy from a refugee background living with his family in Metropolitan Melbourne. On a Friday night in June 2021, Ezra was at home with his family when the police came to his home and arrested him for stealing from a supermarket two weeks earlier.**
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> **Ezra was already on bail for stealing four cans of coke from a shop. Ezra had been placed on very strict bail conditions after he stole the soft drinks, which included exclusion from the local shopping centre, a curfew and a condition that he did not associate with certain other children. Because he was on bail at the time of the second theft, Ezra was in a reverse onus position for bail.**
>
> **Ezra was also accused of lighting a small fire in a pile of leaves in a playground. No damage was caused or intended, he was charged with a summary offence of lighting a fire in a public place.**
>
> **Ezra was taken to the police station where he was held until midnight and a hearing was conducted in front of a bail justice. His family did not understand what was happening and his teenage sister was required to translate for his mother. He did not have legal advice or representation before the bail justice.**
>
> **Bail was refused as the bail justice considered that there was a risk that Ezra would reoffend.**

182 Uniting Church of Australia, *Submission 105*, p. 13.

183 Sentencing Advisory Council, *Submission 17*, p. 2.

184 Sentencing Advisory Council, *Young people in detention*, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/young-people-in-detention> accessed 8 February 2022.

> **Ezra was transported to Parkville where he was placed in the custody of Youth Justice. Due to the COVID-related quarantine arrangements, Ezra was placed in isolation. Ezra spent a night in isolation at Parkville and the staff became increasingly concerned about his welfare and levels of distress. Ezra was scared and couldn't stop crying in custody.**
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> **Ultimately the prosecution withdrew all charges, accepting that the presumption of doli incapax applied to Ezra (meaning that due to his age he did not possess the necessary knowledge required to have criminal intent).**
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> Victoria Legal Aid, *Submission 159*, p. 20.

Smart Justice for Young People submitted similar evidence. It argued that holding children as young as 10 years old criminally responsible is trapping Victorians within the criminal justice system who would otherwise grow out of their criminal behaviour:

> Evidence shows the younger a child is when they have their first contact with the criminal justice system, the higher the chance of future offending and the more likely they are to have long term involvement in crime …
>
> with each one year increase in a child's age at first sentence, there is an 18 per cent reduction in the likelihood of reoffending. Children who are forced into contact with the criminal justice system at a young age are less likely to complete their education and find employment and are more likely to die an early death.[185]

The Youth Affairs Council Victoria likewise asserted that, while the youth justice system is not overloaded with child offenders, 'it is … setting up a small number of young people for a lifetime of repeated involvement in the system' because of the criminogenic nature of early engagement. It suggested that this is partly driven by exposure to older offenders:

> criminal justice responses expose children to older prisoners with whom they would never have interacted otherwise. A young person in our consultations explicitly identified this issue. Young women are particularly impacted by this, given that in Victoria they do not have separate units based on age or process (remand vs. sentenced) so are exposed to adult prisoners from as early as 10 years of age.[186]

Several Inquiry stakeholders suggested that the rebuttable presumption of doli incapax is insufficient protection for children aged between 10 and 13 years old who are too immature to be held criminally responsible for their offending. For example, Amnesty International noted that doli incapax is upheld at the discretion of judges and prosecutors and therefore may be 'inconsistently or unfairly applied'.[187] Moreover, it asserted that even where doli incapax is upheld, it offers inadequate protection from the harmful aspects of the criminal justice system:

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185 Smart Justice for Young People, *Submission 88*, pp. 13–14.

186 Youth Affairs Council Victoria, *Submission 118*, p. 41.

187 Amnesty International, *Submission 89*, p. 13.

> a child will already have been arrested, may have been in custody on remand, and will be required to undergo what can be a difficult and emotional psychological assessment before they are able to rely on the presumption of doli incapax to have their criminal charges resolved. It can take weeks or months to make a determination. The child will have been exposed to multiple hearings and police involvement.[188]

The Uniting Church of Australia, Synod of Victoria and Tasmania also made this point in its submission to the Inquiry:

> For doli incapax to apply, it must be argued in court, by which time a child already has entered the criminal justice system, which can include being remanded in custody. Early interaction with the criminal justice system during adolescence can have negative impacts on a child's development.[189]

It argued that the shortfalls of doli incapax can only be remedied by raising the age of criminal responsibility to 14.[190]

Evidence collected throughout the Inquiry also demonstrated that young Aboriginal children are disproportionately criminalised and that raising the age of criminal responsibility to at least 14 years old will support efforts to reduce this overrepresentation.

Several witnesses drew the Committee's attention to the Commission for Children and Young People's report, *Our youth, Our way* which was tabled in the Victorian Parliament on 9 June 2021. The Commission asserted that 'marginalised and vulnerable children', such as Aboriginal children, are at greater risk of entering the criminal justice system under 14 years old:

> Despite the resilience of Aboriginal communities, Aboriginal children are at increased risk of contact with the youth justice system due to a complex combination of factors, including a legacy of dispossession, intergenerational trauma and incarceration, marginalisation, systemic racism and inequality. For many Aboriginal children, their experiences of trauma, family violence, placement in out-of-home care, mental illness, substance misuse and poverty – compounded by an ongoing failure by government to address their unmet needs in these areas – also make them vulnerable to contact with police and criminalisation at a young age …[191]

> Given these factors, it is not surprising that Aboriginal children aged 10 to 13 years are over-represented in every category of Youth Justice court order, including supervised bail, remand, community-based sentences and custodial sentences. Aboriginal children's early contact with the youth justice system increases the likelihood of their long-term involvement in the system and their eventual incarceration in an adult prison.[192]

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188 Ibid.

189 Uniting Church of Australia, *Submission 105*, p. 10.

190 Ibid., p. 11.

191 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* report for Victorian Government, Victorian Government Printer, Melbourne, June 2021, pp. 150–151.

192 Ibid.

The Commission argued that raising the minimum age of criminal responsibility to at least 14 years old would mean that 'police would no longer have the power to arrest, detain or charge children aged 10 to 13 years'. It contended that this would help ensure police respond to Aboriginal children exhibiting antisocial behaviours by diverting them to support services:

> Where police came into contact with a child in this age group, they would have an important welfare role to play in referring them to the early intervention supports …[193]

The Uniting Church of Australia, Synod of Victoria and Tasmania and Amnesty International also highlighted the socioeconomic disadvantage experienced by many Aboriginal children and how this increases their risk of engaging in the criminal justice system before the age of 14.[194] The Uniting Church of Australia, Synod of Victoria and Tasmania suggested that experiences of disadvantage can be used against Aboriginal children in court to rebut the presumption of doli incapax, increasing their risk of being convicted before the age of 14 years old. It asserted that prosecutors can use a child's early exposure to criminality through their home environment—such as violence or abuse—as evidence a child understood their offending behaviour was wrong and that they are likely to reoffend:

> Therefore, already disadvantaged children are more likely to have the presumption of doli incapax rebutted. First Nations children are already disproportionally represented in youth justice statistics due to wider disadvantages faced by the Aboriginal communities. Doli incapax further reinforces bias against First Nations Children within the judicial system.[195]

Amnesty International submitted that raising the minimum age would prevent Aboriginal children from early criminalisation and argued that this legislative reform should be accompanied by the transfer of all 10 to 13-year-old children in detention to therapeutic rehabilitation programs.[196]

At a public hearing, Monique Hurley, Senior Lawyer at the Human Rights Law Centre, also highlighted that 'engagement with the legal system only serves to compound [an Aboriginal] child's disadvantage and trauma and increase the likelihood of them going on to commit further offending in future'.[197] Monique Hurley argued that raising the minimum age of criminal responsibility to at least 14 would create a fairer legal system. Amala Ramarathinam, another Senior Lawyer at the Human Rights Law Centre, also pointed out that it would assist the Victorian Government to meet its targets to improve the welfare of Aboriginal people under the *National Agreement on Closing the Gap*:

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193 Ibid., p. 164.

194 Amnesty International, *Submission 89*, pp. 11–12; Uniting Church of Australia, *Submission 105*, p. 11.

195 Uniting Church of Australia, *Submission 105*, p. 11.

196 Amnesty International, *Submission 89*, p. 12.

197 Monique Hurley, Senior Lawyer, Human Rights Law Centre, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, pp. 34–35.

> The Victorian government has a commitment under the new National Agreement on Closing the Gap to reduce the rates of incarceration of Aboriginal children and young people, and this recognises that Aboriginal children and young people are overrepresented due to the ongoing effects of colonisation, including the effects of poverty and discriminatory policing. Target 11 requires a 30 per cent reduction in youth incarceration rates by 2030, and this is a whole-of-government commitment. Based on the latest figures provided by the Australian Institute of Health and Welfare, raising the age to 14 alone results, in our calculations, in a 13.7 per cent reduction in incarceration rates for Aboriginal children and young people. So that is almost half the target achieved through one single measure of reform. Raising the age to 14 will have an immediate and generational impact on reducing the overincarceration of children, and this is a crucial first step to closing the gap in target 11.
>
> ...
>
> it is time for the Victorian Parliament to take action, to show leadership and commit to raising the age ... it is a crucial step towards Closing the Gap, especially in relation to target 11.[198]

Some stakeholders, including WEstjustice, Aboriginal Justice Caucus, Djirra, and Smart Justice for Young People, also advocated for legislation to prevent children younger than 16 from being incarcerated in line with a recommendation of the United Nations Committee on the Rights of the Child.[199] For example, Smart Justice for Young People submitted:

> We support the United Nations Committee on the Rights of the Child's recommendation that laws be changed to ensure that children under the age of 16 years "may not legally be deprived of their liberty". We support the CCYP [Commission for Children and Young People'] call for the Victorian Parliament to enact amendments to the *Children, Youth and Families Act 2005* to prohibit the Children's Court from sentencing a child under the age of 16 to youth justice custody and amendment to the *Sentencing Act 1991* to prohibit an adult court from sentencing a child under the age of 16 to youth justice custody.[200]

Amnesty International recommended the alternative approach of introducing a new safeguard for children aged 14 to 16 years old to provide similar protections as doli incapax:

> the principle of doli incapax currently does little to ameliorate the low minimum age of criminal responsibility in Australia. As such, new defences and/or presumptions for children, for example, a defence or presumption of 'developmental immaturity' could seek to replace the principle of doli incapax.[201]'

The Committee heard that any reform to raise the minimum age of criminal responsibility to at least 14 years old must be accompanied by investment in

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198 Amala Ramarathinam, Senior Lawyer, Human Rights Law Centre, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, pp. 37–38.

199 Djirra, *Submission 138*, p. 17; WEstjustice, *Submission 141*, p. 9.

200 Smart Justice for Young People, *Submission 88*, p. 15.

201 Amnesty International, *Submission 89*, p. 14.

community-based social services, to rehabilitate children exhibiting criminal behaviours and support their families to address their needs. For example, Anoushka Jeronimus, Director of the Youth Law Program at WEstjustice, argued that social services must be equipped to respond 'once the age is raised … to make sure that any young person under the age of 14 exhibiting behaviours previously considered offending gets the familial, therapeutic, restorative and rehabilitative assistance required to address them'.[202]

Julie Baron, Policy and Advocacy Manager of the Youth Affairs Council Victoria, advocated for greater investment in restorative justice programs, suggesting that they are 'proven to rehabilitate young people'. Restorative justice programs seek to rehabilitate people who commit crimes by reconciling them with their victims and the community more broadly:

> There is a lot of evidence to show that [restorative justice] is really effective in supporting young people to re-engage with community and actually rehabilitate. I think what is really important to remember is that young people actually have a really unique ability to rehabilitate purely because of their age, and that often gets overlooked.[203]

Jesuit Social Services likewise recommended 'increasing funding for restorative justice, therapeutic approaches and education support for vulnerable children under 14 years old'.[204] It argued that early intervention is the most effective approach to preventing children from entering the criminal justice system and that families should be supported 'at the first signs of struggle':

> Funding for restorative justice, family-centred and therapeutic approaches to respond to children under 14 who come into contact with police is also required. We need responses that take account of their broader family and social circumstances, work with the child to help them to understand the impact of their behaviour and equip them with the tools to take a different path and prevent contact with the justice system.[205]

Smart Justice for Young People suggested that the Victorian social services sector already has the 'resources, the programs and the know how to provide intensive support, education and family and health assistance to help vulnerable children reach their potential and thrive'. It argued that the Victorian Government should build up these services and 'help children to remain in school and help families to provide the care and support children need'.[206]

Uniting Church of Australia, Synod of Victoria and Tasmania supported expanding child-focused community social supports and early interventions to reduce children's contact with the criminal justice system. It said that 'early intervention programs should occur locally and include family or parent training programs, structured pre-school

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202 Anoushka Jeronimus, *Transcript of evidence*, p. 14.

203 Julie Baron, *Transcript of evidence*, p. 13.

204 Jesuit Social Services, *Submission 119*, p. 27.

205 Ibid.

206 Smart Justice for Young People, *Submission 88*, p. 14.

education programs, centre-based developmental daycare, home visitation [services], and family support services'.[207] Moreover, it argued that 'cultural and community-based therapeutic child-centred responses to anti-social behaviour of Aboriginal Children are the best ways to address the causes of behavioural issues'.[208]

Anglicare Victoria contended that, if the age of criminal responsibility is increased to 14 years old, all children under the age of 14 years old should be provided with access to 'therapeutic, culturally based, children-centred and coordinated responses to anti-social behaviour'. It argued that these interventions should be 'family/carer- and community-centred' and that they must address any environmental factors which are contributing to antisocial behaviours. Lastly, it suggested that specialist residential care services focused on treatment and rehabilitation will be required to accommodate and support children who are a risk to themselves or the community.[209]

The Committee also heard that the overrepresentation of Aboriginal children among children who offend between the ages of 10- and 13-years old merits investment in specific, culturally appropriate services which are better equipped to meet these children's rehabilitation needs.

The Commission for Children and Young People recommended that:

> the Victorian Government, in partnership with Aboriginal organisations, develop and provide a range of culturally responsive and gender-specific programs and services that are tailored to meet the needs of Aboriginal children under the age of 14 years who are engaging in anti-social behaviour, and to address the factors contributing to the behaviour.[210]

The Aboriginal Justice Caucus argued that:

> raising the age of criminal responsibility must coincide with preventative measures including early intervention, diversion and rehabilitative/healing and holistic approaches to enhance the wellbeing of children, keeping them strong, safe and resilient in their families and communities.

It referred the Committee to the Koorie Youth Council's 2018 report, *Ngaga-dji (Hear me) young voices creating change for justice*[211]:

> [the report] recommends the sustainable resourcing of Aboriginal community organisations to develop youth support systems to care for children in their communities with localised services across health, social and emotional wellbeing, education, family, legal, cultural, and drug and alcohol services.[212]

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207 Uniting Church of Australia, *Submission 105*, p. 13.

208 Ibid., p. 14.

209 Anglicare Victoria, *Submission 123*, p. 16.

210 Commission for Children and Young People, *Our Youth, Our Way*, p. 164.

211 Koorie Youth Council, *Ngaga-dji (Hear me) young voices creating change for justice*, 2018, p. 40.

212 Aboriginal Justice Caucus, *Submission 106*, p. 8.

Christopher Harrison, Co-Chair of the Aboriginal Justice Caucus, said it is important that children exhibiting antisocial behaviours are treated therapeutically within the community.[213] He urged the Victorian Government to implement the recommendations of the Ngaga-dji.

George Selvanera, Acting Chief Executive Officer of the Victorian Aboriginal Legal Service, argued that social support must be available to Aboriginal children as soon as they begin exhibiting criminal behaviours:

> if a child is engaging in offending behaviour of whatever type that might be, that should be an immediate call to action, like, what is going on for that particular family and child? What can be done to support that family and support that child? … it is about ensuring that they really get to the heart of what the needs of that particular child and family are, about connection to culture, having cultural plans.[214]

The Committee accepts stakeholder evidence that raising the minimum age of criminal responsibility is crucial to:

- ensure that children too developmentally immature to be justly held responsible for offending are not criminalised
- align Victoria with international norms and human rights standards
- reduce the early engagement of children experiencing disadvantage with the criminal justice system and therefore their risk of further offending
- help address the overrepresentation of Aboriginal children in the criminal justice system.

The Committee acknowledges that Victoria, through the MAG, has agreed to contribute to a proposal to raise the minimum age of criminal responsibility to 12 years old. In the Committee's view this represents a missed opportunity to achieve the benefits outlined above. It supports raising the minimum age of criminal responsibility to at least 14 years old.

RECOMMENDATION 10: That the Victorian Government raise the minimum age of criminal responsibility, noting that this is being considered by several jurisdictions via the Meeting of Attorneys-General.

In the Committee's view this important reform should occur alongside an expansion in the community-based support services required to address the factors underpinning children's criminal behaviours.

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213 Christopher Harrison, *Transcript of evidence*, p. 41.

214 George Selvanera, Acting Chief Executive Officer, Victorian Aboriginal Legal Service, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 35.

RECOMMENDATION 11: That the Victorian Government invest in community-based social, health, legal and forensic services which address the factors underpinning the criminal behaviours of children and young people. This investment must include greater resourcing of services which are culturally specific to Aboriginal children.

4 Addressing overrepresentation in the criminal justice system

At a glance

Some Victorians, such as women, Aboriginal people and people from culturally and linguistically diverse backgrounds, are overrepresented in the criminal justice system. This overrepresentation is informed by their experiences of compounding, intersectional and intergenerational disadvantage. It is important that early intervention finds a balance between addressing disadvantage generally and implementing specific interventions targeted at addressing risk factors unique to populations at the greatest risk or criminalisation of victimisation.

Key issues

- For several years women have been the fastest growing cohort in Australian prisons. The number of women in Victorian prisons has more than doubled over the past decade, with the incarceration rate of Aboriginal women more than tripling in the same period.
- Women's pathways into the criminal justice system are informed by untreated trauma from gendered violence and abuse.
- Early intervention which enhances the economic security of women and their access to health and social support services can help prevent engagement with the criminal justice system.
- Most Aboriginal Victorians never come into contact with the criminal justice system. However, those who do are more likely to have long-term, sustained contact.
- Empowering Aboriginal Community Controlled Organisations to have greater self-determination in the criminal justice system and increasing the accessibility of culturally safe services will help prevent the criminalisation and victimisation of Aboriginal Victorians.
- Like other populations, experiences of disadvantage can increase the risk of people from culturally and linguistically diverse populations encountering the criminal justice system. However, pre- and post-migration experiences may also contribute to victimisation or criminalisation.
- The overrepresentation of culturally and linguistically diverse populations within the criminal justice system has persisted over time, even as the cohorts most at risk have evolved and migration trends have varied.

Findings and recommendations

Finding 9: Women, particularly Aboriginal and culturally and linguistically diverse women, are overrepresented in the criminal justice system. Their criminalisation is often underpinned by unresolved trauma connected to sexual abuse, emotional abuse and family and other violence. Their offending is typically non-violent and of a less serious nature, such as low-level drug offending.

Recommendation 12: That the Victorian Government encourage the Australian Government to review welfare available to women and families experiencing disadvantage to ensure it is commensurate to the current cost of living.

Recommendation 13: That the Victorian Government increase funding and support to social support providers offering therapeutic interventions for alcohol and other drug use, sexual abuse, violence and trauma to:

- expand their services to women voluntarily seeking help and reduce wait times to access services
- develop gender-specific, trauma-informed and culturally safe therapeutic services
- enhance connectivity, collaboration and referrals between social support providers to ensure women are provided with long-term holistic support
- enhance screening programs to ensure complex and multifaceted support needs are identified and addressed.

Finding 10: Most Aboriginal Victorians do not encounter the criminal justice system. However, intergenerational trauma associated with ongoing colonisation, culturally unresponsive institutional structures, complex disadvantage and systemic racism place Aboriginal people at greater risk of being victimised or criminalised than other populations in Victoria.

Finding 11: Greater self-determination is the only approach which can overcome the entrenched disadvantage experienced by some Aboriginal Victorians and sustainably reduce their overrepresentation in the criminal justice system.

Recommendation 14: That the Victorian Government partner with Aboriginal Community Controlled Organisations to:

- develop long-term funding arrangements which support the expansion of these organisations' leadership and service provision with the justice and social services sectors
- identify opportunities for expanding these organisations decision-making authority and responsibilities in relation to Aboriginal people at risk of, or already engaged with the criminal justice system
- diversify and expand the social, health, forensic and legal services provided by these organisations to the Aboriginal community.

Finding 12: Holistic early intervention to address the overrepresentation of Aboriginal Victorians within the criminal justice system must encompass systemic reform to improve the cultural safety of justice institutions and social support more broadly.

Recommendation 15: That the Victorian Government ensure the comprehensive implementation and continued support for the reforms and initiatives outlined in the:

- *National Agreement on Closing the Gap*
- *Victorian Aboriginal Affairs Framework 2018–2023*
- *Burra Lotjpa Dunguludja 'Senior Leaders Talking Strong'*
- *Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017–2027*
- *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement and Strategic Action Plan*
- *Balit Murrup: Aboriginal social and emotional wellbeing framework*
- *Marrung Aboriginal Education Plan 2016–2026*
- *Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families.*

Recommendation 16: That the Victorian Government expand the Youth Crime Prevention Grants to include a dedicated stream of funding to support Aboriginal community led, placed-based early intervention initiatives specifically targeted at addressing the factors informing the overrepresentation of Aboriginal people within the criminal justice system. The Victorian Government should also ensure it supports these initiatives by:

- facilitating access to localised data related to criminal justice and other relevant government service provision, and associated costs
- supporting local justice reinvestment initiatives
- facilitating participation by, and coordination between, relevant government departments and agencies.

Finding 13: The Committee believes that how Aboriginality is established in justice contexts merits investigation by the Victorian Government, in partnership with Aboriginal representative bodies, Aboriginal Community Controlled Organisations, Traditional Owners and the Aboriginal community more broadly.

Recommendation 17: That the Victorian Government work with culturally and linguistically diverse community representatives, community service providers and Victoria Police to develop a Multicultural Youth Justice Strategy to:

- drive committed action to eradicating all forms of racial discrimination within the criminal justice system
- improve accountability and transparency through monitoring and reporting on outcomes for culturally and linguistically diverse people who encounter the criminal justice system
- promote research into underlying drivers of culturally and linguistically diverse youth offending and effective interventions targeting at risk youths, those already engaged in the criminal justice system, and those being released from incarceration
- promote investment in evidence-based, community-informed early intervention which addresses the drivers of criminal behaviours in culturally and linguistically diverse youths and their overrepresentation in the criminal justice system
- strengthen diversion pathways for culturally and linguistically diverse people who offend, including by investigating the adaptation of Victoria's Koori Court model to suit multicultural communities
- improve service coordination for young culturally and linguistically diverse people, their families and communities.

As discussed in Chapter 3, individuals experiencing compounding, intergenerational and intersectional socio-economic disadvantage are at a greater risk of engaging with the criminal justice system, either as a victim or a perpetrator. It is important that early intervention combines both general structural reform and investment to address disadvantage generally. Specific interventions targeted at addressing risk factors unique to those populations at greatest risk of criminalisation or victimisation should also be implemented.

This Chapter examines evidence that women, Aboriginal Victorians and individuals from culturally and linguistically diverse backgrounds are overrepresented in the criminal justice system. It also considers stakeholder suggestions for addressing this.

> **We are building prisons to meet demand, but investment in prevention is our only cure.**
>
> Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer, Victorian Aboriginal Child Care Agency, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 34.

4.2 Women

For several years women have been the fastest growing cohort in Australian prisons.[1] The number of women in Victorian prisons has more than doubled over the past decade, with the incarceration rate of Aboriginal women more than tripling in the same period.[2]

According to Inquiry stakeholders, the general factors which place women at risk of entering the criminal justice system centre on disadvantage and are similar to those experienced by men (see Chapter 3). In its submission, Women and Mentoring points out that for women, these general factors are amplified by 'broader structures of inequality relating to social, economic, and political dominance that enhance barriers for women to gain control of their financial situation, mental health, and to escape violence'.[3] However, there are key differences in women's pathways into the criminal justice system.

In its submission, the Centre for Innovative Justice at RMIT University explained women's unique pathways into the criminal justice system. It asserted that untreated trauma from gendered violence and abuse is instrumental in women's criminalisation:

> When left untreated, trauma from gendered violence is a key factor in women entering, and re-entering prison. Evidence indicates that victimisation from gendered violence can lead women to commit criminal offences in a variety of ways, including through using drugs and alcohol to self-medicate; being forced into sexual exploitation; resisting violence through physical force (and being misidentified by police as the predominant aggressor as a result); experiencing systems abuse; or through associated poverty, often entrenched through financial abuse by a partner.[4]

The Fitzroy Legal Centre's Women's Leadership Group provided stories of women with lived experience on the ways victimisation can inform their criminalisation.

> **My ex and I, it was, you know, a toxic, toxic relationship. And before I committed my offense, he had already had priors for violence, had priors for stabbings, broke into my house, stabbed a guy at my home, I was then classed as the victim. Within 12 months you know, there was constant mental stuff going on. I turned, I attacked him. I attacked his partner, I wasn't the victim no more, I was the perpetrator.**
>
> Cyndi, Women's Leadership Group, *Submission 154*, p. 11.

Several other stakeholders to the Inquiry made similar observations. Dr Karen Gelb, criminologist and Director of Karen Gelb Consulting, characterised women's trajectories into the criminal justice system as the 'sexual abuse to prison pipeline':

> Research has shown that, despite general similarities in risk factors for offending for male and female youth and adults, there are differences in females' trajectories due

1 Smart Justice for Women, *Submission 94*, p. 5.

2 Victorian Legal Services Board and Commissioner, *Keeping women out of the justice system*, 2020, p. 2.

3 Women and Mentoring, *Submission 120*, p. 1.

4 Centre for Innovative Justice, *Submission 82*, p. 3.

> to their unique experiences. Pathways to girls' and women's offending often involve significant histories of familial and domestic abuse characterised by victimisation and dysfunctional relationships; the abuse and ensuing trauma are subsequently related to substance abuse, economically-motivated offending, mental illness, self-harm, prostitution and further victimisation. While the 'school-to-prison pipeline' is often used as a short-hand description of males' pathways to incarceration, a 'sexual abuse-to-prison pipeline' would be a more apt description of the trajectories of women. Indeed, Australian research has found that 87% of women in custody had been victims of sexual, physical or emotional abuse, with the majority being victims of multiple forms of abuse. Abuse in childhood and adulthood were related to drug dependency and involvement in sex work, while mental health problems were related to drug dependency, violent offending and sex work. Almost two-thirds of these women were regular users of illegal drugs, with a high proportion attributing their offending to their illegal drug use.[5]

Smart Justice for Women and Elena Campbell, Associate Director of Research, Advocacy and Policy at the Centre for Innovative Justice at RMIT University both asserted that between 70–90% of incarcerated women have experienced sexual abuse, family violence and trauma.[6] Women and Mentoring explained that 'women's offending is consequently often associated with resistance to violence and their drive for survival'.[7]

> **Joan also had experiences of violence prior to being incarcerated. She had been in an abusive relationship when she was about 18 years old and spoke about one incident when her boyfriend had attempted to strangle her. "I called the police, and I didn't have a criminal record, but I had "notes" against my name, about people I consorted with, that I was a drug addict. I hadn't been caught with anything, but I was known to police … I went down to the station and they, in a roundabout way said to me, before I even had a chance to fight for myself or speak for myself, they said to me, "because you're known to police, and he isn't, this won't hold up in court, so there's no point". "I feel like that was the beginning of all the trauma to come, all of the feeling alone, feeling like I didn't have a voice, feeling like there was no safe space to be, feeling like I couldn't call on the law to help me"**
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> Joan, Women's Leadership Group, *Submission 154*, p. 12.

Evidence submitted to the Inquiry also highlighted that women who enter the criminal justice system as perpetrators of crime typically commit non-violent offences. The Centre for Innovative Justice at RMIT University explained that the antisocial behaviours which criminalise women are generally less serious than those exhibited by men entering the criminal justice system:

> Women tend to be charged with less serious offences than men – such as property or economic crimes and low-level drug offences – and have fewer previous convictions.

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5 Dr Karen Gelb, Director, Karen Gelb Consulting, *Submission 70*, p. 2.

6 Smart Justice for Women, *Submission 94*, p. 5; Elena Campbell, Associate Director, Research, Advocacy and Policy, Centre for Innovative Justice, RMIT University, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 36.

7 Women and Mentoring, *Submission 120*, p. 1.

> This makes women good candidates for programs that divert them from prison and link them with supports in the community.[8]

Smart Justice for Women pointed out that women are less likely to commit violent offences and are typically criminalised for drug dependence or poverty.[9]

As with other cohorts overrepresented in the criminal justice system, well designed and accessible early intervention can support women to:

- overcome the challenges associated with disadvantage
- address unresolved trauma
- manage alcohol and other drug issues.

The Centre for Innovative Justice submitted that:

> given what is known about the role played by trauma and socio-economic disadvantage in women's criminalisation, the first priority of government should be to invest in early intervention services in the community to prevent women from coming into contact with police and courts in the first place.[10]

Smart Justice for Women said that social and health support can play a 'critical role' in identifying and responding to issues such as homelessness, poverty, family violence, mental illness, and alcohol and other drug dependency before women become criminalised. It asserted that 'the priority for any support system reform must be ensuring that women can access the support they need at the right time in the right settings'.[11] Smart Justice for Women stated:

> The social and health support system can play a crucial role in identifying and responding to issues that lead to criminalisation for women, such as homelessness, poverty, family violence, untreated health problems and drug dependence.
>
> The priority for any support system reform must be ensuring that women can access the support they need at the right time and in the right settings in a way that avoids the ongoing stigma and discrimination that many women face in trying to access these services. Such supports must be responsive at the first risk of criminalisation. They must be accessible and sustained to reconnect with community and prevent ongoing criminalisation and, most importantly, support must be safe and respectful of the specific needs of women.
>
> Culturally appropriate wraparound services that are able to deal with the co-occurring needs of women in the justice system and deliver services in a gender-responsive and trauma-informed manner must be adequately resourced. In particular Aboriginal and Torres Strait Islander community controlled organisations and specialist organisations

8 Centre for Innovative Justice, *Submission 82*, p. 4.

9 Smart Justice for Women, *Submission 94*, p. 5.

10 Centre for Innovative Justice, *Submission 82*, p. 12.

11 Smart Justice for Women, *Submission 94*, p. 37.

> that work specifically with criminalised women must be properly and sustainably funded. Fundamental to this social support system is the provision of safe, secure and appropriate housing for women.[12]

Kathleen Maltzahn, Chief Executive Officer of Sexual Assault Services Victoria, argued that early intervention should focus on treating unaddressed trauma:

> one of the things that we wanted to say very clearly is that although we often think of the criminal justice system as a place where victims come in relation to sexual violence and where perpetrators are held to account, it is really important to acknowledge that many, many—too many—victim-survivors are caught up in the court system as offenders and to really make the point that we frequently misunderstand trauma, distress and anger that have resulted from unattended trauma that flows from violence.
>
> We know the huge numbers of children who experience sexual violence, and adults, and for too long people have not got either a justice response or a therapeutic response. For too many people that then results in their behaviour, in a sense, being misconstrued as, I guess, intentionally wrong …
>
> So we really want to recommend that the committee have a focus on the significance of trauma and the way that drives behaviours. Now, that is not to say that whatever those behaviours are they are acceptable or reasonable or that they might not impact on other people and that there does not need to be accountability about that but to understand that if we deal with that trauma, we may lessen that behaviour, and that is better for that person and better of course for anyone their behaviour is impacting on.[13]

However, the Committee heard that a range of barriers are preventing women from accessing the social, health and legal support they need prior to, during or following contact with the criminal justice system.

Tricia Clampa, Executive Officer of Women and Mentoring, canvassed women's justice issues at a public hearing in Melbourne. She explained that both women at risk of, and those who have already entered the criminal justice system, are not accessing the social support services they need to resolve unaddressed psychosocial issues:

> Women's offending overwhelmingly comes from their responses to the complexity and unaddressed psychosocial issues and challenges in their lives, and as such a gendered response is critical to keep women out of the justice system … significantly, many women are not adequately engaged with services to address these issues either before their offending, whilst progressing through the justice system, when they are serving a custodial sentence or when they are transitioning back into the community. They are either unaware of the services or do not know how to access them or there are significant barriers in accessing those services that are readily available in the community.[14]

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12 Elisa Buggy, Member, Smart Justice for Women, public hearing, Melbourne, 19 october 2021, *Transcript of evidence*, p. 19.

13 Kathleen Maltzahn, Chief Executive Officer, Sexual Assault Services Victoria, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, pp. 16–17.

14 Tricia Clampa, Executive Officer, Women and Mentoring, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 42.

Stakeholders outlined the following barriers impeding women's early access to social, health and legal support:

- poverty and a lack of economic stability[15]
- the failure to self-identify their need for support (for example, acknowledge an alcohol or drug use issue)[16]
- a lack of awareness of available support services[17]
- the social stigma associated with seeking help with some issues, such as mental illness or alcohol and other drug use issues[18]
- general fear and mistrust[19]
- the impact that engaging with support services can have on family court or child protection proceedings[20]
- a lack of support services which are gender specific, can cater to clients with caring responsibilities, are trauma informed or culturally appropriate[21]
- the manner in which mental health providers and alcohol and other drug treatment providers ration their services, which can result in reduced accessibility to women seeking support voluntarily.[22]

Moreover, Smart Justice for Women pointed out that even where women do access support services, it is often short-term and issue-specific rather than holistic, long-term support to resolve complex disadvantage:

> There are a number of problems with the way that support services are currently funded and resourced which can impact on women's access to supports. Many agencies are funded to provide services that address individual or discrete issues, and may not be well-equipped to respond to the complex, co-occurring needs of women at risk of criminalisation or engaged with the criminal justice system.[23]

Women and Mentoring submitted similar evidence. It noted that social, health and legal support services directed at women—particularly criminalised women—are typically issue specific, crisis oriented and provide short term support to address an immediate need. It suggested that 'while critical, these services generally do not provide long term support and guidance to assist women to address the causes of their criminalisation'.[24]

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15 Women's Leadership Group, *Submission 154*, p. 23; Council of single mothers and their children, *Submission 151*, pp. 3–5.

16 Smart Justice for Women, *Submission 94*, p. 37.

17 Tricia Clampa, *Transcript of evidence*, p. 45.

18 Smart Justice for Women, *Submission 94*, p. 37.

19 Tricia Clampa, *Transcript of evidence*, p. 45.

20 Ibid.

21 Smart Justice for Women, *Submission 94*, p. 39.

22 Ibid., p. 37.

23 Ibid., p. 39.

24 Women and Mentoring, *Submission 120*, p. 2.

The Centre for Innovative Justice suggested that inadequate and disconnected social services are primarily caused by insufficient funding and that investment is required to facilitate an integrated service sector:

> Stakeholders consulted … stressed that the fragmented nature of the service sector compounded disadvantage for criminalised women. Integrated practice requires time and resourcing, while under-resourced services face barriers to collaboration, including competing for funding. As a result, the sector can be ill-equipped to address the complexity of women's interconnected needs.[25]

The Committee understands that women may be particularly impacted by a lack of appropriate treatment options for alcohol and other drug use issues and sexual assault trauma. These are typical elements in a women's trajectory into the criminal justice system. For example, the Centre for Innovative Justice noted that the 'link between women's justice involvement and substance dependence is a particularly strong one'.[26] Yet, as the Fitzroy Legal Service noted in its submission, demand for all forms of treatment for alcohol and other drugs has long outstripped the availability of these services and that the COVID-19 pandemic has exacerbated this phenomenon:

> Anecdotal evidence from our health justice partnerships–which is echoed by the experience of our clients and our lawyers–suggest that the demand for alcohol and other drug counselling, inpatient withdrawal, detox and rehabilitation programs far exceeds service availability. This is a longstanding issue that has been exacerbated by the demands of COVID-19. The increase in demand is reflected in a recent survey of Australian treatment providers, which revealed that 70 per cent of providers have experienced an increase in demand of 40 per cent or more. Across the sector, wait times for alcohol and other drug services are substantial: alcohol and drug counselling (6–8 weeks), inpatient withdrawal/detox (approx. 8 weeks), long term rehabilitation programs (4–12 months).
>
> Moreover, the impact of COVID-19 has significantly reduced capacity limits of already stretched AOD services. Withdrawal/detox and rehabilitation programs have been particularly affected, with some services closed to new referrals or operating at reduced capacity.

It also suggested that many of these services 'have been developed in the absence of a gender lens' and therefore may not be equipped to effectively assist women seeking treatment for alcohol and other drug use. They are also complex to navigate, which can undermine the success of treatment:

> engagement with alcohol and other drug support services can be multifaceted and complex, even without the added difficulty of navigating a system where demand far exceeds capacity. While the alcohol and other drug sector emphasises an integrative and holistic service model, the reality of engaging with alcohol and other drug services is often dominated by disjointed service delivery, where a person needs to navigate

25 Centre for Innovative Justice, *Submission 82, Attachment 1*, p. 91.

26 Centre for Innovative Justice, *Submission 82*, p. 3.

> several processes and assessments across different organisations. For example, it is likely that a person will need to engage in alcohol and other drug counselling and potentially detox/withdrawal prior to being added to a waitlist for residential rehabilitation.[27]

Likewise, the prevalence of unresolved trauma from sexual assault, both in childhood and as an adult, is high amongst women engaged with the criminal justice system.[28] Yet, as Sexual Assault Services Victoria points out, there is a dearth of these services and those that do exist are difficult to access, particularly for criminalised women:

> Under-funding of the specialist sexual assault services means that many services have waiting lists that are a barrier for criminalised survivors …
>
> There is no residential program explicitly focused on recovery from sexual assault. Existing models for residential alcohol services could be adapted to focus more explicitly on sexual assault survivors, whether with drug and alcohol dependences or not.
>
> There remains to be poor recognition in the new mental health reforms of the impact of sexual violence on mental health, and poor inclusion of specialist sexual assault services in new models for mental health care.[29]

Stakeholders suggested that early intervention to reduce the overrepresentation of women in the criminal justice system can be improved by investing in social, health and legal support services to improve their accessibility, and through measures which enhance the economic stability of women.

Tricia Clampa of Women and Mentoring said that early intervention initiatives should promote awareness of the support services which are available and build women's capacity and knowledge to access the support they need.[30]

Sexual Assault Services Victoria submitted that increasing 'funding for specialist sexual assault services, including for intensive outreach to criminalised survivors, would allow survivors to access appropriate and tailored therapeutic support'.[31] It recommended that the Victorian Government:

- increase funding to specialist sexual assault services to reduce waiting times
- fund sexual assault services to provide 'intensive outreach and tailored therapeutic services to criminalised survivors'
- pilot a residential therapeutic program for survivors of sexual abuse, including criminalised survivors

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27 Fitzroy Legal Service, *Submission 152*, pp. 43–44.

28 Elena Campbell, *Transcript of evidence*, p. 36.

29 Sexual Assault Services Victoria, *Submission 136*, p. 13.

30 Tricia Clampa, *Transcript of evidence*, p. 45.

31 Sexual Assault Services Victoria, *Submission 136*, p. 13.

- incorporate the expansion of specialist sexual assault services into the reform of the mental health system currently underway in response to the Royal Commission into Victoria's mental health system.[32]

Smart Justice for Women also called for social support services to be 'adequately resourced to prioritise early intervention, [and] voluntary support to reduce the risk of criminalisation'. It stated support for:

- reforming screening processes to ensure women with complex needs, trauma and family/caring responsibilities are supported to access services
- resourcing social support services to work collaboratively to establish partnerships, referral pathways, and integrated services
- providing support services with training in trauma-informed and intersectional support to overcome stigma and discrimination towards criminalised women
- sustainably resourcing Aboriginal and Torres Strait Islander Community Controlled Organisations to provide culturally safe supports.[33]

The Law and Advocacy Centre for Women made recommendations which aligned with those put forward by Smart Justice for Women, including to:

1. Ensure that supports are responsive to women's needs at the first risk of criminalisation.
2. Ensure that supports are accessible and sustained to enable women to reconnect with their community and reduce the risk of offending.
3. Ensure that supports are safe and respectful of the specific needs of women engaged with the criminal justice system, including the adoption of trauma-informed and integrated practice across the service system.[34]

The Law and Advocacy Centre for Women provided an example illustrating how an assertive case manager can support women to address multifaceted or complex support needs.

A LACW client had a disability and an unused NDIS package because she did not know how to access it. She had complex mental health issues and was the primary carer for her son. Her case manager supported her to access her NDIS funding, linked her with regular social support and counselling, and found her some respite support as a carer. She has since reduced her mental health medication, is happy and connected to her community and is linked to a paid employment pathway. Before working with her LACW case manager, she struggled to find other support given her involvement with the criminal justice system and criminal history.

32 Ibid., p. 14.

33 Smart Justice for Women, *Submission 94*, p. 40.

34 Law and Advocacy Centre for Women, *Submission 135*, p. 15.

> **A LACW case manager was working with one older woman who had a traumatic childhood, suffered from mental illness and had experienced a long period of homelessness. When she was referred to us, she was sleeping rough and was unmedicated and suicidal. Her LACW case manager has supported her to find stable accommodation, which means she has been able to re-engage with her doctor and access medication and support for her mental illness. She has benefited from having one consistent case manager who has taken a trauma-informed approach to supporting her.**
>
> Law and Advocacy Centre for Women, *Submission 135*, p. 15.

Djirra noted that fewer Aboriginal women were incarcerated during the first half of 2020 and attributed this to increased economic security as a result of COVID-19 employment payments. It asserted that 'for some women, it was the first time they didn't have to worry about how they were going to pay for groceries for their kids'. It called on the Victorian Government to learn from this period, acknowledge the link between poverty and offending, and implement measures to increase the economic security of women:

> This should include a focus on the connection between poverty and offending, with consideration of measures to increase Aboriginal and Torres Strait Islander women's financial security and decrease the risk of incarceration.[35]

The Council of Single Mothers noted that welfare payments are generally provided by the Australian Government, whereas offending connected to poverty costs state governments. It urged the Victorian Government to lobby the Australian Government to address 'government induced poverty' or inadequate welfare support.[36]

The Committee understands that whilst disadvantage places women at similar risk of entering the criminal justice system as other populations, their trajectory into victimisation and/or criminalisation is more often characterised by unresolved trauma from sexual abuse, emotional abuse and violence. Further, their offending is typically non-violent and drug-related.

FINDING 9: Women, particularly Aboriginal and culturally and linguistically diverse women, are overrepresented in the criminal justice system. Their criminalisation is often underpinned by unresolved trauma connected to sexual abuse, emotional abuse, and family and other forms of violence. Their offending is typically non-violent and of a less serious nature, such as low-level drug offending.

The Committee is disappointed to note that while the typical trajectories of women into the criminal justice system are well understood, women are still not supported to access the social, health and legal support they require to address the factors underpinning their criminalisation.

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35 Djirra, *Submission 138*, p. 18.

36 Council of single mothers and their children, *Submission 151*, p. 3.

Evidence received through the Inquiry indicates that a two-pronged approach is needed to assist women to access support early and avoid pathways into the criminal justice system. In the Committee's view, measures to increase the economic security of women and their families will foster the stability that at risk women need to engage with support services as soon as a need arises, in a manner which is meaningful and enduring. Support services also require investment to enable them to tailor their services to the unique needs of women and to improve access by those seeking support voluntarily.

RECOMMENDATION 12: That the Victorian Government encourage the Australian Government to review welfare available to women and families experiencing disadvantage to ensure it is commensurate to the current cost of living.

RECOMMENDATION 13: That the Victorian Government increase funding and support to social support providers offering therapeutic interventions for alcohol and other drug use, sexual abuse, violence and trauma to:

- expand their services to women voluntarily seeking help and reduce wait times to access services
- develop gender-specific, trauma-informed and culturally safe therapeutic services
- enhance connectivity, collaboration and referrals between social support providers to ensure women are provided with long-term holistic support
- enhance screening programs to ensure complex and multifaceted support needs are identified and addressed.

The Committee acknowledges the work of Odyssey House Victoria is characteristic of the approach it would like to see services supported to take more broadly.

CASE STUDY 4.1: Odyssey House Victoria, a holistic alcohol and drug treatment service

Odyssey House Victoria (OHV) is a specialist drug and alcohol treatment, training and support organisation that assists more than 16,000 people each year on their journey to recovery. In addition to our community services, OHV manages over 180 residential alcohol and other drug (AOD) treatment beds across Victoria, and provides opportunities for change and growth by reducing drug use, improving mental health and reconnecting people to families and the community. Since inception in 1979, OHV has been a leading provider of integrated services to clients who typically present with a range of complex issues and co-morbidities. OHV has long recognised that issues of addiction have wider causal factors that may relate to childhood trauma, significant life events, and mental health, and we work collaboratively in a coordinated fashion with other services and sectors to provide holistic, recovery focused interventions. OHV clients receive tailored services for their individual differences and diverse needs.

AOD issues also impact on children, families and communities. Consequently, OHV also provides a range of education, prevention and support programs to families and community groups. OHV has won a number of National Awards for its treatment programs (including the 2012 National Award for Excellence in Services to Young People, an Australasian Therapeutic Communities Association award for its Circuit Breaker residential program near Benalla, and the 2017 Victorian Public Healthcare Award for Improving Indigenous Health – Closing the Gap).

Source: Odyssey House Victoria, *Submission 130*, p. 3

4.3 Aboriginal Victorians

Most Aboriginal Victorians never come into contact with the criminal justice system. However, those who do are more likely to have long-term, sustained contact.[37]

As described in Chapter 2, Aboriginal Victorians are overrepresented throughout the criminal justice system. Intergenerational trauma, culturally unresponsive institutional structures, complex disadvantage and racism place Aboriginal people at greater risk of perpetrating or becoming the victim of a crime than other populations in Victoria. The Victorian Aboriginal Community Services Organisation explained in its submission to the Inquiry:

> Due to the ongoing effects of colonisation, Aboriginal people experience adverse outcomes across almost every social determinant, including lower levels of employment, reduced access to healthcare and housing, financial disadvantage, increased rates of

37 Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023*, 2018, p. 49.

> family violence and adverse health outcomes. This economic and social disadvantage directly contributes to the overrepresentation of Aboriginal people in Victoria's criminal justice system.[38]

At a public hearing in Melbourne, Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer of the Victorian Aboriginal Child Care Agency, described the profoundly disorientating impact ongoing colonisation can have on an individual's life:

> The criminal justice system must be accountable and invest also in prevention and early intervention but should have a focus on culture. Many of the Aboriginal people that are in the justice system do not have strong aunts, do not have strong uncles, do not know where they come from, have been removed from their families. I cannot imagine what it is like to not know who you are. I know where I come from. I know all my aunts and uncles. I can identify … I have got genealogies, I have got aboriginality. I can [and] do a return to country because I know my country.[39]

Adjunct Professor Bamblett said it is important to acknowledge this context when seeking to intervene early to address the factors underpinning offending by Aboriginal people:

> Offending behaviour among Aboriginal men and women cannot be understood or addressed in the absence of knowing the historical and current context within which this behaviour occurs—namely, disconnection from culture, the impact of trauma, grief and loss, as well as social and economic disadvantage. When you think about Aboriginal people, we have been colonised for 200 years. We have had to change dramatically from living traditionally to where we are today, and many of my people have been acculturated into today's systems, and many have made the transition very easily but many have not.[40]

The Victorian Government and the Victorian Aboriginal community are pursuing numerous agreements, joint initiatives, actions plans and frameworks, to reduce the complex disadvantage experienced by Aboriginal people and mitigate their risk of engaging with the criminal justice system. Three agreements or frameworks which are particularly pertinent to the matters under consideration in this report are:

- *National Agreement on Closing the Gap*
- *Victorian Aboriginal Affairs Framework 2018–2023*
- the Aboriginal Justice Agreement.

The most recent *National Agreement on Closing the Gap* took effect in July 2020 and formally commits all Australian governments to working with Aboriginal communities, organisation and businesses 'to overcome the entrenched inequality faced by too many

38 Victorian Aboriginal Community Service Association, *Submission 81*, p. 3.

39 Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer, Victorian Aboriginal Child Care Agency, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 35.

40 Ibid., p. 23.

Aboriginal and Torres Strait Islander people so that their life outcomes are equal to all Australians'. It seeks to achieve 'priority reforms' including:

- shared decision making
- building a strong and sustainable Aboriginal community controlled sector
- improving the cultural safety and responsivity of mainstream institutions
- Aboriginal and Torres Strait Islander access to, and use of, relevant data
- a range of socio-economic outcomes.[41]

The National Agreement also establishes 17 targets across these areas of priority reform which address specific areas of policy making, such as education, employment, health, and justice.[42]

The *Victorian Aboriginal Affairs Framework 2018–2023* is the Victorian Government's overarching framework which details shared government and Aboriginal community commitments to improve outcomes for Aboriginal Victorians. It seeks to shape:

- how the Victorian Government works with Aboriginal Victorians, organisations and the community to drive action that improves outcomes for Aboriginal Victorians
- whole-of-government structural and systemic reform to enable self-determination.[43]

The *National Agreement on Closing the Gap* and the Victorian Aboriginal Affairs Framework are complemented by the long running Aboriginal Justice Agreement. This commits the Victorian Government to partnering with the Aboriginal community to 'improve Aboriginal justice outcomes, family and community safety, and reduce over-representation in the Victorian criminal justice system'. Both the Victorian Aboriginal Affairs Framework and Phase 4 of the Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja 'Senior Leaders Talking Strong'* strive to achieve the shared vision:

> Aboriginal people have access to an equitable justice system that is shaped by self-determination, and protects and upholds their human, civil, legal and cultural rights.[44]

Burra Lotjpa Dunguludja also shares objectives with other Victorian Government frameworks and plans. These are detailed in Figure 4.1.

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41 Australian Government, *Closing the Gap In partnership*, 2019, <https://www.closingthegap.gov.au/partnership> accessed 26 January 2022.

42 Ibid.

43 Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023*, p. 10.

44 A partnership between the Victorian Government and Aboriginal community, *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, p. 8; Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023*, p. 48.

Figure 4.1 Burra Lotjpa Dunguludja's shared vision and outcomes with other government frameworks and plans

Source: A partnership between the Victorian Government and Aboriginal community, *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, August 2018, p. 22.

The Victorian Aboriginal Affairs Framework and Burra Lotjpa Dunguludja both recognise early intervention as pivotal to addressing the overrepresentation of Aboriginal people in the criminal justice system. For example, the Framework notes:

> Prevention and early intervention can keep Aboriginal young people, women and men out of the criminal justice system. Community-based diversion programs and community-led services that connect people to culture can also help break cycles of offending and promote positive outcomes. This also requires intersectional services in health, child protection, homelessness and family violence, to deliver effective prevention and early intervention support.[45]

45 Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023*, p. 50.

4.3.1 Self-determination and intervention to address the overrepresentation of Aboriginal and Torres Strait Islander people

The *National Agreement on Closing the Gap*, the Victorian Aboriginal Affairs Framework and Burra Lotjpa Dunguludja all provide that self-determination must be foundational in any intervention to reduce the overrepresentation of Aboriginal people in the criminal justice system.

The National Agreement commits all Australian governments to listening to the voices and aspirations of Aboriginal people and adapting the way they work in response. Several of its priority reform areas aim to enhance Aboriginal self-determination. For example, priority reform area one seeks to enhance shared decision-making. It envisions that Aboriginal people are 'empowered to share decision-making authority with governments to accelerate policy and place-based progress on Closing the Gap through formal partnership arrangements'. Likewise, priority reform area two aims to build the community-controlled sector. It envisions 'a strong and sustainable Aboriginal and Torres Strait Islander community-controlled sector delivering high quality services to meet the needs of Aboriginal and Torres Strait Islander people across the country'.[46]

The Victorian Aboriginal Affairs Framework states that it is up to Aboriginal Victorians to define what meaningful self-determination encompasses for them. It further notes that the principle of self-determination underpins the framework is underpinned by the principle of self-determination:

- Aboriginal Victorians hold the knowledge and expertise about what is best for themselves, their families and their communities. Local and international evidence shows … that self-determination is the key policy approach that has produced effective and sustainable outcomes for Indigenous peoples.
- Aboriginal Victorians have consistently and long called for self-determination as the key enabler for Aboriginal people, families and communities to thrive.
- Australia is a signatory to international law instruments, including UNDRIP [the United Nations Declaration on the Rights of Indigenous Peoples], that affirm the right to self-determination for Indigenous peoples.[47]

Burra Lotjpa Dunguludja also outlines several reasons why only self-determination is capable of reducing the overrepresentation of Aboriginal people in the criminal justice system. It argues that 'Aboriginal people understand the issues of concern and priority in their local areas' and the 'involvement of Aboriginal people ensures community buy-in and culturally appropriate solutions'. It asserted that Aboriginal people can use their community networks to engage people in programs and services who may not

46 Australian Government, *Closing the Gap*

47 Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023*, p. 22.

otherwise participate. Burra Lotjpa Dunguludja also states that the involvement of Aboriginal people in the design and implementation of programs builds community and social capital.[48]

Burra Lotjpa Dunguludja mandates adherence to principles of self-determination developed by the Aboriginal Justice Caucus—the state-wide body comprised of Aboriginal community representatives who are signatories to the Aboriginal Justice Agreement. These are outlined in Table 4.1.

Table 4.1 Aboriginal Justice Caucus principles defining self-determination in the criminal justice system

Principle	Description
Prioritise self-determination	Always strive to transfer power, decision-making and resources to the Aboriginal community.
Support cultural strengthening	Enhance positive connections to family, community and kin to build resilience to setbacks and develop strategies for dealing with hardships.
Be strengths-based	Respect and honour the strengths and resilience of Aboriginal people, families and communities and build upon these.
Be trauma-informed	Employ healing approaches that seek to understand and respond to trauma and its impact on individuals, families and communities.
Be restorative	Aim for the restoration of victims, people who have offended and communities and repair the harm resulting from the crime, including harm to relationships.
Use therapeutic approaches	Recognise that at all stages of involvement with the justice system there is potential to make a positive impact on a person's life.
Respond to context	Recognise and adapt to meet the specific needs and circumstances of people, families, and communities.
Be holistic	Address the interrelated risk factors for offending in a holistic manner, such as substance abuse, housing, and unemployment.
Protect cultural rights	Respect the distinct and unique rights of Aboriginal people.
Address unconscious bias	Identify and respond to systemic racism and discrimination that persists in the justice system.

Source: Aboriginal Justice Caucus, *Submission 106*, pp. 6–7; *Burra Lotjpa Dunguludja (Senior Leaders Talking Strong): Victorian Aboriginal Justice Agreement Phase 4: A partnership between the Victorian Government and Aboriginal Community*, August 2018, p. 28.

Many stakeholders who engaged with the Inquiry also emphasised the importance of ensuring that all intervention to address the overrepresentation of Aboriginal people within the criminal justice system is underpinned by the principle of self-determination. For example, the Victorian Government argued that 'for Aboriginal communities, self-determination is the only policy approach that can produce effective and sustainable outcomes, and that enduring solutions must be community-led'.[49]

48 *Burra Lotjpa Dunguludja (Senior Leaders Talking Strong): Victorian Aboriginal Justice Agreement Phase 4: A partnership between the Victorian Government and Aboriginal Community*, August 2018, p. 11.

49 Victorian Government, *Submission 93*, p. 9.

At a public hearing, George Selvanera, Acting Chief Executive Officer of the Victorian Aboriginal Legal Service, stated that—in terms of effective early intervention—Aboriginal people know the solutions to the challenges they are facing:

> it is very much about needing to work with Aboriginal people and Aboriginal organisations themselves … that is essential. Aboriginal people know the solutions to their challenges, and so they absolutely need to be not just a partner but a decision-maker within, if you like, system-wide reform, because that is what systemic racism is—it is the production of those racially disparate outcomes.[50]

The Aboriginal Justice Caucus similarly submitted that Aboriginal communities are best placed to design and lead solutions to the challenges they face:

> Policy makers need to understand that social problems are deeply entrenched and ought to be approached with consideration of historical, social, community, family and individual factors. It is imperative that Aboriginal people and communities lead the design of polices and legislation that affects us. Similarly, programs and services need to be designed, delivered and evaluated by and with the Aboriginal community. When Elders, community members and other Aboriginal organisations and service providers are engaged in consultative and development processes the most important needs of the community can be distinguished and the most appropriate methods of implementation can be identified.[51]

The aspirations of Victorian Aboriginals for self-determination in the criminal justice system are established in Burra Lotjpa Dunguludja. Phase 4 of the Aboriginal Justice Agreement provides that, in order to address the overrepresentation of Aboriginal people within the criminal justice system, the Aboriginal community must be empowered to:

- determine goals and aspirations for that system as it applies to Aboriginal people
- set the direction for government policy and programs as they apply to Aboriginal people's interaction with the justice system
- hold governments to account against benchmarks set by the Aboriginal community
- establish justice institutions to exercise self-determination.[52]

Burra Lotjpa Dunguludja states that 'taking the first steps toward transitioning to greater Aboriginal authority is a crucial aim of this Agreement' and acknowledges that this will require the transfer of decision-making power and resources to the Aboriginal community.[53]

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50 George Selvanera, Acting Chief Executive Officer, Victorian Aboriginal Legal Service, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 34.

51 Aboriginal Justice Caucus, *Submission 106*, p. 4.

52 *Burra Lotjpa Dunguludja (Senior Leaders Talking Strong): Victorian Aboriginal Justice Agreement Phase 4*, p. 13.

53 Ibid.

Several stakeholders argued that Aboriginal Community Controlled Organisations should have a larger role in designing, leading and implementing early intervention to address the factors propelling Aboriginal people into the criminal justice system.

Representatives of the Victorian Aboriginal Child Care Agency and the Victorian Aboriginal Community Services Association both argued that the Aboriginal Children in Aboriginal Care program demonstrates the capacity of Aboriginal Community Controlled Organisations to lead interventions, to reduce the overrepresentation of Aboriginal people within the criminal justice system. This program involves transferring responsibility for the case management of young Aboriginal people subject to court protection orders to Aboriginal Community Controlled Organisations.

Adjunct Professor Aunty Muriel Bamblett of the Victorian Aboriginal Child Care Agency reported that Aboriginal Community Controlled Organisations' care of Aboriginal children is 'stemming the flow of juvenile justice':

> I want to give a big call-out to the Aboriginal community controlled organisations. We have moved to Aboriginal guardianship of Aboriginal children. We now have five Aboriginal organisations that will take on guardianship. What we are seeing is that where Aboriginal community controlled organisations are involved in child protection, they are stemming the flow of juvenile justice. So Aboriginal guardianship, Aboriginal decision-making, does work.[54]

Adjunct Professor Aunty Bamblett called on the Victorian Government to act on its commitment to Aboriginal self-determination by 'continu[ing] to shift towards greater Aboriginal community control and decision-making across the justice system':

> We need to better understand and support activities to strengthen Aboriginal community organisations' role in building a self-determined, end-to-end Aboriginal youth system. An effective correctional services program can lead to reduced recidivism, which makes the community safer and in the long run saves money. It can also reduce negative behaviours, leading to a safer prison environment and making the jobs of staff easier.[55]

The Victorian Aboriginal Child Care Agency was also in favour of expanding the role of Aboriginal Community Controlled Organisations to provide early intervention, to address the disadvantage leading Aboriginal people into the criminal justice system:

> The Royal Commission into Aboriginal Deaths in Custody in 1991 recommended that in order to eliminate disadvantage and improve justice outcomes, empowerment of Aboriginal people through returning control of their lives and their communities to Aboriginal hands is key. We are yet to see this happen. In order to prioritise self-determination, greater Aboriginal community control across the service system is needed, including proportionate funding transferred from mainstream to boost sector development and to enable the ACCO sector to take on new roles and build capability.[56]

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54 Adjunct Professor Aunty Muriel Bamblett AO, *Transcript of evidence*, pp. 35–36.

55 Ibid.

56 Victorian Aboriginal Child Care Agency, *Submission 121*, p. 13.

Aunty Linda Bamblett, Chief Executive Officer of the Victorian Aboriginal Community Services Association, said that the outcomes achieved through the Aboriginal Children in Aboriginal Care program demonstrates the potential of Aboriginal-led organisations to reduce the overrepresentation of Aboriginal people:

> Work like ours demonstrates that the ACCO sector can take responsibility for our own people, providing culturally appropriate services to break the cycle of reoffending and intergenerational incarceration. With the success of decision-making powers for children in out-of-home care being transferred to ACCOs, we believe that this success can be replicated in the criminal justice system. We should move to a system that transfers the authority and resources to ACCOs to provide culturally appropriate community responses.[57]

The Victorian Aboriginal Community Services Association asserted that 'a true commitment to self-determination and the transfer of power and resources to Aboriginal communities and their organisations is imperative to drive down incarceration and recidivism'. It argued that 'providing culturally responsive services that prioritise community control over design, a holistic approach to wellbeing and healing and systems and services and programs that reflect the community's values' aligns with the aspiration for self-determination. It argued that Aboriginal Community Controlled Organisations are 'best placed to provide services to the Aboriginal community' because 'services designed, delivered and controlled by the Aboriginal community and ACCO's have the greatest potential to produce outcomes for Aboriginal children and young people'.[58]

Jesuit Social Services also argued that 'services designed, controlled, and delivered by the Aboriginal community resulted in the best outcomes for Aboriginal children involved with youth justice with positive flow on effects for the wider Aboriginal community'. It advocated to increase funding for Aboriginal Community Controlled Organisations to deliver services addressing mental illness, homelessness, and alcohol and other drug issues. Jesuit Social Services argued that this accords with international principles of self-determination.[59]

The Aboriginal Justice Caucus said that it envisions a 'self-determined justice system where Aboriginal communities are actively involved in determining appropriate responses, interventions and programs at key decision-making points in the system'. It noted that both the Koorie Youth Council and the Commission for Children and Young People have published reports on youth justice issues. These reports found that effective early intervention is best achieved by resourcing Aboriginal Community Controlled Organisations to develop and lead the delivery of culturally appropriate youth support.[60]

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57 Aunty Linda Bamblett, Transcript of Evidence, p. 10.

58 Victorian Aboriginal Community Service Association, *Submission 81*, p. 12.

59 Jesuit Social Services, *Submission 119*, pp. 13–14.

60 Aboriginal Justice Caucus, *Submission 106*, p. 8.

However, the Committee heard that current funding arrangements for Aboriginal Community Controlled Organisations are undermining their ability to pursue self-determination in the criminal justice system and expand the provision of early intervention programs.

At a public hearing, Christopher Harrison, Co-Chair of the Aboriginal Justice Caucus, explained how Aboriginal Community Controlled Organisations are provided with funding to deliver the shared objectives of Burra Lotjpa Dunguludja. He noted that organisations submit budget bids to secure resources and typically receive short-term or inadequate government investment:

> So with the AJA4 [Aboriginal Justice Agreement Phase 4] what we have got is we have got a whole bunch of actions and processes that we have to deliver out of it. What we have done is each year we have gone to funding submissions and budget bids to try and deliver on most of the actions and requirements. Some things are still on that list that have not been quite fulfilled. The other side of things is that it is also basically around the investment that we have into it. Some are very poorly funded, so it is short-term funding for a short-term goal, and that is where we would probably be looking at more of that investment back into it to actually say, 'Look, we've got all our recommendations and our budget bids that we've put up. We would actually see a better improvement in actually reaching that goal if it was properly funded'.[61]

Uncle Robert Nicholls, Chair of the Hume Regional Aboriginal Justice Advisory Committee under the Aboriginal Justice Caucus, said that the Victorian Government stipulates how the funding it provides to Aboriginal Community Controlled Organisations must be used conflicts with the principles of self-determination:

> when it comes to the Aboriginal community controlled organisations, their organisations are told, 'You've got $50 000 and this is how you are going to spend it', so it takes away the self-determination in terms of how do we assist our people—young men, young women and adults—in the prison system. So if we had better control in terms of saying what is happening with that money, we could probably add value to it.[62]

Adjunct Professor Aunty Bamblett of the Victorian Aboriginal Child Care Agency suggested that most funding to address Aboriginal overrepresentation in the criminal justice system does not go to Aboriginal Community Controlled Organisations. Rather, it is provided to mainstream services which are typically unable to provide culturally appropriate intervention:

> Seven per cent of the funding for child protection for early intervention and prevention goes to Aboriginal—have a look at the numbers—and then 93 per cent of funding for Aboriginal goes to mainstream organisations.

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61 Christopher Harrison, Co-Chair, Aboriginal Justice Caucus, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 42.

62 Uncle Robert Nicholls, Hume Regional Aboriginal Justice Advisory Committee Chair and Member of the Aboriginal Justice Caucus, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*.

> Aboriginal-led solutions and the continuing cycles go beyond obviously what is visible. The cycle continues because culture is ignored and not valued. [Mainstream services] underperform and then get rewarded and still get funding. So where is the accountability of mainstream to Aboriginal? So much wasted government money—taxpayers money. We are building prisons to meet demand, but investment in prevention is our only cure.[63]

Adjunct Professor Aunty Bamblett explained that mainstream social services lack the cultural competency required to assist Aboriginal Victorians to overcome disadvantage and avoid the criminal justice system.

> **Lastly, children and young people who come into contact with the justice system more often than not have compounding complex needs having experienced significant trauma, family violence, poor mental health or substance abuse, so many Aboriginal people in the justice system have a disability or a cognitive impairment. Even with such high rates of disability, mental health and substance abuse the lesson here time and time again is the lack of access to culturally safe support prior to, after entering and on release from the criminal justice system. Mental health and disability assessments are not culturally appropriate, leading to either a misdiagnosis or a condition that goes untreated.**
>
> Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer, Victorian Aboriginal Child Care Agency, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 35.

Adjunct Professor Aunty Bamblett argued that 'culturally therapeutic specialised services, including mental health, alcohol and drug and education, should be available to support healing and to disrupt trajectories into the system':

> For Aboriginal people healing occurs in the context of relationships, in our connection to our culture, community and land and recognising these are results of complex trauma, grief and loss …
>
> We know that where culture is strong there is a buffer from the impacts of trauma. For those who have a tenuous relationship with their culture, strengthening their bond to and connecting with Aboriginal community, family and culture is essential for their sense of identity and thus their healing. [64]

Djirra provided a similar example of how mainstream services can lack cultural competency to support Aboriginal people to overcome challenges associated with disadvantage. Djirra submitted that it currently lacks the funding required to make its culturally appropriate programs more accessible to Aboriginal women with disability.[65]

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63 Adjunct Professor Aunty Muriel Bamblett AO, *Transcript of evidence*, p. 34.

64 Ibid., p. 35.

65 Djirra, *Submission 138*, p. 21.

> **Some Aboriginal and Torres Strait Islander women "pass" as not having a disability. Obtaining a formal diagnosis is difficult, due in part to cultural differences in the understanding of disability, a lack of cultural safety among assessing practitioners, and prohibitive assessment costs. Even when an assessment is possible, Djirra understands that very few of the recognised assessment tools have been validated as appropriate for use with Aboriginal and Torres Strait Islander peoples. This limitation is implicitly acknowledged in the National Disability Insurance Scheme's recently abolished Independent Assessment Framework. As a result, high numbers of Aboriginal and Torres Strait Islander women, both in prison and in the community, have a disability but are much less likely to have a formal diagnosis.**
>
> Djirra, *Submission 138,* p. 21

In a response to a question on notice, the Victorian Aboriginal Child Care Service provided more detail on funding arrangements for Aboriginal Community Controlled Organisations which deliver early intervention services. It contended that:

> current models of early intervention and prevention funding [are] inflexible, [are] conceptualised as access to early years such as child care, playgroups and maternal and child health rather than targeted at the need for trauma-informed, culturally informed, sustained and targeted early intervention work with families.[66]

Further, it submitted that the level of funding provided to Aboriginal Community Controlled Organisations is not commensurate with the overrepresentation of Aboriginal people within the criminal justice system:

> Aboriginal Community Controlled Organisations funded for Early Help service through Department Families, Fairness and Housing are now funded 7%, this is still significantly disproportionate to the number of Aboriginal children in Child Protection. This is similarly the case across family violence.[67]

Aunty Linda Bamblett of the Victorian Aboriginal Community Service Association also noted that the funding provided for early intervention initiatives is not targeted at the overrepresentation of Aboriginal people within the criminal justice system. Aunty Bamblett noted that there is 'no specific early intervention preventative funding stream for Aboriginal women', despite their disproportionate engagement.[68]

Funding arrangements for Aboriginal Community Controlled Organisations also contribute to the difficulties they face in attempting to realise self-determination by informing the development of criminal justice policy and legislation. For example, the Victorian Legal Service submitted:

> VALS [Victorian Aboriginal Legal Service] is routinely contacted by departments and agencies of the Victorian Government for consultations concerning legislative and

66 Victorian Aboriginal Child Care Agency, Adjunct Professor Aunty Muriel Bamblett AO, Chief Executive Officer, Inquiry into Victoria's criminal justice system hearing, response to questions on notice received 23 September 2021.

67 Ibid. Ibid.

68 Aunty Linda Bamblett, Chief Executive Officer, Victorian Aboriginal Community Service Association Ltd (VASCAL), public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 11.

> administrative proposals. The consultation timeframes are frequently very short, making it challenging for VALS, being chronically underfunded, to provide comprehensive feedback. Moreover, feedback provided by VALS is not typically reflected in the measures implemented by the Victorian Government.[69]

The Victorian Aboriginal Legal Service contended that 'the ability of [Aboriginal Community Controlled Organisations] to effectively advocate for the interests of Aboriginal communities in Victoria is considerably impeded by the lack of appropriate funding and resources to fulfil their respective mandates'.[70] It noted that it has repeatedly identified funding as an issue in previous submissions to the Victorian Government.[71] George Selvanera of the Victorian Aboriginal Legal Service warned that unless Aboriginal organisations are at the centre of policy development and decision making, self-determination in the criminal justice system will not be achieved:

> what is self-determination? Self-determination in a real sense is not just consulting with Aboriginal people. So, you know, there are some really great governance mechanisms that are in place, like the Aboriginal Justice Caucus, the Aboriginal Justice Agreement and then meeting with government partners. But that is still largely a very consultative body. The Caucus has a series of recommendations, whether it is increased funding for VALS [the Victorian Aboriginal Legal Service] … to have an Aboriginal Social Justice Commissioner, to reform the bail laws that are broken … Those ideas, I suppose, or those proposals, are put to government, who will think about them. That is not to say that those meetings do not happen in a very respectful way, but Aboriginal people are not the decision-makers in that meeting … [it] is about recognising that Aboriginal people need to be at the centre of the decision-making about what happens for Aboriginal people.[72]

The Victorian Aboriginal Legal Service recommended that the Victorian Government ensure that 'Aboriginal peoples enjoy the right to meaningful and effective consultation in decision-making processes on matters that affect their rights'. It argued that this must involve engaging with Aboriginal communities and their organisations 'at all stages of the conceptualisation, development and drafting of such measures'.[73] It called on the Victorian Government to ensure all Aboriginal Community Controlled Organisations are 'sufficiently resourced to fulfil their respective mandates to represent the interests, both individual and collective, of Aboriginal peoples in Victoria'.[74]

Aunty Linda Bamblett of the Victorian Aboriginal Community Service Association likewise argued that 'sustainable long-term funding' and investment into the workforce of Aboriginal Community Controlled Organisations is needed to facilitate greater independence and self-determination.[75] In its submission to the Inquiry, the Association argued that these long-term funding agreements should be designed by the sector

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69 Victorian Aboriginal Legal Service, *Submission 139*, p. 42.

70 Ibid., p. 44.

71 Ibid.

72 George Selvanera, *Transcript of evidence*, p. 35.

73 Victorian Aboriginal Legal Service, *Submission 139*, p. 46.

74 Ibid.

75 Aunty Linda Bamblett, Transcript of Evidence, p. 10.

and align with the level of funding provided to mainstream community services. It advocated for Aboriginal Community Controlled Organisations, the Aboriginal community more broadly and Traditional Owner groups to have input into Victorian State Budget planning processes.[76]

The Victorian Aboriginal Child Care Agency called for greater investment in Aboriginal Community Controlled Organisations in line with the priority reforms outlined in the *National Closing the Gap Agreement*:

> ACCOs are already delivering culturally therapeutic trauma informed programs which when sufficiently funded can disrupt an intergenerational cycle of justice involvement and improve overall wellbeing.
>
> In line with the Closing the Gap Priority Reform Two: Building the Community-Controlled Sector, ACCOs must be resourced to expand and deliver programs focused on engaging disconnected children and families in programs that provide practical supports as well as opportunities for personal development capable of offering pathways back into education, training, employment and the community.[77]

The Aboriginal Justice Caucus called for 'appropriate, sustainable long-term models to support prevention, early intervention and diversionary programs run by Aboriginal organisations'. It argued that working in the criminal justice system can be 'very challenging' for Aboriginal people and they must be 'adequately supported culturally and financially to engage in this work':

> Aboriginal justice programs and services designed by Aboriginal people for Aboriginal people are the most effective. We need an appropriate, sustainable long-term model to support prevention, early intervention and diversionary programs run by Aboriginal organisations. From this inquiry we want to see real outcomes and benefits that benefit the lives of Aboriginal people in the state.[78]

Djirra recommended that the Victorian Government 'invest in self-determined Aboriginal Community Controlled solutions' because:

> community-led solutions are proven to be much more effective at reducing crime and addressing underlying drivers; including family violence, homelessness and housing instability, emotional and social wellbeing issues and AOD issues.[79]

Jesuit Social Services recommended that 'the Victorian Government resource [Aboriginal Community Controlled Organisations] to design, lead and deliver services and programs aimed at early intervention to address the overrepresentation of Aboriginal and Torres Strait Islander people in contact with the justice system'.[80]

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76 Victorian Aboriginal Community Service Association, *Submission 81*, pp. 8, 13.

77 Victorian Aboriginal Child Care Agency, *Submission 121*, p. 13.

78 Christopher Harrison, *Transcript of evidence*, p. 41.

79 Djirra, *Submission 138*, p. 15.

80 Jesuit Social Services, *Submission 119*, p. 14.

The Committee acknowledges that the overrepresentation of Aboriginal Victorians within the criminal justice system is informed by complex disadvantage—ongoing colonialism, trauma, culturally unsafe institutions and systemic racism.

FINDING 10: Most Aboriginal Victorians do not encounter the criminal justice system. However, intergenerational trauma associated with ongoing colonisation, culturally unresponsive institutional structures, complex disadvantage and systemic racism place Aboriginal people at greater risk of being victimised or criminalised than other populations in Victoria.

The Committee recognises that the Victorian Government and Aboriginal Victorians are committed to improving collaboration on Aboriginal criminal justice issues. They have formalised this commitment and outlined plans to address disadvantage and overrepresentation in numerous frameworks and agreements.

This is important work, and the Committee urges the Victorian Government to resource the comprehensive implementation of these frameworks and agreements as a priority.

The Committee understands that these frameworks and agreements are clear that greater self-determination is the only approach which can overcome the entrenched disadvantage experienced by some Aboriginal Victorians and reduce overrepresentation in the criminal justice system.

FINDING 11: Greater self-determination is the only approach which can overcome the entrenched disadvantage experienced by some Aboriginal Victorians and sustainably reduce their overrepresentation in the criminal justice system.

In line with the Aboriginal community's aspirations and principles for greater self-determination as outlined in Burra Lotjpa Dunguludja, the Committee calls for the Victorian Government to support Aboriginal Community Controlled Organisations to expand their role within the criminal justice system.

RECOMMENDATION 14: That the Victorian Government partner with Aboriginal Community Controlled Organisations to:

- develop long-term funding arrangements which support the expansion of these organisations' leadership and service provision with the justice and social services sectors
- identify opportunities for expanding these organisations' decision-making authority and responsibilities in relation to Aboriginal people at risk of, or already engaged with the criminal justice system
- diversify and expand the social, health, forensic and legal services provided by these organisations to the Aboriginal community.

Lastly, the Committee acknowledges the Victorian Government's work, in partnership with Aboriginal Victorians to enable true self-determination through the establishment of a representative body for Aboriginal people, the development of a treaty and a commitment to a truth-telling process. The Committee believes this important work may also have positive flow on effects for the overrepresentation of Aboriginal Victorians within the criminal justice system.

4.3.2 Culturally safe institutions and services

Evidence provided to the Inquiry highlighted that holistic intervention to reduce the overrepresentation of Aboriginal Victorians within the criminal justice system must encompass reform to improve the cultural safety of justice institutions and social support more broadly.

Andreea Lachsz, Head of Policy, Communications and Strategy at the Victorian Legal Service, asserted that 'it is really important when we are talking about [early intervention], that we do not just look at what programs could be developed but [also] at having a more holistic approach' which examines institutions and social services. Andreea Lachsz used the example of a young Aboriginal person disengaging from education to illustrate his point:

> Part of interrogating what is happening for that child or family.. [who] has stopped engaging with their education … [is] asking the question, why? What supports need to be provided, but also what needs to change at the school? We know there have been instances where children disengage in school because there is racism. They are subject to racist behaviour and then it is not a safe place for them. We know that risk factors can also be families living in poverty, and that actually raises this bigger question, which is I suppose an issue for the commonwealth: are welfare benefits sufficient? It is very hard for a child to want to go to school or be able to go to school if their living situation is really precarious or there are added stresses in their families that might lead to family violence. I think when we are talking about prevention and intervention it is having this more holistic approach and looking at what the failures are in social security nets.[81]

The Victorian Aboriginal Legal Service called for significant and diverse 'public investment [to] recognise the importance of cultural safety and self-determination in providing services to Aboriginal people, given the significant overrepresentation of Aboriginal people in the legal system'.[82] It drew the Committee's attention to the Australian Law Reform Commission's 2018 Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples, which found that reform is required to ensure Aboriginal people have access to substantive equality before the law as opposed to formal equality:

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81 Andreea Lachsz, Head of Policy, Communications and Strategy, Victorian Aboriginal Legal Service, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 36.

82 Victorian Aboriginal Legal Service, *Submission 139*, pp. 52–53.

> Formal equality suggests that all people should be treated the same regardless of their differences. Substantive equality is 'premised on the basis that rights, entitlements, opportunities and access are not equally distributed throughout society and that a one size fits all approach will not achieve equality'.[83]

The Victorian Aboriginal Legal Service supported the Australian Law Reform Commission's recommendation that governments, in partnership with Aboriginal people, trial reinvesting resources from the criminal justice system into community led, place-based measures which address the drivers of crime and incarceration:

> Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities, including through:
>
> - facilitating access to localised data related to criminal justice and other relevant government service provision, and associated costs;
> - supporting local justice reinvestment initiatives; and
> - facilitating participation by, and coordination between, relevant government departments and agencies.[84]

The Victorian Aboriginal Legal Service encouraged the Victorian Government to implement this recommendation.[85]

Amnesty International also submitted evidence that justice reinvestment can achieve substantive change in Aboriginal communities. It noted that several other Australian states have implemented justice reinvestment trials which have improved justice outcomes for Aboriginal people:

> New South Wales, Queensland and Western Australia have funded justice reinvestment trials. The Maranguka Justice Reinvestment program in Bourke, New South Wales, reported a 23% reduction in police recorded incidence of domestic violence and comparable drops in rates of reoffending, a 31% increase in year 12 student retention rates and a 38% reduction in charges across the top five juvenile offence categories, and a 14% reduction in bail breaches and 42% reduction in days spent in custody.[86]

It recommended that the Victorian Government:

- establish a justice reinvestment fund, to invest in 'Victorian place-based justice reinvestment pilots and provide communities with the resources and authority they need to ready themselves for a justice reinvestment approach'

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83 Australian Law Reform Commission, *The case for reform: Equality before the law*, 2018, <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/the-case-for-reform-2> accessed 26 January 2022.

84 Australian Law Reform Commission, *Recommendations: Justice reinvestment* 2018, <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/recommendations-14> accessed 26 January 2022.

85 Victorian Aboriginal Legal Service, *Submission 139*, pp. 52–53.

86 Amnesty International, *Submission 89*, p. 15.

- 'increase funding for Indigenous community-led and controlled organisations, to support culturally appropriate, place-based, Indigenous designed and led preventative programs to address the needs of Aboriginal and Torres Strait Islander children'.[87]

Similarly, Victoria Legal Aid expressed that 'laws, policies, practices and systemic racism' continue to contribute to the overrepresentation of Aboriginal people in the criminal justice system and this needs to be addressed:

> The overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system is directly linked to of the ongoing impact of colonisation and systemic racism embedded within our legal system. We support explicit recognition of the role of laws, policies, practices and systemic racism that have contributed to the continuing overrepresentation in the Victorian criminal justice system, and stronger consideration of these factors in judicial decision-making.[88]

Victoria Legal Aid advocated for systemic change to improve cultural competency across the criminal justice system:

> Systemic change requires cultural safety competence across the system and the individuals that work in the system. For example, lawyers, police, judicial officers, corrections and court staff must receive knowledge, tools and skills in understanding why First Nations people continue to be before the system in overrepresented numbers.[89]

The Victorian Aboriginal Community Services Association referred to the policies and frameworks described in Figure 4.1 and noted that they 'exist to address … entrenched disadvantage and strive for better outcomes for Aboriginal people across every area of life'. It called for them to be urgently and comprehensively implemented:

> Several policy frameworks exist to address this entrenched disadvantage and strive for better outcomes for Aboriginal people across every area of life. These include Korin Korin Balit Djak, Wungurilwil Gapgapduir, Balit Marrup, Burra Lotjpa Dunguludja, Marrung, Dhelk Dja, The Victorian Aboriginal Affairs Framework and Burra Lotjpa Dunguludja. Victoria's Closing the Gap Implementation plan has also recently been finalised, with extensive input from the ACCO sector. It is urgent that these frameworks are progressed, adequately funded and resourced to meet the needs of the Aboriginal community and subsequently drive down contact with the criminal justice system.[90]

The Committee acknowledges that systemic reform to foster cultural safety and enhance self-determination is required to address the overrepresentation of Aboriginal Victorians in the criminal justice system.

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87 Ibid., p. 17.

88 Victoria Legal Aid, *Submission 159*, p. 11.

89 Ibid.

90 Victorian Aboriginal Community Service Association, *Submission 81*, p. 4.

FINDING 12: Holistic early intervention to address the overrepresentation of Aboriginal Victorians within the criminal justice system must encompass systemic reform to improve the cultural safety of justice institutions and social support more broadly.

In the Committee's view, these reforms are fundamental to improving the health and wellbeing of Aboriginal Victorians, ensuring substantive equality in society and before the law. The Committee would therefore like to see the Victorian Government pursue these reforms in partnership with Aboriginal communities across the State and at the community level simultaneously. It recommends that existing agreements and frameworks between the Victorian Government and Aboriginal communities are urgently implemented. Further, that the expansion of the Youth Crime Prevention Grants include a specific funding stream for justice reinvestment in Aboriginal communities.

RECOMMENDATION 15: That the Victorian Government ensure the comprehensive implementation and continued support for the reforms and initiatives outlined in the:

- *National Agreement on Closing the Gap*
- *Victorian Aboriginal Affairs Framework 2018–2023*
- *Burra Lotjpa Dunguludja 'Senior Leaders Talking Strong'*
- *Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017–2027*
- *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement and Strategic Action Plan*
- *Balit Murrup: Aboriginal social and emotional wellbeing framework*
- *Marrung Aboriginal Education Plan 2016–2026*
- *Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families.*

RECOMMENDATION 16: That the Victorian Government expand the Youth Crime Prevention Grants to include a dedicated stream of funding to support Aboriginal community led, placed-based early intervention initiatives specifically targeted at addressing the factors informing the overrepresentation of Aboriginal people within the criminal justice system. The Victorian Government should also ensure it supports these initiatives by:

- facilitating access to localised data related to criminal justice and other relevant government service provision, and associated costs
- supporting local justice reinvestment initiatives
- facilitating participation by, and coordination between, relevant government departments and agencies.

The Committee notes that this recommendation builds on its earlier recommendation (in Chapter 3) to expand the Youth Crime Prevention Grants to enable the continuation of existing successful initiatives and the establishment of new initiatives in additional communities.

For further discussion of culturally safe early intervention reforms, see Chapter 3 which discusses the use of 'common client reforms' to expand Aboriginal-led early intervention and diversion to keep young Aboriginal people out of custody.

4.3.3 Confirmation of Aboriginality

In its submission to the Inquiry, the Aboriginal Justice Caucus suggested that the Aboriginal community is concerned that the Victorian Government takes no consistent, whole-of-government, culturally authoritative approach to confirmation of Aboriginality. It argued that without a robust confirmation process, 'Aboriginal specific employment opportunities and program resources can be diverted to benefit non-Aboriginal people, thus contributing to entrenched Aboriginal poverty and poorer outcomes, including the overrepresentation in the criminal justice system'.[91]

The Aboriginal Justice Caucus recommended that statutory declarations no longer be accepted as proof of Aboriginality and that an Aboriginal-led authority be appointed to approve confirmation of Aboriginality applications:

> As a starting point, the AJC recommend that all Government Departments cease the acceptance of Statutory Declarations as confirmation of Aboriginality and that fraudulent claims of Aboriginality and Statutory Declarations be examined and prosecuted under the Oaths and Affirmations Act. Following this reform, the AJC envisage that an independent, well-resourced Aboriginal-led authority ought to be established for researching and processes CoA applications. In addition, this independent authority will assist and refer individuals to existing organisations for members of the Stolen Generation to research family connections.[92]

Aboriginal Justice Caucus said:

> In terms of addressing equality issues when accessing services, a confirmation of Aboriginality process must be implemented. This will ensure a constant approach across the service to ensure Aboriginal people have access to the programs and services they need.[93]

The Committee shares the Aboriginal Justice Caucus' concerns that the Victorian Government has no consistent, whole-of-government, culturally authoritative approach to confirmation of Aboriginality.

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91 Aboriginal Justice Caucus, *Submission 106*, p. 5.

92 Ibid.

93 Christopher Harrison, *Transcript of evidence*, p. 41.

FINDING 13: The Committee believes that how Aboriginality is established in justice contexts, merits investigation by the Victorian Government, in partnership with Aboriginal representative bodies, Aboriginal Community Controlled Organisations, Traditional Owners and the Aboriginal community more broadly.

4.4 Culturally and linguistically diverse communities

The population of Victoria is culturally and linguistically diverse. In recent years, the State experienced the largest increase of migrant arrivals of all Australian states and territories, many of whom arrived from non-English speaking countries. Approximately 31% of Victorians were born overseas.[94]

Most people who offend in Victoria were born in Australia. However, some groups of migrants are overrepresented in the criminal justice system. In its submission, the Centre for Forensic Behavioural Science explained that:

- adults from New Zealand, Vietnam, Samoa, Sudan, Afghanistan and Lebanon are disproportionately incarcerated in Victoria
- approximately 25% of incarcerated young people are non-native English speakers
- more than 40% are from culturally and linguistically diverse backgrounds.[95]

The Centre for Multicultural Youth noted that the overrepresentation of some culturally and linguistically diverse populations is 'not a new phenomenon'. It has persisted over time, even as the cohorts of young multicultural Victorians encountering the criminal justice system has evolved.[96] At a public hearing, Carmel Guerra OAM, Director and Chief Executive Officer of the Centre for Multicultural Youth, noted that during the 1990s, the Vietnamese community and young people from South-east Asia were most at risk of encountering the criminal justice system, for similar reasons to the groups that are currently overrepresented.[97]

Like other population groups, the factors underpinning criminal behaviour amongst culturally and linguistically diverse populations are varied. The Centre for Forensic Behavioural Science explained that 'culturally and linguistically diverse offenders, like their majority culture counterparts, typically come from environments of social disadvantage, have disengaged from schooling and employment, experience family dysfunction, use substances and associated with delinquent peers':

> risk items include static historical factors (past histories of violence, child maltreatment, early exposure to crime, criminal caregivers), dynamic environmental factors (antisocial peers, education/employment disengagement, community disorganisation) and

94 Centre for Forensic Behavioural Science, *Submission 36*, p. 1.

95 Ibid., pp. 2–3.

96 Centre for Multicultural Youth, *Submission 95*, p. 14.

97 Carmel Guerra OAM, Director and Chief Executive Officer, Centre for Multicultural Youth, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 43.

> personal behaviours and attitudes (anger problems, views favourable towards crime, impulsivity, remorselessness, substance use).[98]

In addition to these general risk factors, pre- and post-migration experiences may also contribute to criminal behaviours amongst culturally and linguistically diverse populations. The Centre for Forensic Behavioural Science noted that some individuals from culturally and linguistically diverse backgrounds find resettlement very challenging without strong English skills or the support of extended family to draw upon. Humanitarian arrivals may find resettlement additionally stressful as many have also experienced trauma and significant life disruption, and may be experiencing mental illness as a result.[99]

The stress of resettlement may also exacerbate intergenerational tensions within families. The Centre for Forensic Behavioural Science explained that younger migrants tend to acculturate and develop English proficiency quicker than older migrants. It explained that this can create difficulties for parents attempting to set appropriate boundaries and support their children to adapt to their new environment:

> older migrants may attempt to uphold cultural customs while younger migrants may favour Australian mainstream values and attitudes. A number of reports suggest that familial tension is sometimes prompted by the Australian 'sense of freedom' (with its focus on independence) which conflicts with collectivist principles of compliance with elders and communal roles and responsibilities … The resulting intergenerational cultural tension can destabilise the family environment already bereft of the broader social support experienced pre-migration.[100]

The Centre for Forensic Behavioural Science added that estrangement from parents and schooling can also contribute to criminal behaviours amongst culturally and linguistically diverse youths by fostering 'attachment to similarly disengaged and/or disaffected peers' and 'offending for social connection and belonging'.[101] Carmel Guerra made similar observations, that 'peer pressure' and a 'sense of belonging' can be a contributing factor in gang-related offending amongst culturally and linguistically diverse populations.[102]

The Centre for Forensic Behavioural Science explained that financial hardship can contribute to criminal behaviours amongst culturally and linguistically diverse populations. Migration is costly and accessing employment and housing with limited English skills is difficult:

> Financial hardship, initial reliance on government payments and temporary housing, can produce unstable and discouraging environmental contexts with limited opportunities for upward mobility and delay the development of legitimate social capital.[103]

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98 Centre for Forensic Behavioural Science, *Submission 36*, pp. 2–3.

99 Ibid., pp. 4, 6.

100 Ibid., pp. 3–4.

101 Ibid., p. 6.

102 Carmel Guerra OAM, *Transcript of evidence*, pp. 43–44.

103 Centre for Forensic Behavioural Science, *Submission 36*, p. 5.

Carmel Guerra likewise noted that many migrants 'experience poverty, alienation and socio-economic disadvantage in their first, early years of settlement' and that this may lead to 'engagement with police and the criminal justice system'.[104] Dr Adele Murdolo, Executive Director of the Multicultural Centre for Women's Health, asserted that financial hardship is a particular factor in the criminalisation of migrant women:

> one thing we know for sure is that debt issues for migrant women are one of the kind of driving factors for incarceration, and in terms of migrant women that is often migration-related debt, remittances to family overseas and other types of informal obligations to family and community, and I think that is something that is a bit different for migrant women. It costs quite a lot to migrate, and you are often going into debt, either formal debt or informal debt to community or family, that can be a challenge to pay off.[105]

The Committee also heard that experiences of racism and discrimination within Victorian society are also informing the criminalisation of culturally and linguistically diverse populations. The Centre for Forensic Behavioural Sciences said that 'experiences of racism can contribute to feelings of social rejection, frustration, feelings of ostracism and increasing the likelihood of community disengagement'. It asserted that it is a factor in the underutilisation of health services, which results in self-imposed avoidance of particular locations and informs the underreporting of crime.[106] Dr Murdolo said that 'mistrust in the health system … is characteristic of groups that are kind of excluded from society in other ways'.[107]

Carmel Guerra felt that the portrayal of some culturally and linguistically diverse populations in the media has contributed to community racism, and made it more difficult for individuals from some backgrounds to gain employment:

> Many young people we speak to … felt that the whole of the African community, particularly the South Sudanese community, had been labelled as criminogenic because of the experiences of a few, and that was because the media, I think incorrectly and wrongly, identified that they were all South Sudanese young people involved in crime when for some of them, yes, because they are very visible. So if you see a South Sudanese young person or an Islander young person, they are very visible so it can be very confronting for people … I do think the media has a lot to answer for the labelling of that community when there are so many young people also doing very well—educated, finishing school—who cannot get a job because employers and society have got a racial lens to employment as well. So that is why these young people often feel angry and that they do not belong, because they see their brothers and sisters, cousins and friends educated with qualifications, and they cannot get a job.[108]

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104 Carmel Guerra OAM, *Transcript of evidence*, pp. 43–44.

105 Dr Adele Murdolo, Executive Director, Multicultural Centre for Women's Health, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 51.

106 Centre for Forensic Behavioural Science, *Submission 36*, pp. 6–7.

107 Dr Adele Murdolo, *Transcript of evidence*, p. 51.

108 Carmel Guerra OAM, *Transcript of evidence*, p. 44.

Smart Justice for Young People asserted that racism directed at culturally and linguistically diverse populations has become systemic and is reflected by crime prevention approaches which single out groups for intervention:

> the fact is that there is lots of effort at the moment to try and respond—countless committees, subcommittees, action groups to, for example, talk about the African-Australian crime problem. But we are problematising the community and the young person as opposed to actually saying, 'Have we looked at the system? Have we looked at the decisions that lead to these young people, for example, coming into contact with the system more than others?'[109]

Stakeholders also canvassed perceptions of racism and discrimination against culturally and linguistically diverse populations in policing approaches. These issues are discussed in Chapter 5.

The Centre for Forensic Behavioural Science explained that 'while not all migrants experience integration difficulties, the above obstacles can induce disenfranchisement, community disengagement, isolation, frustration and family disharmony'. It asserted that when these obstacles to integration remain unaddressed, the potential for engagement with the Victorian criminal justice system increases.[110]

In its submission, the Victorian Government highlighted some early intervention initiatives it supports which are targeted at preventing and reducing offending amongst culturally and linguistically diverse populations.

In June 2021, the Victorian Government launched an Anti-Racism Taskforce to develop a new statewide Anti-Racism Strategy 'to proactively prevent and address racism in Victoria'. The Taskforce is charged with providing advice and recommendations to ensure that such a Strategy establishes 'a clear and targeted roadmap to reducing racism in Victoria':

> The Taskforce will consider evidence and provide advice on the different ways in which racism occurs, the settings where racism occurs and best practice responses to effectively respond to and reduce the prevalence of racism.[111]

The Victorian Government noted that under its *Youth Justice Strategic Plan 2020–2030* it funds a:

> dedicated culturally and linguistically diverse workforce in Youth Justice who develop and maintain linkages with community organisations, provide cultural advice, strengthen cultural practice in the community and provide multicultural programs and support in custody.[112]

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109 Anoushka Jeronimus, Co-convenor, Smart Justice for Young People, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, pp. 12–13.

110 Centre for Forensic Behavioural Science, *Submission 36*, pp. 1, 3.

111 Victorian Government, *Submission 93*, p. 79.

112 Ibid., p. 21.

It also assists seven community support groups across Melbourne which provide early intervention services to South Sudanese, Somali, Afghan, and Muslim young people and their families:

> [Community support groups] CSGs are an innovative, community-led, and place-based approach that delivers programs and activities to improve youth and community engagement and address local issues and service gaps.
>
> CSGs build protective factors around young people to prevent disengagement that can lead to antisocial behaviour, including youth offending. A seventh Northern CSG provides support and referrals for Muslim communities in Melbourne's northern suburbs, including early intervention to identify and address the risk of violent extremism.[113]

The Victorian Government is also pursuing initiatives seeking to address criminal behaviours of culturally and linguistically diverse adults in particular communities. The Victorian African Communities Action Plan is a 10-year roadmap (2018–2028) that aims to foster 'welcoming communities, address disadvantage, improve social and economic outcomes and create lasting opportunities for Victorians of African heritage'. A Justice Subcommittee working under the Plan is collaborating with the Victorian Government to identify and address issues. Initiatives are also focused on providing education and employment and addressing alcohol and other drug use.[114]

Carmel Guerra suggested that there is insufficient evidence regarding which early intervention measures most effectively address the overrepresentation of culturally and linguistically diverse populations in the criminal justice system:

> At the moment I am not sure that we know enough what interventions are working and whether they are evidence based … that is often because government will fund you … to trial a program, and then we will say, 'We think you need another 10 or 15 per cent to put in an evidence-based, reflective learning evaluation process', and they will say no. So I think it becomes a catch 22. You need to build some evidence base and some evaluation into any program that is put there.[115]

Inquiry stakeholders advocated for evidence-based, culturally responsive early intervention to address challenges associated with migration before individuals come into contact with the criminal justice system.

The Centre for Multicultural Youth argued that:

> Victoria urgently needs a Multicultural Youth Justice Strategy to support a bold change of course for how we respond to overrepresentation and address the needs of young multicultural Victorians at risk of and engaged in our justice system.[116]

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113 Ibid., pp. 21–22.

114 Ibid., pp. 78–79.

115 Carmel Guerra OAM, *Transcript of evidence*, p. 44.

116 Centre for Multicultural Youth, *Submission 95*, pp. 14–15.

It envisioned a strategy informed by a committee of experts encompassing culturally and linguistically diverse people, service providers, the Victorian Government and Victoria Police, and which coordinates and prioritises early intervention initiatives. It argued that a strategy could directly address factors underpinning the overrepresentation of multicultural youth in the criminal justice system by:

- driving committed action to address and eradicate all forms of racial discrimination, and improving accountability and transparency through monitoring and reporting on outcomes for culturally and linguistically diverse youths
- driving research into underlying drivers of culturally and linguistically diverse youth offending and effective interventions targeting at risk youths, those already engaged in the criminal justice system and those being released from incarceration
- promoting investment in evidence-based, community-informed early intervention addressing the drivers of criminal behaviours in culturally and linguistically diverse youths and their overrepresentation in the criminal justice system
- strengthening diversion pathways for culturally and linguistically diverse youths, including by investigating the transferability of Victoria's Koori Court model for multicultural communities
- improving service coordination for young culturally and linguistically diverse people, their families and communities.[117]

The Centre for Multicultural Youth's recommendation aligns with the findings of the 2017 Youth Justice Review undertaken by Penny Armytage and Professor James Ogloff AM. Recommendation 6.43 of this Review also called for the development of a strategy to reduce the overrepresentation of culturally and linguistically diverse youths within the criminal justice system:

> [The then Department of Justice and Regulation] DOJR and the Centre for Multi-Cultural Youth should work together with other relevant agencies to:
>
> - sponsor the development of a strategy to reduce the overrepresentation of CALD [culturally and linguistically diverse] young people, initially focused on Maori, Pacific Islander, South Sudanese and other newly arrived migrants
> - promote the delivery of programs in a culturally safe and effective way through engagement and advice from community leaders and elders from cultural groups that are over-represented in youth justice.[118]

The Centre for Forensic Behavioural Science also felt that government programs and community services aimed at addressing the overrepresentation of culturally and linguistically diverse youths within the criminal justice system should be better coordinated and resourced. It opined that 'grass roots, culture-based community organisations' are more accessible to at risk culturally and linguistically diverse youths.

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117 Ibid.

118 Penny Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy Meeting needs and reducing offending executive summary*, report for Victorian Government, July 2017, p. 37.

This is because they are often viewed as 'more credible, less judgemental, possessing cultural knowledge and having a better understanding of the local clientele'. Mainstream government initiatives instead are often better resourced, but 'struggle to command community trust within specific culturally and linguistically diverse communities'. It called for community organisations to be better resourced and mainstream initiatives to be 'culturally flexible':

> There is a need to fill a void in service delivery: We should be resourcing grass roots organisations to empower them so that they are able to reliably deliver high quality culturally responsive programs and to become self-sustainable and reliable. In contrast, mainstream organisations need to work on becoming more culturally flexible, acquiring community trust and developing relationships through outreach.

This space needs to become more coordinated through the development of partnerships and mutually beneficial collaborations to carry out fully resourced community led interventions.[119]

It is clear to the Committee that while most crimes are committed by individuals born in Australia and most migrants are law abiding, some culturally and linguistically diverse communities are overrepresented in the criminal justice system. It is important to acknowledge that this overrepresentation is not driven by the ethnic background of migrants, but rather similar factors to those underpinning the criminal behaviours of people born in Australia who commit offences. Namely, social disadvantage, disengagement from school or employment and family dysfunction. These general risk factors may be exacerbated or informed by pre- and post-migration experiences and the challenges of adapting to a foreign culture without the support of extended family or strong language skills to draw upon.

The Committee notes that the overrepresentation of culturally and linguistically diverse populations within the criminal justice system has persisted over time, even as the cohorts most at risk have evolved and migration trends have varied. The Committee therefore supports the findings of the 2017 Youth Justice Review and the recommendation of the Centre for Multicultural Youth that a Multicultural Youth Justice Strategy is needed to transform Victoria's approach to intervening early to support culturally and linguistically diverse families and reduce criminal behaviour.

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119 Centre for Forensic Behavioural Science, *Submission 36*, p. 11.

RECOMMENDATION 17: That the Victorian Government work with culturally and linguistically diverse community representatives, community service providers and Victoria Police to develop a Multicultural Youth Justice Strategy to:

- drive committed action to eradicating all forms of racial discrimination within the criminal justice system
- improve accountability and transparency through monitoring and reporting on outcomes for culturally and linguistically diverse people who encounter the criminal justice system
- promote research into underlying drivers of culturally and linguistically diverse youth offending and effective interventions targeting at risk youths, those already engaged in the criminal justice system, and those being released from incarceration
- promote investment in evidence-based, community-informed early intervention which addresses the drivers of criminal behaviours in culturally and linguistically diverse youths and their overrepresentation in the criminal justice system
- strengthen diversion pathways for culturally and linguistically diverse people who offend, including by investigating the adaptation of Victoria's Koori Court model to suit multicultural communities
- improve service coordination for young culturally and linguistically diverse people, their families and communities.

5 Policing

At a glance

Victoria Police is the State's primary law enforcement agency, responsible for investigating criminal offences which breach the law, preserving community safety, and helping those in need of assistance. In recent years the Victorian Government has made substantial investment in expanding Victoria Police, modernising its operations and refining its approach to policing.

Key issues

- Victoria Police is pursuing a more community-focused approach to policing involving more intense local engagement.
- Despite efforts to modernise and improve Victoria Police operations, Inquiry stakeholders have raised several concerns in relation to policing, including:
  - allegations of racism and overpolicing in relation to some communities
  - inappropriate punitive responses to people experiencing mental health crisis or homelessness, and people who have cognitive disabilities
  - declining and inconsistent use of police cautions
  - inconsistent granting of prosecutorial consent to applications for court-based diversion
  - misidentification of aggressors in family violence incidents.
- Victoria Police practices are propelling disadvantaged people into the criminal justice system inappropriately.
- The oversight of Victoria Police provided by the Independent Broad-based Anti-corruption Commission is not robust and lacks independence. Its processes must be improved or a new, independent body should be established to improve Victoria Police accountability.

Findings and recommendations

Finding 14: That Victoria Police is proactively engaging with Aboriginal, culturally and linguistically diverse, and LGBTIQ+ communities to increase trust in law enforcement and collaborate to proactively prevent crime.

Recommendation 18: That Victoria Police ensure that all Protective Service Officers have completed training in relation to responsibly executing their new powers and responsibilities under the *Justice Legislation Amendment (Protective Services Officers and Other Matters) Act 2019* (Vic) and the *Police and Emergency Legislation Amendment Act 2020* (Vic).

Recommendation 19: That the Victorian Government support a community responsive approach to policing and crime prevention by Victoria Police. This should encompass proactive engagement with young people, Aboriginal Victorians, culturally and linguistically diverse communities and LGBTIQ+ people to build trust in law enforcement.

Finding 15: Overpolicing of Aboriginal and culturally and linguistically diverse communities by Victoria Police remains an issue, despite its ongoing commitment to address these matters.

Recommendation 20: That Victoria Police collaborate with the Aboriginal Justice Caucus, Aboriginal community controlled legal services, representatives of culturally and linguistically diverse communities and the Police Stop Data Working Group to design and implement a three-year trial of a racial profiling monitoring scheme. The trial should encompass the routine collection and public release of de-identified data on who Victoria Police stop and search, and for what reasons. Data collection should be comprehensive and be undertaken with a view to:

- quantifying the prevalence of overpolicing and racial profiling, based on police officers' perceptions of ethnicity
- identifying policies, practices and cultural factors within the police force which are informing these issues
- formulating solutions to address these issues
- establishing a data collection and release scheme.

Finding 16: Police are not trained or equipped to independently render appropriate assistance to people experiencing serious and complex mental health issues and who may be in crisis.

Finding 17: Rendering assistance to people experiencing mental health crises occupies substantial Victoria Police resources and time.

Recommendation 21: That Victoria Police review its disability policies, training programs and specialist roles to ensure they:

- equip police officers with the knowledge, skills and support they need to distinguish between criminal and disability behaviours
- identify where an alleged offender, victim or witness would benefit from the provision of reasonable adjustments and/or access to specialist advice or support such as the Independent Third Person Program.

Recommendation 22: That the Victorian Government work to embed the Independent Third Person Program into Victoria Police's practices, including a requirement for Victoria Police to seek the attendance of an Independent Third Person when interviewing a person with a cognitive impairment or mental illness. The Government should also provide funding to expand the program to ensure it is able to meet increasing demand.

Finding 18: Police cautions and court-based diversion programs are important mechanisms for diverting people away from the criminal justice system and connecting them with the social supports necessary to address the factors underpinning their offending.

Finding 19: Victoria Police's use of cautions for both children and adults has declined over the past decade and remains inconsistent across the community. Young Aboriginal people and young people in lower socio-economic communities are less likely to receive a caution—as opposed to a charge—than other Victorians. Adults accused of drug offences in relation to methamphetamine, as opposed to cannabis, are also less likely to receive a caution—as opposed to a charge.

Recommendation 23: That the Department of Justice and Community Safety review the use of verbal and recorded cautions by Victoria Police to inform reform aimed at expanding the use of, and improving the consistency of, cautions across the community. Specifically, the review should consider:

- factors underpinning the declining and inconsistent use of cautions across the community and how these can best be addressed
- the advantages and disadvantages of introducing a presumption in favour of cautioning—as opposed to a charge—in relation to appropriate minor offences
- how the issuance of a caution can better connect individuals with social support to address their criminal behaviours.

Finding 20: Victoria Police's provision of prosecutorial consent for a court-based diversion varies between offences and across courts. This is because its policies and decision-making tools poorly reflect the legislative basis for diversion programs and offer vague guidance, leaving it to the discretion of individual officers to grant or reject access to a diversion program.

Recommendation 24: That the Victorian Government review the requirement for prosecutorial consent for a court-based diversion from s 59(2)(c) of the *Criminal Procedure Act 2009* (Vic) and s 356F of the *Children, Youth and Families Act 2005* (Vic) to consider whether these sections should be replaced with a requirement for the magistrate to consider the recommendation of the prosecutor and/or informant in relation to access to a court-based diversion (as opposed to seeking consent), and the provision of a right to reply for the accused person.

Recommendation 25: That Victoria Police update its polices, decision-making tools, practices and training in relation to court-based diversion to reflect the outcome of the review of prosecutorial consent, and to:

- ensure that they closely reflect the parameters of court-based diversion as established by the *Criminal Procedure Act 2009* (Vic) and the *Children, Youth and Families Act 2005* (Vic)
- provide detailed guidance as to the factors which should inform any decision to consent to/recommend or withhold a recommendation/consent for diversion which are focused on the individual circumstances of the accused, the nature of the alleged offending and prospects for rehabilitation
- provide a clear process for an accused or their legal representation to seek consent to /a recommendation for diversion.

Finding 21: Female victim-survivors of family violence are regularly misidentified by Victoria Police as the primary aggressor/respondent in family violence proceedings. Misidentification has serious repercussions which may include:

- criminal charges
- long term separation from dependent children
- exposure to further violence
- the withdrawal of social, legal and financial supports
- visa cancellation and deportation for migrants.

Recommendation 26: That Victoria Police ensure all front-line police officers undertake regular training in relation to responding to family violence incidents, and that training continues to be provided. This training should include:

- the appropriate application of the *Code of practice for the investigation of family violence*
- the gendered nature of family violence
- the factors informing the misidentification of aggressors (including cultural and language barriers)
- the repercussions of misidentification
- social support available to families to address family violence.

Recommendation 27: That Victoria Police, in collaboration with legal and community stakeholders, implement a review mechanism for family violence matters capable of identifying instances where a victim-survivor may have been misidentified as the primary aggressor in an incident and provide information about a process for the withdrawal of criminal charges.

Finding 22: Criminal justice stakeholders, in particular Aboriginal organisations, have long held concerns regarding the impartiality and effectiveness of the existing police complaint-handling and oversight systems in Victoria.

Recommendation 28: That the Department of Justice and Community Safety consider, as part of its systemic review into police oversight, the evidence outlined in this report regarding:

- the inadequate impartiality and effectiveness of the existing police complaint-handling and oversight systems in Victoria, as well as investigations into deaths in police custody
- options for strengthening Independent Broad-based Anti-corruption Commission's oversight powers, improving its practices, properly resourcing its operations, and ensuring Victoria Police is held accountable for instances of serious officer misconduct
- the consideration of a possible establishment of a new independent body to investigate allegations of police misconduct and increase the accountability of Victoria Police.

5.1 Police as gatekeepers to the criminal justice system

The Committee acknowledges that being a police officer is a serious and difficult role, made more challenging in the past few years as the COVID-19 pandemic has exacerbated social problems (such as family violence). At times, this has also resulted in heightened tension within the community (such as in relation to restrictive health measures). The Committee recognises the resilience of police officers throughout this period and thanks them for their ongoing commitment to preserving community safety and assisting those in need. Moreover, while this Chapter identifies some significant issues with policing practices, the Committee appreciates that the overwhelming majority of officers approach their role with integrity and professionalism, and that in many cases, poor policing outcomes are informed by inadequate training or inadequate links between Victoria Police and social services.

As noted in Chapter 1, Victoria Police is the State's primary law enforcement agency, responsible for investigating criminal offences which breach the law, preserving community safety, and helping those in need of assistance. For many individuals, it is an interaction with police that initiates their engagement with the criminal justice system—as someone who perpetrates or is victimised by crime—and informs whether their encounter will be fleeting or of a more serious nature. As such, police officers can be viewed as gatekeepers to the criminal justice system who must balance holding people who commit crimes to account with facilitating the early provision of social supports to address the factors underpinning criminal behaviours. They must also be mindful of responding to those victimised by crime in a manner which does not add to their trauma.

5.2 Expansion and modernisation of Victoria Police

In recent years Victoria Police has expanded and modernised its operations and approach to policing. Chapter 1 outlines the Victorian Government's substantial investment into the police force which has included the recruitment of over 3,000 new frontline police, including:

- 100 additional protective service officers (PSOs) stationed across the public transport network to 'target criminal and anti-social behaviour'
- 400 police custody officers employed in police stations to free up 'police officers from prisoner management so they can get back on the frontline'.[1]

Victoria Police has also introduced new avenues for reporting crime which does not require an emergency response, such as the Police Assistance Line and Online Reporting.[2] It is also examining how digital reporting mechanisms could be expanded in the future.[3]

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1 Victorian Government, *Submission 93*, p. 103.

2 Ibid., p. 26; Victoria Police, *Victoria Police Annual Plan 2021-2022*, 2021, p. 10.

3 Chief Commissioner Shane Patton, Victoria Police, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 29.

In its submission to the Inquiry, the Victorian Government reported that this investment 'increases police responsiveness and visibility, factors which are known to help reduce offending and improve feelings of safety among the community'.[4] It suggested that this investment may have contributed to a substantial increase in 'recorded offences' over the past 15 years. Recorded offences are 'any criminal act or omission by a person or organisation for which a penalty could be imposed by the Victorian legal system'. The Victorian Government submitted that the recent boost in police resources has made it more likely that an offence will be recorded as officers are more available to take reports and new online reporting avenues make it easier for the community to engage with police.[5]

The Victorian Government has also pursued legislative reform to enhance the powers of PSOs. The *Justice Legislation Amendment (Protective Services Officers and Other Matters) Act 2019* (Vic) empowered PSOs to 'arrest a person who has breached their parole, conduct searches for illicit drugs, and request names and addresses from people who witness crime'. The range of places a PSO can exercise their powers also increased under the *Police and Emergency Legislation Amendment Act 2020*:

> The range of 'designated places' where PSOs can exercise their powers has also been increased, meaning PSOs can be redeployed from the public transport network and into communities, which was particularly important in limiting the spread of COVID-19. The Chief Commissioner of Police also has the power to deploy PSOs right across the state during disasters or emergencies, supporting police to maintain public order in the event of incidents like fires and floods.[6]

In a submission to the Inquiry, the Victorian Aboriginal Legal Service informed the Committee that it does not support the expanded PSO powers or operating areas. It expressed concern that the designated areas a PSO can exercise their powers can be varied by Victoria Police with little notice or public awareness. It suggested that this is making it difficult for legal services to challenge instances of mistreatment by PSOs.[7]

The Legal Service also contended that PSOs now have similar powers to sworn police officers but without commensurate training. It observed that policing measures aimed at anti-social behaviour, like the expansion of PSO powers, typically have a disproportionate impact on 'Aboriginal people, homeless people, people with mental health or substance use issues, and children'. This can 'can lead to detention, further police contact and entrenchment with the criminal legal system'.[8] It therefore recommended that the Victorian Government legislate to repeal:

- the powers of Victoria Police to designate where PSOs can operate
- the powers of PSOs to detain or arrest citizens and to carry weapons such as pepper spray.[9]

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4 Victorian Government, *Submission 93*, p. 103.

5 Ibid., pp. 6, 26.

6 Ibid., pp. 103–104.

7 Victorian Aboriginal Legal Service, *Submission 139*, p. 134.

8 Ibid.

9 Ibid., p. 135.

As discussed in Chapter 1, Victoria Police has sought to leverage the Victorian Government's recent investment to expand and modernise the police force by pursuing a more community-focused approach to policing. Chief Commissioner Shane Patton APM noted in the *Victoria Police Annual Plan 2021–22* that this encompasses:

> how we engage with local communities and specific groups within communities through new models of neighbourhood policing, engagement in schools and the deployment of Protective Services Officers. We will ensure that police are more visible and accessible in the community in order to deter and prevent crime, respond to local issues swiftly and to foster community trust and confidence.[10]

Chief Commissioner Patton explained neighbourhood policing in more detail during a public hearing in Melbourne. He said that, under this model, 'every police officer has a responsibility and a role to be engaging with the communities', regardless of the program they are working in. Officers recognise the unique requirements of different communities and work to meet these needs. For example, a community in Dandenong did not have a good understanding of the road safety rules, so police officers worked with them to develop their knowledge. Chief Commissioner Patton explained that the model replicates Victoria Police's approach to policing Aboriginal communities.[11] He described this community-focused approach as 'back to basics policing' which seeks to keep the community safe and drive down crime by preventing it before it occurs.[12]

As noted in Chapter 1, Victoria Police has also instigated several initiatives aimed at facilitating a cooperative working relationship and increasing trust with marginalised communities. This includes operating Portfolio Reference Groups (PRGs) comprised of community stakeholders (for example the Aboriginal PRG, Disability PRG, Mental Health PRG and the Multicultural PRG) and employing liaison officers to engage with multicultural, LGBTIQ+ and Aboriginal communities. Chief Commissioner Patton explained that multicultural liaison officers are key to fostering trust from migrant communities who may require greater police assistance but who do not necessarily come from areas where there is strong trust in law enforcement. He acknowledged that discriminatory practices or bias has occurred and noted the importance of LGBTIQ+ liaison officers working with the community.[13]

Chief Commissioner Patton said that Victoria Police is proactively working to earn the trust of Aboriginal Victorians but conceded that this will take time.[14] Sergeant Wayne Gatt, Secretary and Chief Executive Officer of the Police Association of Victoria, explained that new police officers complete education in relation to interacting with Aboriginal communities and undertake refresher and reinforcement training throughout their careers. He noted that members strive to ensure interactions with Aboriginal Victorians are of the 'highest standards' and are 'ethically sound'. However, Victoria

10 Victoria Police, *Victoria Police Annual Plan 2021-2022*, p. 4.

11 Chief Commissioner Shane Patton, *Transcript of evidence*, p. 31.

12 Ibid., p. 24.

13 Ibid., p. 32.

14 Ibid., p. 29.

Police members remain 'deeply concerned' that the disadvantaged faced by many in this community is not being addressed and is continuing to result in engagement with the criminal justice system.[15]

Chief Commissioner Patton noted that the expansion of the police force 'does mean more arrests'. However, he said it has also enabled the deployment of officers into local police stations to work with the community, and the addition of specialists positions aimed at preventing crime before it occurs, such as 'youth specialist officers'. Chief Commissioner Patton explained that Victoria Police has set up taskforces to proactively drive reductions in particular types of crime, for example 'high end youth offending' or youth gang activity:

> one really good example is if I talk about Taskforce Wayward, which was in the north-west metro area, and it has been predominantly focused on holding high-end youth offenders to account who are committing carjackings or those types of offences. But instead of just locking them up, they then go and work with the families. They then go and work with siblings et cetera who may be going to transition to a life of crime, and we have quite successfully been able to defer them.
>
> ...
>
> Operation Alliance, which we launched, has seen us focusing on youth gangs, and we have been able to drop the number of youth gang members from around 700-odd to 500-and-something—I can chase the exact figures up, but it is roughly around 200 over this 12-month period—and a third of those who we have charged have then stopped offending. So it is being both proactive and reactive in the way we use our resources.[16]

Some witnesses felt that Victoria Police's taskforce approach to law enforcement is contributing to the overpolicing of some marginalised communities and is undermining its commitment to community policing. For example, at a public hearing, Sergeant Gatt described the impact of taskforce policing:

> Increasingly our members have been deviated and moved into a task force model of policing. We are seeing our police officers, despite repeated resourcing injections from the Victorian state government, barely able to staff and man their police stations at the present time. They have been locked into a response model that sees our local police, who once could actively patrol and engage with community, locked into a vicious cycle of going from job to job to job. Effectively what this means is that every attendance that we go to sees somebody taken into custody or processed as opposed to police actively trying to engage with the community, disrupt crime and prevent it before it occurs.
>
> It also fails to build the effective and meaningful community confidence with policing that is the cornerstone upon which policing operates in the community. If we continue on this trajectory, we really do worry about the future of policing in Victoria.[17]

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15 Sergeant Wayne Gatt, Secretary and Chief Executive Officer, Police Association Victoria, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 24.

16 Chief Commissioner Shane Patton, *Transcript of evidence*, p. 25.

17 Sergeant Wayne Gatt, *Transcript of evidence*, p. 19.

However, Sergeant Gatt said he is 'heartened' by Chief Commissioner Patton's stated commitment to community policing and hopes that this stated focus on a community policy and prevention approach will be underpinned by action:

> We are heartened by this chief commissioner's recent moves and discussion around re-engagement with community, but those words need to be met with real action—and that starts with the resourcing of police stations because that is where that work is undertaken. If the resources delivered by state governments are constantly applied to task force policing models, all you will see is more people put into prisons and you will see less and less engagement with community.[18]

Sergeant Gatt supported policing approaches which engage the community and ensure early intervention to prevent crime:

> if the focus is on early intervention, what we do is we effectively diminish the amount of times we have to get into that compliance space, into that processing space. That is the first part. I keep coming back to this because—I keep saying—it is the cornerstone of policing and it is the balance by which we should measure our success. They are as old as the profession of policing, these principles. We should measure ourselves by the amount of crime that we prevent, not by the amount of offenders we hold to account—that is the measure of the failure of policing to fundamentally undertake its work.[19]

Anoushka Jeronimus, Director of the Youth Law Program at WEstjustice noted Sergeant Gatt's evidence during a subsequent public hearing and said that her organisation shares his concerns—and those of Chief Commissioner Patton—in relation to taskforce policing:

> we note … Sergeant Gatt's evidence before this committee the other day and echo his concerns about the taskforce approach to policing that we are currently seeing and proactively pushing children and young people into the system as opposed to the opposite.[20]

The Committee recognises the Victorian Government's investment in expanding and modernising Victoria Police accords with their important and difficult role within the community. It also acknowledges that Victoria Police is seeking to leverage this investment to enhance both its ability to enforce the law, and its initiatives aimed at increasing community engagement to foster trust with marginalised communities and proactively prevent crime.

FINDING 14: That Victoria Police is proactively engaging with Aboriginal, culturally and linguistically diverse, and LGBTIQ+ communities to increase trust in law enforcement and collaborate to proactively prevent crime.

18 Ibid.

19 Ibid., p. 20.

20 Anoushka Jeronimus, Director, Youth Law Program, WEstjustice, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, pp. 11–12.

However, the Committee also notes stakeholder evidence that taskforce-style policing may be undermining Victoria Police's efforts to establish closer working relationships between officers and their local communities. It urges Victoria Police to maintain its commitment to community policing and redeploy its resources to ensure a greater emphasis on this approach. This may require a re-evaluation by the Government of the benefits of taskforce-style policing in consideration of this evidence from Victoria Police and other stakeholders.

The Committee also appreciates the Victorian Aboriginal Legal Service's concerns in relation to the expansion of PSO powers and operating areas. The Committee believes that it is critical that any expansion of law enforcement powers is underpinned by appropriate training to ensure that officers understand their responsibility to exercise these powers ethically and only in support of their legislated duties. Expanded law enforcement powers must also be subjected to appropriate scrutiny through effective oversight and complaints mechanisms. This is discussed more in Section 5.6 of this Chapter.

RECOMMENDATION 18: That Victoria Police ensure that all Protective Service Officers have completed training in relation to responsibly executing their new powers and responsibilities under the *Justice Legislation Amendment (Protective Services Officers and Other Matters) Act 2019* (Vic) and the *Police and Emergency Legislation Amendment Act 2020* (Vic).

RECOMMENDATION 19: That the Victorian Government support a community responsive approach to policing and crime prevention by Victoria Police. This should encompass proactive engagement with young people, Aboriginal Victorians, culturally and linguistically diverse communities and LGBTIQ+ people to build trust in law enforcement.

Lastly, the Committee notes that despite significant investment and efforts to modernise the operations of Victoria Police, evidence received throughout the Inquiry indicates that some policing practices may be compounding disadvantage and inappropriately driving people experiencing disadvantage into the criminal justice system. The remainder of this Chapter examines these issues, specifically:

- racism and overpolicing of Aboriginal and culturally and linguistically diverse communities
- punitive responses to health or social problems
- police use of cautioning and consent to court-based diversion
- police responses to family violence
- calls to increase police accountability.

5.2.1 Racism and overpolicing of Aboriginal and culturally and linguistically diverse communities

Evidence submitted by Aboriginal and culturally and linguistically diverse stakeholder groups suggested that policing in Victoria disproportionately targets individuals from these communities (particularly young people), contributing to their overrepresentation in the criminal justice system.

> **Racial profiling is a practice whereby police, consciously or otherwise, systemically stop and search Aboriginal and Torres Strait Islander peoples and racial minorities on the basis of stereotypes rather than reasonable grounds to believe an offence has taken place. Racial profiling is a form of biased and discriminatory policing, and its implications and impacts of racial profiling are profound.**
>
> Police Stop Data Working Group, *Monitoring racial profiling: Introducing a scheme to prevent unlawful stops and searches by Victoria Police*, Melbourne, 17 July 2017, p. 6.

For example, several stakeholders drew the Committee's attention to the Commission for Children and Young People's 2021 report, *Our Youth, Our Way,* which examined the overrepresentation of Aboriginal children and young people in the Victorian Youth Justice System. The Commission's consultation with young Aboriginal people who had engaged with police found that 70% spoke about racism, mistreatment and violence by Victoria Police, including physical and sexual assault, swearing and racial abuse. Of the 66 children and young people consulted, 25 said they had experienced racism and racial abuse during police interactions, and several said they feared police as a result of these personal and collective experiences.[21]

The Victorian Aboriginal Child Care Agency asserted that 'systemic racism and bias disproportionately impact on Aboriginal children and young people at all stages of the criminal justice system, including contact with police'. It asserted that Aboriginal children and young people are disproportionately targeted by police.[22]

The Centre for Multicultural Youth submitted that:

> evidence shows young multicultural Victorians, especially those from highly visible migrant communities, are much more likely to experience police surveillance, interaction and engagement than their peers, drawing them disproportionately into the court and criminal justice systems.[23]

Furthermore, it suggested that they are also much more likely to experience punitive outcomes from these interactions and that negative consequences include mistrust in law enforcement:

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21 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* report for Victorian Government, Victorian Government Printer, Melbourne, June 2021, pp. 431–433.

22 Victorian Aboriginal Community Service Association, *Submission 81*, p. 4.

23 Centre for Multicultural Youth, *Submission 95*, p. 8.

> Attempts to discourage violence by breaking up groups of South Sudanese and Pasifika young people, tracking past offenders and monitoring spaces and places these youth frequent (especially without evidence of offending) are culturally-deaf approaches that reinforce exclusion and incite disillusionment with Victoria Police.[24]

> **R was stopped by police for being in the central business district. He told police and workers he was going to a cheap supermarket because that is where he used to be homeless and he knows what to buy. He was issued with an infringement. The infringement noted he 'looked like a drug dealer'. R knows this was racial profiling.**

> Fitzroy Legal Service, *Submission 152*, p. 32.

The Centre for Forensic Behavioural Science informed the Committee that 'young people from [culturally and linguistically diverse] groups perceive that they are unfairly treated by law enforcement'. It noted that community surveys demonstrate that some young culturally and linguistically diverse people 'feel overpoliced and singled out, due to their stature, skin colour and tendency to congregate in larger groups'. The Centre explained that ongoing discrimination has a range of adverse impacts on these individuals' lives, including on how safe they feel in the community and their ability to make a positive contribution to society.[25]

Australia Red Cross provided similar evidence. It reported that members of its Youth Justice Advisory Group—comprised of young people with lived experience of the justice system—report feeling targeted or mistreated by police because of their age and skin colour.[26] It also submitted that 'feeling racially targeted or discriminated against … has a lasting impact on [a young person's] life', particularly if they are also experiencing other forms of disadvantage[27]:

> Whether racial targeting by police is perceived or actual, Red Cross understands that this sentiment can have a profound impact on young people's perception of themselves and sense of self-worth. This experience has an impact on their ability to trust workers, and on their engagement with justice-related initiatives and services…
>
> There is a body of evidence demonstrating that discrimination and exclusion impact CALD young people's engagement with the law, police and the justice system. CALD young people are more likely to have negative perceptions and experiences of police including feeling targeted, this is in part due to the prevalence of internalised biases as well as the tendency for police to both target and over-police CALD young people and their communities.
>
> The evidence also shows that experiences of implicit and explicit discrimination and racism cause significant harm and trauma, feeding and magnifying other challenges young people face such as mental illness. Similarly, being perceived and treated as

24 Ibid.

25 Centre for Forensic Behavioural Science, *Submission 36*, p. 7.

26 Red Cross Australia, *Submission 83*, p. 5.

27 Ibid., p. 1.

> different or the 'other' causes exclusion and isolation for CALD young people, increasing the likelihood of disconnection from education and minimising engagement with prosocial behaviours and activities.[28]

Many stakeholders acknowledged that the prevalence of perceived and actual racial profiling by Victoria Police is difficult to assess due to a lack of data collection in relation to who is stopped and searched by officers, and for what purpose.[29] Nonetheless, stakeholders such as the Jesuit Social Services and the Victorian Aboriginal Legal Service noted that Victoria Police has had demonstrable issues with racial profiling in the past.[30] These stakeholders suggested that Crime Statistics Agency data in relation to policing during the COVID-19 pandemic appears to indicate that it continues to be a problem, despite reports and actions plans seeking to address this issue.

The Victorian Aboriginal Legal Service said that Victoria Police's response to the COVID-19 pandemic has resulted in 'a large number of unnecessary contacts with police and the justice system for marginalised communities', such as Aboriginal Victorians:

> Expansion of police powers, and the disproportionate use of these powers and of heavy public health fines against already marginalised communities, leads to engagement with police which ultimately lead to more arrests, more people unnecessarily taken into custody and higher incarceration rates.[31]

The Legal Service referred to statistics from the Crime Statistics Agency (which were reported in the media) which indicated that at least 1.6% of Aboriginal people in Victoria had COVID-19-related offences recorded against them, compared to 0.2% of non-Indigenous Victorians. It noted that this disproportionality is particularly striking as 84% of these offences were recorded in metropolitan Melbourne, whereas only 49.5% of Aboriginal Victorians reside there. It submitted:

> With the concentration of COVID-19 restrictions and recorded offences in Melbourne, one would expect that Aboriginal people in Victoria would receive fewer fines per capita than non-Aboriginal people. Instead, they received at least eight times more.[32]

The Legal Service was also concerned to observe that, during the April to September 2020 lockdowns, Aboriginal Victorians were also more likely to have COVID-19 offences recorded alongside other offences. It suggested that this may be indicative of inappropriate policing practices:

> either that police are using public health rules as an opportunity to stop and question people for other policing purposes, or that they are recording public health offences simply to increase the penalties for people they had already stopped over other

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28 Ibid., p. 5.

29 For example: Victorian Aboriginal Legal Service, *Submission 139*, p. 148; Jesuit Social Services, *Submission 119*, p. 14; Victorian Council of Social Service, *Submission 137*, p. 223.

30 In Haile Michael v Konstantinidis (a race discrimination claim by a group of African young people against Victoria Police) the Federal Court of Australia requested the release of data. This showed that in the Flemington/North Melbourne, 45.6% of all Victoria Police stops (field contacts) of young people were of African/Middle Eastern youth, despite African/Middle Eastern youth constituting only 18% of the youth population in this area.

31 Victorian Aboriginal Legal Service, *Submission 139*, p. 129.

32 Ibid., pp. 130–131.

> offences. Either practice would constitute a misuse of public health powers for unrelated purposes, and is likely to cause resentment towards and cynicism about important public health measures, as well as leading to unnecessary fines and arrests, which can propel into the justice system and, in turn, incarceration.[33]

Jesuit Social Services pointed out that similar patterns can be observed in the Crime Statistics Agency data relating to Victorians from culturally and linguistically diverse populations. It explained that during the April to September 2020 lockdowns, 'South Sudanese-born Australians received 65 (or 0.79 %) of the 8,161 fines, while they constitute only 0.14 % of the Victorian population'.[34]

Moreover, the Victorian Aboriginal Legal Service pointed out that the fines for COVID-19 offences are 'extremely high' and 'when these fines are levied on vulnerable people there is effectively no prospect that they will be able to be paid'. The Legal Service informed the Committee that as of August 2021, more than three quarters of COVID-19 fines remained unpaid and the Victoria Police's internal review process for fines lacks fairness and transparency. It noted that it has partnered with other legal organisations to ask the Director of Fines Victoria to address these concerns. The Legal Service recommended that Victoria Police be required to articulate reasons for rejecting a review of a fine, in line with the administrative standards of other agencies which issue infringements.[35]

> **Ahmed is a young man in his late teens of African background. He lives in public housing with two other young African men. Early in the first lockdown, Ahmed and his housemates went to the supermarket to buy groceries, and then decided to get KFC. While they were driving to the KFC, they were stopped by police and fined for being in the same car together, despite the fact that, as members of the same household, they were not breaching the restrictions. We applied to the Traffic Camera Office to have the fine withdrawn, as contrary to law, which was refused without reasons being given. Ahmed now has to take his fine to court, and risk getting a criminal record, or pay more than $1,600, which he cannot afford.**
>
> Fitzroy Legal Service, *Submission 152*, p. 31.

Smart Justice for Young People noted that more than 1,500 of these fines have been issued to children.[36]

The Victorian Aboriginal Legal Service, WEstjustice and Smart Justice for Young People all suggested that, in some instances, apparent racial profiling by Victoria Police may be informed by the use of 'predictive policing tools'.[37] Predictive policing tools use data

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33 Ibid.

34 Jesuit Social Services, *Submission 119*, pp. 14–15.

35 Victorian Aboriginal Legal Service, *Submission 139*, pp. 131–133.

36 Smart Justice for Young People, *Submission 88*, p. 5.

37 Anoushka Jeronimus, Co-convenor, Smart Justice for Young People, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 10.

collected by police, through technology or by other agencies to understand where and when crimes are likely to be committed, or by whom.[38]

Looking for trends in crime data has always been part of police work.[39] However, Smart Justice for Young People and WEstjustice both submitted that 'predictive policing technologies that rely on technology-based data collection and analysis have the propensity to produce biased, discriminatory and racialised effects'.[40] Likewise, the Victorian Aboriginal Legal Service contended that international evidence demonstrates that such tools typically lead to disproportionate impacts on racial minorities, such as Aboriginal Victorians, for several reasons, including:

> When tools are trained on data from very different populations, their validity when applied to minority communities is highly doubtful. Predictive tools are also highly sensitive to previous over policing: because Aboriginal people are, as a result of existing biases and systemic racism in the legal system, more likely to have criminal records, they are more likely to be assessed as a risk by predictive tools, essentially entrenching historical discrimination in data. Other socioeconomic indicators are also liable to focus disproportionate attention on Aboriginal people, because of the ongoing marginalisation of Aboriginal communities by government social and economic policy. And experience shows that there is scope for interpretation and inconsistent application of the results given by predictive tools – for example, between police stations or courts – opening up space for discrimination to be reinforced.[41]

The Legal Service asserted that the use of predictive policing tools may also be encouraging overpolicing as police may be conducting random stops and searches to collect data to inform the algorithms.[42]

The Legal Service did not support the use of predictive policing tools, but recommended that, as long as they are being used, 'Victoria Police should make public information about its past and current use of predictive tools across the state, including demographic data on the people identified and targeted by police as a result of using of such tools'.[43]

The Legal Service also called for increased transparency around who Victoria Police stops and searches, and for what reasons, more generally. It recommended that Victoria Police implement a racial profiling monitoring scheme, in line with the recommendations of the Police Stop Data Working Group—a group of academic researchers examining policing issues.[44]

The Police Stop Data Working Group believe that requiring Victoria Police to record its reasons for stopping and searching people (including the perceived ethnicity of the individuals they stop) will 'permit analysis about whether there was reasonable

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38 Patrick Williams and Eric Kind, 'Data-driven Policing: The hardwiring of discriminatory policing practices across Europe', *European Network Against Racism*, 2019, p. 23.

39 Ibid.

40 Smart Justice for Young People, *Submission 88*, p. 4; WEstjustice, *Submission 141*, p. 11.

41 Victorian Aboriginal Legal Service, *Submission 139*, p. 151.

42 Ibid.

43 Ibid., p. 152.

44 Ibid., p. 149.

justification for a stop and search'.[45] Box 5.1 outlines the data which the Working Group believed Victoria Police should collect and report.

BOX 5.1: Police Stop Data Working Group recommendation for data collection and reporting

The Police Stop Data Working Group recommend that Victoria Police mandate its members to collect the following data for all stops, searches and directions to move on as part of the racial profiling monitoring and prevention scheme:

a. reason for the stop (before the stop is initiated) or decision to direct a person to move on

b. record of any relevant suspect profile or intelligence report

c. officer-perceived ethnicity

d. reasons to conduct any search (including searches by consent, statutory and database searches such as warrant checks, car registration, immigration status, etc.)

e. outcome, including items seized, cautions, infringements, arrest, charges, moved on, no further action

f. use of force (if any)

g. officer-perceived age of the person (within a 10-year range)

h. officer-perceived gender of the person

i. stop location

j. time and date

k. length of stop

l. name of the person (where available)

m. if in a car, the presence of passengers and perceived ethnicity of passengers; if on the street, the presence of companions and perceived ethnicity of companions

n. whether the driver was asked to leave the vehicle

o. whether a call for back-up was made

p. for vehicle stops, state of residence of the driver as recorded on the person's driver's licence

q. officer number, rank, station, operation (if relevant), vehicle code (if relevant)

r. prosecution outcome (if relevant) when available.

Source: adapted from Police Stop Data Working Group, *Monitoring racial profiling: Introducing a scheme to prevent unlawful stops and searches by Victoria Police*, Melbourne, 17 July 2017, p. 11.

45 Police Stop Data Working Group, *Monitoring racial profiling: Introducing a scheme to prevent unlawful stops and searches by Victoria Police*, Melbourne, 17 July 2017, p. 48.

The Police Stop Data Working Group argued that requiring police officers to record their perception of the ethnicity of all the people they stop and search, will enable the prevalence of racial bias and profiling amongst Victoria Police to be assessed. This would be the case even where officers incorrectly identify the cultural heritage of the people they interact with. It noted that 'accusations of racial profiling are based on the presumption that officers treat minority citizens differently', therefore misperceptions are 'irrelevant for data collection analysis that seeks to explain officer decision making'. Moreover, the Group suggested that recording officers' perception of ethnicity is a preferrable approach to requiring the people stopped and searched to self-report their ethnicity as this can exacerbate 'the stopped person's sense of violation and intrusion into their privacy'.[46]

Anoushka Jeronimus, Co-Convenor of Smart Justice for Young People, stated her support for increasing Victoria Police's collection and reporting of police stop and search data. Anoushka Jeronimus said data:

- would help determine the 'nature and extent' that police officers target some population groups over others
- could aid in understanding the drivers of youth offending
- could inform solutions.[47]

In an answer to a question on notice, Smart Justice for Young People pointed out that police stop and search rates declined in international police jurisdictions which began collecting and publishing data:

> Data is an essential starting point for transparency and to develop an understanding and start working on the problem of overrepresentation. Currently we know stops and searches are happening without reasonable grounds, as well as there being targeted police operations in high minority populations. But little if any data is publicly available to highlight this.
>
> No jurisdiction is doing that well bringing down the overrepresentation. However, New York dramatically reduced its stop and frisk rate when they started to make data public about what was going on.[48]

Carmel Guerra OAM, Director and Chief Executive Officer of the Centre for Multicultural Youth endorsed data collection as critical to identifying perceived versus actual racial profiling by Victoria Police:

> I think that is probably the challenge, isn't it, that young people say they are and police say no, they are not doing it. So there has to be some mechanism to see how much of it is a perception. And I am sure some of it is, to be honest, because we do know that some

46 Police Stop Data Working Group, *Monitoring racial profiling: Introducing a scheme to prevent unlawful stops and searches by Victoria Police*, Melbourne, 17 July 2017, pp. 40–41.

47 Anoushka Jeronimus, *Transcript of evidence*, p. 11.

48 Smart Justice for Young People, Inquiry into Victoria's criminal justice system hearing, response to questions on notice received 15 September 2021.

> of the young people we work with are very community orientated, so they are more visible … But I think some way of documenting whether it is real or not would be really useful, actually, in fact, so we would probably endorse that approach.[49]

The Centre for Multicultural Youth also argued that 'greater training in evidence-informed culturally responsive practices' may help improve police practices and culture.[50]

The Victorian Aboriginal Legal Service likewise recommended that Victoria Police address racial profiling by developing and delivering, in partnership with the Aboriginal community and Aboriginal Community Controlled Organisations, a policy on racial profiling and training materials on preventing racial profiling.[51]

Smart Justice for Women and the Victorian Council of Social Services both called for discrimination and racism in policing practice to be acknowledged and 'immediately addressed'. The Victorian Council of Social Services argued that Victorian Aboriginal communities should lead any reform.[52] Smart Justice for Women felt that the accountability of police must be increased and recommended that greater education and training for police on racial discrimination.[53]

Jesuit Social Services believed that increasing the diversity of the Victoria Police workforce will increase the cultural safety of its practices. It commended Victoria Police for developing the Victoria Police Diversity Recruitment Program, which seeks to increase the representation of African-Australians from refugee and other backgrounds. Jesuit Social Services acknowledged that 'as at December 2020, 51 participants were progressing through the recruitment process or alternative employment pathways, 28 participants had passed the Victoria Police Entrance Exam and five participants have received an offer to join the Victoria Police Academy'.[54]

The Committee acknowledges that racial profiling and overpolicing of culturally and linguistically diverse communities, particularly young people, by Victoria Police has been demonstrated in the past. It is very disappointed to hear that this remains an issue despite Victoria Police's ongoing commitment to addressing problematic practices and building stronger connections with these communities.

Crime Statistics Agency data on policing in relation to COVID-19 pandemic health measures clearly indicates that Victoria Police appears to stop Aboriginal Victorians and individuals from some culturally and linguistically diverse communities. Further, the data shows that they are subjected to punitive measures more frequently than individuals from other communities.

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49 Carmel Guerra OAM, Director and Chief Executive Officer, Centre for Multicultural Youth, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, pp. 42–43.

50 Centre for Multicultural Youth, *Submission 95*, p. 9.

51 Victorian Aboriginal Legal Service, *Submission 139*, p. 150.

52 Victorian Council of Social Service, *Submission 137*, p. 23.

53 Smart Justice for Women, *Submission 94*, p. 29.

54 Jesuit Social Services, *Submission 119*, p. 15.

FINDING 15: Overpolicing of Aboriginal and culturally and linguistically diverse communities by Victoria Police remains an issue, despite its ongoing commitment to address these matters.

However, the extent to which this is occurring as part of police stop and searches more broadly, and the factors informing this, are unclear as data is not routinely collected or made public by Victoria Police. It is likely that a combination of predictive policing tools, inadequate cultural awareness training, an under-representative police force and other factors are all contributing to these issues.

Regardless of the extent to which overpolicing and racial profiling is actual or perceived, the Committee notes that it has a similarly devastating impact on individual wellbeing, contributes to compounding disadvantage and fuels mistrust between Aboriginal and culturally and linguistically diverse communities and law enforcement in Victoria.

In the Committee's view, it is clear that the initiatives Victoria Police has pursued to date are not adequately resolving these issues. A better way forward must be identified.

The Committee shares stakeholder views that an important first step in addressing overpolicing and racial profiling by Victoria Police is to collect and publish data to support the quantification of these issues, the identification of problematic practices and the formulation of solutions.

RECOMMENDATION 20: That Victoria Police collaborate with the Aboriginal Justice Caucus, Aboriginal community controlled legal services, representatives of culturally and linguistically diverse communities and the Police Stop Data Working Group to design and implement a three-year trial of a racial profiling monitoring scheme. The trial should encompass the routine collection and public release of de-identified data on who Victoria Police stop and search, and for what reasons. Data collection should be comprehensive and be undertaken with a view to:

- quantifying the prevalence of overpolicing and racial profiling, based on police officers' perceptions of ethnicity
- identifying policies, practices and cultural factors within the police force which are informing these issues
- formulating solutions to address these issues
- establishing a data collection and release scheme.

Victoria Police must consult with representatives of marginalised communities, including Aboriginal and culturally and linguistically diverse populations, to develop a robust methodology for data collection and publication. Victoria Police must also commit to working with marginalised communities to develop solutions to these matters, which may include police education and recruitment initiatives to make the police force more representative of the Victorian public.

The Committee believes that a closer working relationship between Victoria Police and marginalised communities, characterised by trust in law enforcement, is not possible without increasing transparency and collaboration to address overpolicing and racial profiling.

5.3 Punitive responses to health and social problems

Evidence suggested that Victoria Police is regularly called upon to assist people experiencing health or social problems (such as a mental health crises or homelessness) and often interacts with people who have cognitive disabilities, such as acquired brain injuries. Stakeholders observed that these encounters frequently result in inappropriately punitive measures which drive disadvantaged people into the criminal justice system. For example, the Fitzroy Legal Service outlined its experiences in a submission to the Inquiry:

> In our experience, police are regularly called to assist in situations where help is needed, but police powers are not. Police are not specialist trained mental health workers, family violence workers, social workers, housing workers, addiction specialists, or disability support workers. But they are often expected to be.
>
> Over-reliance on police in these situations also results in criminalisation. People end up charged and sometimes incarcerated when police are not equipped to respond to complex situations, when they fail to properly exercise their discretion or when police interactions with our clients escalate. This is particularly true for people from racialized or stigmatised communities, including Aboriginal people, people who use drugs or experience psycho-social disability, people in mental health crisis or those who are homeless.[55]

The following sections of the report examine how police interact with people experiencing mental health crises, homelessness, and people with disability. Sections also canvass stakeholder suggestions for better utilising these police interactions as an opportunity for early intervention aimed at preventing further contact with the criminal justice system.

5.3.1 People experiencing mental health crises

Victoria Police has a high level of contact with people experiencing mental illness. Sergeant Gatt of the Police Association said that responding to people in mental health crisis is a large proportion of the work undertaken by Victoria Police:

> Our members report in research conducted by the police association that the average time spent on single occurrences of mental health ranges between 4 and 6 hours. And if you put that in context, an 8-hour shift is the general shift undertaken by a police crew. That is the majority of the shifts dealing with one issue, and our members are

55 Fitzroy Legal Service, *Submission 152*, p. 25.

> responding to one person in mental health crisis every 12 minutes in Victoria, so this is a massive driver, in fact perhaps almost the primary driver, along with family violence intervention, for Victoria Police.[56]

Sergeant Gatt said that police are called to assist people in mental health crises because other social support systems have failed to address their needs. He argued that investment in community-based care options for people experiencing mental illness is needed to ensure support is available before a crisis point is reached and police intervention becomes necessary.[57]

According to the Justice Map, 'in Victoria, one in three people (32%) taken into police custody were meant to be receiving psychiatric treatment at the time of their arrest'.[58] It suggested that this high level of contact is in part driven by a lack of appropriate community mental health care options:

> Due to the reduction of available non-acute care beds in specialised facilities, sufferers of severe mental illness and related episodes are more frequently receiving treatment in emergency departments. This can lead to patients being prematurely discharged prior to receiving the full treatment they need in an effort to make beds available for further patients. Following premature discharge these individuals are susceptible to suicide as well as further breakdowns of mental health, aggressive behaviour and homelessness, all of which can result in incarceration and entry into the criminal legal system.[59]

Inner Melbourne Legal Centre said acute mental health care is also inadequate and leading to increased contact with Victoria Police:

> Severe resource pressures on public mental health services and Crisis Treatment Teams (CATT) to respond to people experiencing mental health crisis has seen an increased demand on Victoria Police and hospital emergency departments to assist individuals in crisis.[60]

Inner Melbourne Community Legal said that 'too often … interactions between police and individuals experiencing mental health crisis leads to those individuals becoming criminalised', particularly if it is not the first interaction between police and that individual. The Legal Service said that in situations where individuals:

> have had a previous negative interaction with police, a police response at a time of a mental health crisis has the potential to result in an escalation of behaviour, increasing the risk of the person in health crisis being charged with criminal offences such as resisting arrest or assault.[61]

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56 Sergeant Wayne Gatt, *Transcript of evidence*, p. 21.

57 Ibid.

58 The Justice Map, *Submission 157*, p. 8.

59 Ibid.

60 Inner Melbourne Community Legal Centre, *Submission 133*, p. 11.

61 Ibid.

> **Leila is an Indian woman in her mid-50s with no criminal history. She has been diagnosed with schizophrenia in adulthood and after a period of not taking her medication, she experienced an episode of psychosis with paranoid delusions. One of her children called an ambulance, who attended accompanied by police. Leila hit the police officer while being placed in the ambulance to go to the hospital. She was charged with assaulting a police officer. The charges were ultimately withdrawn after significant advocacy by our office. In the absence of this advocacy, our client was facing a term of incarceration due to the seriousness of the charge.**
>
> Fitzroy Legal Service, *Submission 152*, p. 26.

Fitzroy Legal Service likewise observed that many of its clients are arrested and charged following an interaction with Victoria Police during a mental health crisis. It argued that 'arrest and charge should never form part of responding to a person in crisis'. Rather, police should utilise one of the discretionary options available to them, including 'resolving the issues informally, calling emergency mental health services for assistance, taking the person to hospital'.[62]

Fitzroy Legal Service and Inner Melbourne Community Legal both supported the urgent implementation of the Royal Commission into Victoria's Mental Health System's recommendation to introduce a health-led (as opposed to police-led) emergency response to people experiencing a mental health crisis by 2026. The report contended that the criminal justice system has become a mental health provider of last resort and that people with mental health needs are overrepresented.[63] Fitzroy Legal Service felt that as part of implementing this recommendation, 'mental health crises must be considered to include health episodes relating to drug use or dependence'.[64]

Inner Melbourne Community Legal suggested that the implementation of a co-responder approach, such as the Police, Ambulance and Clinical Early Response (PACER) model, could also help reduce punitive police responses to people experiencing mental health crises. The PACER model involves a joint crisis response from police and mental health clinicians to people experiencing 'behavioural disturbances' in the community.[65] Inner Melbourne Community Legal suggested that it the model has 'proven success at improving the response for people in mental health crisis and preventing unnecessary interactions with the criminal justice system'.[66]

The Australian Community Support Organisation and the Victorian Council of Social Services also noted the benefits of co-responder models, such as PACER.[67] The Victorian Council of Social Services submitted:

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62 Fitzroy Legal Service, *Submission 152*, p. 25.

63 Victorian Government, *Royal Commission into Victoria's Mental Health System*, <https://finalreport.rcvmhs.vic.gov.au> accessed 30 January 2022.

64 Fitzroy Legal Service, *Submission 152*, p. 26; Inner Melbourne Community Legal Centre, *Submission 133*, pp. 11–12.

65 Department of Health, *Police, Ambulance and Clinical Early Response (PACER) Evaluation Report*, 22 May 2012, <https://www.health.vic.gov.au/publications/police-ambulance-and-clinical-early-response-pacer-evaluation-report> accessed 13 January 2022.

66 Inner Melbourne Community Legal Centre, *Submission 133*, pp. 11–12.

67 Australian Community Support Organisation, *Submission 91*, p. 22.

> VCOSS members acknowledge good outcomes for community when police use the Police, Ambulance and Clinical Early Response (PACER) model in first responses. In this model, police have wide discretion to draw on clinicians – including social workers, lawyers and advocates – when first attending callouts for incidences involving public nuisance, drug and alcohol use and mental health episodes.

However, the Council acknowledged that the model relies on individual officers' relationships with local mental health providers, as well as their discretion to make referrals.[68] It argued that law enforcement training to engage with vulnerable members of the community is also necessary to avoid poor outcomes.[69]

The Committee shares stakeholder views that a health-led emergency response or co-responder approach to people experiencing a mental health crisis will result in better outcomes for the individual and the community than a law-enforcement response.

Although an important responsibility of Victoria Police under the *Victoria Police Act 2013* (Vic) is 'helping those in need of assistance'[70], police are not specialist trained mental health workers and should not be expected to independently render assistance to people experiencing serious and complex mental health issues and who may be in crisis.

FINDING 16: Police are not trained or equipped to independently render appropriate assistance to people experiencing serious and complex mental health issues and who may be in crisis.

Moreover, the Committee is concerned by evidence that rendering assistance to people experiencing mental health crises is consuming a large proportion of Victoria Police resources.

FINDING 17: Rendering assistance to people experiencing mental health crises occupies substantial Victoria Police resources and time.

The Committee notes that the Victorian Government has accepted all 65 recommendations of the Royal Commission into Victoria's Mental Health System, including Recommendation 10 which requires the establishment of a health-led emergency response to people experiencing mental health crisis. The Victorian Government noted in its submission that this 'will mean that Ambulance Victoria and mental health clinicians are the lead responders to a mental health crisis, rather than Victoria Police'.[71] The Victorian Government has also committed to increasing the

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68 Victorian Council of Social Service, *Submission 137*, p. 32.

69 Ibid., pp. 31–32.

70 *Victoria Police Act 2013* (Vic) s 8.

71 Victorian Government, *Submission 93*, p. 51.

accessibility of community-based mental health support as part of its 2021–22 State Budget. It explained it its submission to the Inquiry that it expects this investment to reduce instances of Victoria Police having to assist people in mental health crises over time:

> As the Commission noted, the expansion of community-based mental health services is also expected to have a positive impact on the justice system, as over time, people with complex mental health issues will have their needs met in the community, reducing the chance of contact with the criminal justice system.[72]

The Committee commends the Victorian Government for committing to the implementation of all recommendations made by the Royal Commission into Victoria's Mental Health System. The Committee believes that, fully implemented, these will have a positive flow-on effect to police interactions with people experiencing mental health crises, and may reduce the criminalisation of people with mental illness. The Committee endorses this approach.

5.3.2 People experiencing homelessness

The Committee considered the relationship between policing, homelessness and contact with the criminal justice system as part of its 2019 Inquiry into homelessness in Victoria. It found that people experiencing homelessness—particularly those sleeping rough—often live in public spaces, which increases their risk of committing a public order offence and their visibility to Victoria Police. This can lead people experiencing homelessness to enter the criminal justice system or even be incarcerated.[73]

Public order offences include:

- public urination
- sexual exposure (getting dressed in public view)
- using offensive language
- public nuisance
- vagrancy
- loitering
- trespassing
- begging.[74]

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72 Ibid., p. 52.

73 Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria*, March 2021, p. 189.

74 Fitzroy Legal Service, *Submission 152*, p. 26; The Justice Map, *Submission 157*, p. 15.

Fitzroy Legal Service submitted that while these offences are not formulated to target people experiencing homelessness, they disproportionately criminalise them.[75] The Justice Map likewise argued that these offences systematically criminalise people experiencing disadvantage and asserted that this is borne out of 'a wealth of lived experience accounts and qualitative survey data'.[76]

The Committee's report on the *Inquiry into homelessness in Victoria* made several justice-focused recommendations to address this issue. This included that the Victorian Government develop and implement a protocol for Victoria Police and other enforcement agencies to use when responding to people experiencing homelessness, which would:

- avoid unnecessary enforcement-based interactions with people experiencing homelessness
- ensure that where interactions do occur, they are appropriate and respectful
- support enforcement officers to use their discretion and consider alternative options to fines and charges when interacting with people experiencing homelessness
- train and equip enforcement officers to make referrals to appropriate services as an alternative to fines and charges.[77]

The Committee required the protocol to be modelled on an existing protocol between the City of Melbourne and Victoria Police. Evidence suggested that the existing protocol, which requires people experiencing homelessness to be referred to social support services, was operating successfully.[78]

The Committee also called on the Victorian Government to consider whether to amend the *Summary Offences Act 1966* (Vic) to remove begging as an offence but stopped short of making a recommendation due to Victoria Police concerns about 'professional begging'.[79]

The Victorian Government has not yet responded to this report to indicate whether it supports the Committee's recommendations. However, some stakeholders expressed their views on the Committee's findings during this Inquiry into the criminal justice system. For example, Fitzroy Legal Service supported the underlying objective of the recommended protocol to reduce people experiencing homelessness' contact with the criminal justice system. However, it felt that this objective could not be fully realised without repealing public order offences which disproportionately criminalise people sleeping rough:

> laws that expressly criminalise people experiencing homelessness include the state offence of begging alms and the local laws of the City of Melbourne that put limits

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75 Fitzroy Legal Service, *Submission 152*, p. 26.

76 The Justice Map, *Submission 157*, p. 15.

77 Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria*, p. 191.

78 Ibid., p. 190.

79 Ibid., pp. 191–192.

> on the number of people allowed to sleep near one another, the number of bags of possessions a person is allowed to have, and where people are permitted to sleep. These laws are completely ineffective and should be abolished immediately.[80]

Fitzroy Legal Service therefore recommended that, in implementing the Committee's recommendation, the Victorian Government:

- ensure social support services respond to rough sleepers and that Victoria Police officers are only in attendance as a last resort
- repeal begging offences from the *Summary Offences Act 1966* (Vic).[81]

It also recommended that the City of Melbourne repeal all local laws 'that penalise and overly regulate the lives of people who are homeless'.[82]

Justice Connect and Inner Melbourne Community Legal also supported the development of a protocol to inform Victoria Police's response to people experiencing homelessness. Justice Connect envisioned that such a protocol would support Victoria Police officers to issue cautions and support referrals in lieu of punitive measures.[83]

Inner Melbourne Community Legal Centre said that decreasing enforcement-based approaches to policing people experiencing homelessness is critical to prevent them from ending up in the criminal justice system.[84]

Justice Connect and the Justice Map also recommended repealing public order offences which criminalise homelessness. The Justice Map argued that 'these laws serve only to punish the poorest and most marginalised Victorians'.[85] Justice Connect said that the abolition of these offences will assist in breaking the nexus between homelessness and the criminal justice system.[86]

The Committee observed that evidence submitted to this Inquiry into Victoria's criminal justice system aligns with that provided to its Inquiry into homelessness. As such, it expects that the recommended protocol would improve interactions between police officers and people experiencing homelessness and reduce their engagement with the criminal justice system.

The Committee is disappointed to observe that the Victorian Government's response to its Inquiry into homelessness is now approximately six months overdue with no explanation for the delay forthcoming. The Committee discusses the implications of this delay and the need for an immediate response further in Chapter 11 of the report which highlights the nexus between homelessness and recidivism.

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80 Fitzroy Legal Service, *Submission 152*.

81 Ibid., pp. 27–28.

82 Ibid.

83 Justice Connect, *Submission 158*, pp. 11–12; Inner Melbourne Community Legal Centre, *Submission 133*, p. 9.

84 Inner Melbourne Community Legal Centre, *Submission 133*, p. 9.

85 The Justice Map, *Submission 157*, p. 23.

86 Justice Connect, *Submission 158*, p. 14.

5.3.3 People with cognitive disability

In its submission, the Victorian Government explained that people with disability often experience multiple forms of disadvantage, 'such as unemployment, poverty, homelessness, health problems and social isolation' and that these hardships 'can result in, and exacerbate, contact with the criminal justice system'.[87] The Office of the Public Advocate noted that the first point of contact that many people with a disability have with the criminal justice system is Victoria Police.[88]

Victoria Police has introduced several initiatives aimed at diverting people with disabilities away from the criminal justice system and towards social services, as well as measures to better support people with disabilities during police interactions including:

- disability liaison officers to support police officers to implement Victoria Police disability policies
- Communication Access Symbol accreditation, which involves ensuring that communication is accessible, staff are welcoming and communication tools are available in police stations to assist people to be understood
- police cautions and diversion programs are available to people with disability.[89]

In addition to these initiatives, Victoria Police supports the Office of the Public Advocate's delivery of the Independent Third Person (ITP) Program. The Office of the Public Advocate submitted that the ITP Program seeks to support people with cognitive disabilities—no matter if they are an offender, victim or witness—during their interactions with police:

> ITPs are trained volunteers who attend police interviews for adults and young people with disability to ensure that they are not disadvantaged during the police interview process. Police interviews often require people to comprehend complex issues and information quickly, understand their legal rights, and be able to communicate with people in positions of authority. ITPs are available 24/7 to attend any police station throughout Victoria. ITPs are independent of police and of the investigation, and act as a safeguard to ensure a person with disability is not disadvantaged when communicating with police. [90]

The ITP Program relies on police officers to identify instances where the individual they are interacting with has a cognitive disability using 'their experience and knowledge, observations of the person, and active questioning'.[91]

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87 Victorian Government, *Submission 93*, p. 17.

88 Office of the Public Advocate, *Submission 153*, p. 22.

89 Ibid., pp. 22–23; Scope, *Communication Access*, <https://www.scopeaust.org.au/services-for-organisations/access-and-inclusion-for-businesses/communication-access> accessed 15 January 2021.

90 Office of the Public Advocate, *Submission 153*, p. 24.

91 Ibid.

In 2019–20, the ITP Program supported 2,689 people with disabilities during 3,718 interviews with Victoria Police. Of these interviews:

- 85% involved alleged offenders
  - 4.4% were with sex offenders
- 8.2% were with victims of crime, and
- 2.4% involved witnesses.

People with intellectual disabilities comprised 55.7% of interviewees, followed by 35.8% with mental illness, 24.3% with acquired brain injury, 2.1% with physical disability and 13.4% with unstated disabilities. Interviews were conducted at 140 police stations as well as private homes, hospitals and disability facilities in Melbourne and regional Victoria. The number of Aboriginal interviewees increased from 13% in 2017–18 to 18% in 2019–20.[92]

The Committee heard that, despite measures to improve police interactions, people with disability are too often subjected to inappropriate punitive measures which can propel them further into the criminal justice system.

The Victorian Council of Social Services explained that Victoria Police responses to people with disabilities can escalate when disability-related behaviours are misinterpreted as defiant:

> People with disabilities … experience the "criminalisation of disability", when conduct associated with people's impairment, health condition or trauma are interpreted as difficult or defiant behaviours, leading to disproportionate interactions with police.[93]

The Youth Affairs Council claimed that interactions between police and young people with a disability demonstrate that a 'lack of understanding of the diversity and nuance of disability is pervasive and deeply entrenched in the police force':

> A lack of understanding about disability is evident, where police deny disabled people reasonable adjustments or supports, or use excess force when they perceive the disabled person to be a threat.[94]

Stan Winford, Associate Director of Research, Innovation and Reform at the RMIT Centre for Innovative Justice, made a similar observation during a public hearing in Melbourne:

> Police were not equipped with the knowledge and skills to recognise and interact with people with disability who are drawn into the system with their disability attracting the

92 Ibid., p. 25.

93 Victorian Council of Social Service, *Submission 137*, p. 22.

94 Youth Affairs Council Victoria, *Submission 118*, p. 20.

> attention of police. Behavioural manifestations of disability had been interpreted as wilful, difficult or antisocial conduct leading to criminalisation …[95]

Stan Winford suggested that many Victoria Police officers lack the awareness, knowledge and skills to recognise people who have cognitive disabilities and ensure they get access to support, such as the ITP Program. He said that 'too often it was left to people with disability themselves to advocate for support' and that, in many instances, disabilities are not disclosed 'because in many people's experience [disclosure] had led to exploitation of their vulnerability'.[96]

Moreover, VALID—an advocacy group for people with intellectual disabilities and their families—submitted that its research showed that people with intellectual disabilities are often not believed when they do disclose their conditions to Victoria Police, as they have no formal proof.[97]

> **Various members of the [peer action] group talked about, 'When I've been arrested, police don't listen to me. They don't believe I have a disability. They think I'm substance affected. They know me from when I was a teenager. They just think I'm a troublemaker, and I go off. And I get really angry and I start screaming and shouting, and then it gets worse'.**
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> Emily Piggott, Advocacy Coordinator, VALID, public hearing, Melbourne, 5 November 2021, *Transcript of evidence,* p. 56.

Even where disabilities are disclosed, the Committee heard that the ITP Program is underfunded, and volunteers are not always available to attend interactions between Victoria Police and people with disabilities.

Emily Piggott, Advocacy Coordinator at VALID, described the ITP Program as 'incredibly important' but noted that it is underfunded and relies on volunteers. They suggested that there are not enough ITPs and there can be a delay in a volunteer's attendance at interactions between Victoria Police and people with disabilities. Emily Piggott said that this can result in people with disabilities choosing to go ahead with a police interaction without support.[98]

The Office of the Public Advocate told the Committee that funding for the program has not kept pace with steadily increasing demand, 'hampering its ability to ensure trained ITPs are available when requested to attend face-to-face interviews'. It recommended that the Victorian Government increase funding for the program so that it can meet demand and that it introduce a legal requirement for police to ensure an ITP is present when interviewing a person with an apparent cognitive disability or mental illness (regardless of their age or status as an alleged offender, victim or witness).[99]

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95 Stan Winford, Associate Director, Research, Innovation and Reform, Centre for Innovative Justice, RMIT University, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 35.

96 Ibid.

97 VALID, *Submission 156*, p. 16.

98 Emily Piggott, Advocacy Coordinator, VALID, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 58.

99 Office of the Public Advocate, *Submission 153*, pp. 26–27.

VALID recommended a two-pronged approach to improve interactions between Victoria Police officers and people with disability, which comprised of:

- the introduction of an independent, 24-hour support service for people with disability who find themselves in crisis and who have barriers to accessing support (encompassing counselling, social support referrals, and in-person attendance)
- the development of a communication tool for people with disability to use with police, courts and other justice professions which supports them to convey information about their identity, disability behaviours and support needs.[100]

VALID suggested that the communication tool could be something as simple as a USB or a card with information disclosing a disability, humanising the person with the disability by providing some information about their interests, and describing the reasonable adjustments or other support they require.[101] Emily Piggott explained how a communications tool could improve interactions between police and people with disabilities:

> when you have a disability and you go into custody or you are in court, sometimes you are going to get really stressed, you are going to get really upset and you may not behave in a way that you necessarily want to...
>
> [People with cognitive disabilities] have this overwhelming sense that the police are looking at them and going, 'We know there's something wrong with this one, but we don't really know what it is'. And it just escalates the anger, the fear—it just escalates. And so we came up with this idea of having a tool that allows a bit of space so that you do not have to do it verbally, so that you can hand it over—something that makes people feel like the person at the other end is going to treat them as a real human being, not just as a problem.[102]

At a public hearing, Julie Baron, Policy and Advocacy Manager, Youth Affairs Council Victoria argued that improving officer training to align with a 'human rights-based model' could improve Victoria Police interactions with young people with disabilities:

> This would ensure that when disabled young people are being interviewed or questioned by police they are afforded reasonable adjustments, such as regular breaks or having a support person present. We would love to see that this training is actually developed and delivered by [Zoom dropout] people with lived experience of disability.[103]

As gatekeepers to the criminal justice system, it is important that Victoria Police can distinguish between criminal behaviours, which require a law enforcement response, and disability related behaviours, which should be addressed through the provision of social supports. In the Committee's view, ensuring that officers can accurately make

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100 VALID, *Submission 156*, p. 8.

101 Ibid., p. 20; Piggott, *Transcript of evidence*, p. 56.

102 Piggott, *Transcript of evidence*, p. 56.

103 Julie Baron, Policy and Advocacy Manager, Youth Affairs Council Victoria, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 11.

this determination will help prevent inappropriate punitive responses to disability related behaviours. It will help ensure that alleged offenders, victims and witnesses with disabilities are provided with the reasonable adjustments or ITP support that they require to properly engage with police during a criminal matter.

RECOMMENDATION 21: That Victoria Police review its disability policies, training programs and specialist roles to ensure they:

- equip police officers with the knowledge, skills and support they need to distinguish between criminal and disability behaviours
- identify where an alleged offender, victim or witness would benefit from the provision of reasonable adjustments and/or access to specialist advice or support such as the Independent Third Person Program.

The Committee is also concerned by evidence from VALID and the Office of the Public Advocate that the ITP Program is currently underfunded and, as a result, is failing to adequately support some people with disability throughout their engagement with police. The Committee notes that this program is critical to ensuring that people with disability are treated fairly by Victoria Police and that they understand the purpose and outcomes of interactions with officers. These issues are explored further from a victim of crime perspective in Chapter 7.

RECOMMENDATION 22: That the Victorian Government work to embed the Independent Third Person Program into Victoria Police's practices, including a requirement for Victoria Police to seek the attendance of an Independent Third Person when interviewing a person with a cognitive impairment or mental illness. The Government should also provide funding to expand the program to ensure it is able to meet increasing demand.

5.4 Police use of cautions and consent to court-based diversion

Police cautions and court-based diversions are important forms of early intervention which enable an alleged offender to avoid being formally charged and processed through the criminal justice system. They can also assist in preventing an alleged offender from further contact with the criminal justice system by mandating therapeutic intervention.[104]

Victorian Aboriginal Legal Service said police cautions and diversion programs are particularly important for children and young people as evidence shows that early contact with the criminal justice system is criminogenic:

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104 Victorian Government, *Submission 93*, p. 54.

> Diversion and cautioning are particularly important for children and young people. Early contact with the criminal legal system has a tendency to reproduce itself, and children are particularly likely to be fully integrated into society and avoid reoffending if they are given appropriate support. There is clear evidence from Victoria that diversion away from the court system has a positive impact in reducing reoffending for young people. Avoiding the use of full judicial proceedings for children is also part of Australia's obligations under the Convention on the Rights of the Child.[105]

The Centre for Multicultural Youth asserted that police cautioning and diversion programs are well recognised ways to prevent offending and ensure safer communities:

> A 2017 report from Victoria's Crime Statistics Agency found "young people who were cautioned by police in Victoria were less likely to offend, while the Royal Commission into the Protection and Detention of Children in the Northern Territory reported that the vast majority, almost 85%, of diverted young people did not reoffend.[106]

The Australian Community Support Organisation submitted that 'diversions and cautions are an underutilised opportunity to divert individuals into planned treatment in the community':

> Diversion offers up the benefit of treatment and support in the community and is less likely to lead to loss of employment or housing, family breakdown and community disconnect. Furthermore, it can avoid the stigma associated with an offending history that impacts on every part of a person's life, including potential employment, interpersonal relationships and the lives of children and significant others.[107]

Fitzroy Legal Service submitted that diversion is beneficial because:

- it allows people to avoid a criminal record, which in turn reduces any barriers they might face obtaining employment and housing
- it aims to centre a therapeutic rather than a punitive approach, by assisting the accused person to access community supports
- it has been found to reduce recidivism and provide economic benefits to the community.[108]

In addition, the Law Institute of Victoria noted that recent research undertaken by the Crime Statistics Agency shows that when young people are diverted from the criminal justice system—including through the issuance of a police caution—they are less likely to reoffend than those who are charged:

> 5,981 children who were cautioned or charged were analysed, with 56.3 per cent receiving a caution and 43.7 per cent receiving a charge. Of the children who were

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105 Victorian Aboriginal Legal Service, *Submission 139*, p. 162.

106 Centre for Multicultural Youth, *Submission 95*, p. 5.

107 Australian Community Support Organisation, *Submission 91*, p. 19.

108 Fitzroy Legal Service, *Submission 152*, p. 47.

> cautioned, 35.9 per cent reoffended, whereas 47.8 per cent of children who were charged reoffended. The children who were initially cautioned also reoffended at a slower rate than those who were initially charged.[109]

The Law Institute of Victoria considered diversions 'an indispensable tool in reducing recidivism amongst first time offenders':

> [Diversion programs] provide a unique opportunity to identify any criminogenic issues affecting an offender, assess the causes of offending and to put in place support mechanisms to ensure that criminal offending is not repeated. The LIV recommends increasing the use of diversionary mechanisms to reduce the number of people needing to appear before the courts.[110]

The Committee notes that the benefits of police cautions and court-based diversion programs are well documented.

FINDING 18: Police cautions and court-based diversion programs are important mechanisms for diverting people away from the criminal justice system and connecting them with the social supports necessary to address the factors underpinning their offending.

The following sections of the report consider police issuing of cautions and police consent to court-based diversions. For broader discussion of court-based diversion measures see Chapter 10.

5.4.1 Police cautioning

In Victoria, police can issue verbal or recorded cautions to young people and adults who they allege have committed an offence.

Unlike other Australian jurisdictions, there are no legislated parameters guiding the issuing of police cautions in Victoria. Officers have broad discretion regarding whether to issue a verbal or recorded caution in lieu of seeking prosecution. In making this decision, officers must balance the requirement to enforce the law to its full extent with the need to recognise the personal circumstances of the accused, as well as the context and seriousness of the crime. This includes:

- the nature, severity and gravity of the alleged offence
- the characteristics and circumstances of the accused person and the victim
- whether the accused is a child
- any injury, loss or damage resulting directly from the alleged offence

109 Law Institute of Victoria, *Submission 112*, p. 66.

110 Ibid., p. 58.

- community expectations
- the effect of deterrence on the individual and on the community in general.[111]

Until recently, a young person accused of committing an offence was required to admit their guilt in order to be eligible for a police caution, and the number of cautions police could issue to a young person was limited. Currently, an accused person may consent to receiving a police caution without any reference to whether they are guilty of the offence. There is no limit on the number of cautions a young person can receive.[112]

Several witnesses reflected positively on these changes, for example:

- Smart Justice for Young People
- Springvale Monash Legal Service
- Victoria Legal Aid.[113]

Victoria Legal Aid submitted:

> People responsible for low-level, low-harm offending should be diverted away from the criminal justice system as quickly as possible…
>
> We recognise and support recent changes made by Victoria Police to improve access to cautions.[114]

Victoria Police officers have a range of cautions at their disposal, namely:

- child cautions
- adult cautions
- cannabis cautions (adults only)
- drug diversion.[115]

Table 5.1 outlines an example of an existing cautioning program and two pilot cautioning programs.

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111 Victorian Government, *Submission 93*, pp. 53–54; Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria*, <https://www.parliament.vic.gov.au/447-lsic-lc/inquiry-into-youth-justice-centres-in-victoria> accessed 14 December 2021.

112 Victorian Government, *Submission 93*, pp. 53-54; Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria*; Tammy Mills, 'Criminal charges over minor offences prod police to change tack on youth cautions', *The Age*, 9 September 2021, <https://www.theage.com.au/national/victoria/criminal-charges-over-minor-offences-prod-police-to-change-tack-on-youth-cautions-20210908-p58pum.html> accessed 15 January 2022.

113 Victoria Legal Aid, *Submission 159*, p. 8; Smart Justice for Young People, *Submission 88*, p. 8; Springvale Monash Legal Service, *Submission 146*, p. 8.

114 Victoria Legal Aid, *Submission 159*, p. 8.

115 Victorian Government, *Submission 93*, pp. 53–54.

Table 5.1 Examples of police cautioning programs

Program	Description
Cannabis Cautioning Program (CCP)	The CCP aims to reduce the number of adults entering the criminal justice system on low-level drug charges. It involves Victoria Police issuing a caution to adults found with less than 50g of cannabis in their possession, rather than pursing charges. Individuals can receive a maximum of two cannabis cautions before being ineligible for the program for future offences. The following pre-conditions must be met for an individual to receive a cannabis caution: • they must admit to the offence • the cannabis possessed must be for personal use only • they have not been involved or detected in any other offence • they have not received more than one previous drug cautioning notice for other drugs (if they have more than two, they will be formally charged). Cannabis cautions have conditions attached to them which must be compiled with in a set timeframe. For example, a person may be required to complete a drug education program (e.g. the Cautious With Cannabis program), seek drug treatment or undergo counselling. If conditions are not complied with, Victoria Police will proceed to formal charges.
Aboriginal Youth Cautioning Program (AYCP) Pilot	The AYCP aims to reduce the number of young Aboriginal Victorians entering the criminal justice system. Police in Greater Dandenong, Bendigo and Echuca are piloting the program. They have undertaken Aboriginal Cultural Awareness training which encourages the use of cautions and diversions where appropriate and are monitoring the use of child cautions for young Aboriginal people in those areas. The pilot is still in progress. It has been operating in a more limited capacity during 2020 due to COVID-19 restrictions. Victoria Police aims to eventually deliver the program state-wide. Preliminary results show that it has increased the number of police cautions being issued to young Aboriginal people. The preliminary success of the program led Victoria Police to remove the requirement for all young people to admit to an offence in order to be issued with a child caution and abolished the limit on the number of child cautions a young person can be offered before they are charged.
Youth Disability Cautioning Program (YDCP) Pilot	The YDCP aims to reduce the number of young people with disability entering the criminal justice system. It is currently under development, and will be based in the AYCP. The program will involve Victoria Police issuing a child caution to a young person with a disability who is accused of low-level offending, and then working with the disability sector to connect that person with services to address the underlying causes of the offending behaviour. The program will involve fast-tracked referrals to relevant participating agencies including support programs, education or employment opportunities and mentoring. The pilot was anticipated to commence on 1 November 2021 however it is unclear whether it has.

Source: Office of the Public Advocate, *Submission 153*, p. 23; Victorian Government, *Aboriginal Youth Cautioning Program,* <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-22-fewer-aboriginal-people-enter-the-2> accessed 16 January 2022; Tammy Mills, 'Criminal charges over minor offences prod police to change tack on youth cautions', The Age, 9 September 2021, <https://www.theage.com.au/national/victoria/criminal-charges-over-minor-offences-prod-police-to-change-tack-on-youth-cautions-20210908-p58pum.html> accessed 16 January 2022; Parliament of Victoria, Legislative Council Legal and Social Issues Committee, Inquiry into the use of Cannabis, August 2021, pp. 126-127.

At a public hearing in Melbourne, Fiona Dowsley, Chief Statistician of the Crime Statistics Agency, provided evidence that issuance of child cautions and warnings by Victoria Police has declined during the last decade from 37% in 2010–11 to 20% in 2019–20. She said that fewer cautions are bringing people further into contact with the criminal justice system:

> We are finding police are using diversion options less over time, bringing more people further into the criminal justice system … Looking at child cautioning, within 12 months of receiving a caution, 36 per cent of those cautions were recorded for a further offence

> compared to 48 per cent who were charged. When we controlled for all available factors, that still held.[116]

Fiona Dowsley noted that the Crime Statistics Agency also found that Victoria Police is less likely to issue cautions:

- to young people in lower socio-economic areas
- to young Aboriginal people accused of offences
- to people accused of drug offences in relation to methamphetamine as opposed to cannabis.[117]

Throughout the Inquiry, several stakeholders provided evidence which reflected the Crime Statistics Agency's findings.

The Youth Affairs Council Victoria submitted that because police cautioning has no legislative underpinning it is applied very inconsistently across regions and between people:

> Young people who attended our consultations reported a high degree of discretion in how they were treated by police; there was an overwhelming sense that 'snap judgments' and unfair assumptions about a young person's character were defining their interactions with police.[118]

The Council also noted that police discretion adversely impacts racially diverse young people. It asserted that 'every single young person' who participated in its consultations 'was acutely aware of how race and gender impacts police treatment, especially of racially diverse young men'. It claimed that 'several people recalled clear experiences of racial profiling'.[119]

Jesuit Social Services, Smart Justice for Young People and Amnesty International made similar claims in relation to culturally and linguistically diverse and Aboriginal people. Amnesty International stated that Victoria Police are more likely to arrest and detain, and less likely to caution Aboriginal children than their non-Aboriginal peers.[120] Smart Justice for Young People asserted that discrimination in the use of police discretionary powers is drawing Aboriginal and culturally and linguistically diverse children disproportionately into the criminal justice system. It contended that young Aboriginal Victorians are less likely than their non-Aboriginal counterparts to be cautioned or referred for diversion.[121]

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116 Fiona Dowsley, Chief Statistician, Crime Statistic Agency, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 2.

117 Ibid., pp. 4, 7.

118 Youth Affairs Council Victoria, *Submission 118*, p. 19.

119 Ibid.

120 Amnesty International, *Submission 89*, p. 12.

121 Smart Justice for Young People, *Submission 88*, p. 4.

Inner Melbourne Community Legal made similar observations about Victoria Police's interactions with people with mental illness. It suggested that officers inconsistently apply cautioning in lieu of charging when interacting with accused people with mental illness. It reflected that it has 'assisted many clients charged with low-level offences which are a direct consequence of a mental health episode' and called for an increased impetus for Victoria Police not to charge people who are experiencing mental illness at the time of their offending. It therefore recommended the introduction of a 'specific mental illness caution' to manage low-level offending attributable to mental illness.[122]

Stakeholders advocated for three major reforms to expand access to cautioning for people experiencing disadvantage. The reforms aim to improve the consistency of Victoria Police's use of cautions across different regions and populations within the community, namely:

- expanding Victoria Police's capacity to make referrals to local legal and social support services[123]
- legislating to codify police cautions[124] and introduce a presumption in favour of cautioning for some offences[125]
- requiring police to provide a 'notice of failure to caution' to a senior officer in cases where they believe it is inappropriate to issue a caution.[126]

Stakeholders suggested monitoring the impact of these reforms and reviewing them within two years.[127]

Victoria Legal Aid argued that codifying a cautioning scheme in legislation will help reduce the number of people experiencing disadvantage from getting caught up in the criminal justice system:

> A further shift in law enforcement practices, including changes to police charging, cautioning and diversion processes, could play a significant role in reducing contact of marginalised Victorians with the criminal justice system and removing minor matters from the court. This will assist to reduce the overrepresentation of marginalised people in the growing remand and prison population.[128]

During a public hearing, Dan Nicholson, Executive Director of Criminal Law at Victoria Legal Aid, was questioned regarding the appropriateness of legislating a presumption in favour of cautioning for some offences, given that not all offences are victimless. He responded:

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122 Inner Melbourne Community Legal Centre, *Submission 133*, pp. 12–13.

123 Elena Campbell, Associate Director, Research, Advocacy and Policy, Centre for Innovative Justice, RMIT University, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 40; Dan Nicholson, Executive Director, Criminal Law, Victoria Legal Aid, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 25.

124 Youth Affairs Council Victoria, *Submission 118*, pp. 19-20; Victoria Legal Aid, *Submission 159*, pp. 7–8.

125 Smart Justice for Young People, *Submission 88*, p. 8; Victoria Legal Aid, *Submission 159*, pp. 7–8; Nicholson, *Transcript of evidence*, p. 25.

126 Smart Justice for Young People, *Submission 88*, p. 8.

127 Youth Affairs Council Victoria, *Submission 118*, pp. 19–20.

128 Victoria Legal Aid, *Submission 159*, p. 8.

> There will always be an exercise of discretion. What a legislative scheme does is it tries to make it more consistent and also allows the possibility of court oversight of that decision-making if it does go wrong. That is all—nothing further.[129]

WEstjustice noted in a submission to the Inquiry that it is already working with Victoria Police to expand and improve the consistency of the use of cautioning in Western Melbourne as part of its Youth Crime Prevention and Early Intervention Project. Box 5.2 describes the project.

BOX 5.2: Youth Crime Prevention and Early Intervention Project

WEstjustice, Wyndham Police Service, Brimbank Police Service and a range of legal, court and advocacy services are working together to design and pilot the Youth Crime Prevention and Early Intervention Project.

The program aims to reduce the rate of offending and re-offending amongst children and young people in western Melbourne through the following key initiatives:

- Increasing the use and consistency of warnings, cautions and diversions for children and young people, particularly for groups that are overrepresented in the criminal justice system (Aboriginal, Maori and Pasifika Australians and South Sudanese Australians).
- Establishing a fast-tracked Diversion List at Werribee and Sunshine Children's Courts–reducing the current significant delay between arrest and the first listing of a Diversion Hearing from approximately five months to within one month.
- Training police officers on the benefits of early intervention (including cautions, diversions and referrals to social and legal support services), criminogenic risk factors for young people and cultural competency.
- Mandating referrals at point of arrest (with consent of the accused young person) to social support services (such as mental health) and legal services. Referrals will be supported by a Support Coordinator provided by Victoria Legal Aid.
- Increasing early referrals for victims to support their recovery.
- Employing a Youth Crime Sergeant at participating police stations to oversee and promote the various aspects of the pilot and provide a consistent approach to processing children and young people.

The implementation of the pilot project has been delayed by the COVID-19 pandemic. However, planning for the design and delivery of the project has already deepened collaboration between partner agencies.

Source: WEstjustice, *Submission 141,* pp. 12–13.

129 Nicholson, *Transcript of evidence*, p. 26.

The Committee is concerned to hear that the issuance of verbal and recorded cautions by Victoria Police has declined over time and is inconsistent across the community, despite being well recognised as important tools for diverting people away from the criminal justice system. The Committee notes that similar criticism was levelled at the Cannabis Cautioning Program during the Committee's Inquiry into the use of cannabis in Victoria.[130]

FINDING 19: Victoria Police's use of cautions for both children and adults has declined over the past decade and remains inconsistent across the community. Young Aboriginal people and young people in lower socio-economic communities are less likely to receive a caution—as opposed to a charge—than other Victorians. Adults accused of drug offences in relation to methamphetamine, as opposed to cannabis, are also less likely to receive a caution—as opposed to a charge.

The Committee recognises stakeholder calls to introduce a legislative basis for cautioning which includes:

- a presumption in favour of cautioning
- a requirement to explain instances where a caution has not been issued
- better connectivity between Victoria Police and community based social support services.

Such an approach has the potential to reduce engagement with the criminal justice system by expanding and increasing the consistency of Victoria Police's use of verbal and recorded cautions. However, the Committee does not feel it received enough evidence throughout this Inquiry to recommend a legislated cautioning scheme at this time. For example, the Committee is unable to identify why Victoria Police's use of cautions has declined, why they are inconsistently applied and whether a legislated cautioning scheme can provide the flexibility Victoria Police require to respond to the specific circumstances of individual cases.

As such, the Committee would like to see the Department of Justice and Community Safety (DJCS) examine this issue in more detail.

130 See evidence provided by Dr Kate Seear, Associate Professor & Principal Research Fellow, DruGS Research Program, Australian Research Centre in Sex, Health and Society, Latrobe University, public hearing, Melbourne, 19 May 2021, *Transcript of evidence*, p. 54.

RECOMMENDATION 23: That the Department of Justice and Community Safety review the use of verbal and recorded cautions by Victoria Police to inform reform aimed at expanding the use of, and improving the consistency of, cautions across the community. Specifically, the review should consider:

- factors underpinning the declining and inconsistent use of cautions across the community and how these can best be addressed
- the advantages and disadvantages of introducing a presumption in favour of cautioning—as opposed to a charge—in relation to appropriate minor offences
- how the issuance of a caution can better connect individuals with social support to address their criminal behaviours.

5.4.2 Police consent to court-based diversion

Adults charged with summary offences can avoid a criminal record by securing a court-based diversion through the Criminal Justice Diversion Program.

The Criminal Justice Diversion Program is provided for by s 59 of the *Criminal Procedure Act 2009* (Vic). The Program enables people accused of committing their first offence to be diverted away from further contact with the criminal justice system so long as their offence was of a minor nature—for example criminal damage, shop theft, or minor drug offences. For a matter to be eligible to be resolved through a diversion program:

- the accused person must agree that they are responsible for the offence
- the matter must be heard in the Magistrates' Court
- the offence must not attract a minimum or fixed sentence or penalty
- both the accused and the prosecution (typically Victoria Police) must consent to diversion.

While an accused person must admit that they are responsible for an offence in order to qualify for the Criminal Justice Diversion Program, that does not mean that they are pleading guilty. So long as they abide by the conditions of any diversion which is granted, there will be no finding of guilt and no criminal record.[131]

Victoria Police has developed the Victoria Police Diversion Criteria Matrix to guide its decision to approve or reject an application for court-based diversion. The matrix is not publicly available. However, an example was published in Liberty Victoria's 2018 report, *Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria*.

131 Victoria Legal Aid, *Diversion programs*, 12 June 2019, <https://www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/diversion-programs> accessed 15 January 2022; Go To Court, *Referrals to Diversion (Vic)*, <https://www.gotocourt.com.au/criminal-law/vic/referrals-to-diversion> accessed 15 January 2022.

Figure 5.1 Victoria Police Diversion Criteria Matrix example (provided by Liberty Victoria)

DIVERSION CRITERIA MATRIX

Future Offending Risk	Offence Seriousness: 1 — Minor	2 — Medium	3 — Major
3 — Major	No	No	No
2 — Medium	Possible	Possible	No
1 — Minor	Yes	Possible	No

OFFENCE SERIOUSNESS TABLE

Rating	Offence Seriousness
3 — Major	Under no circumstances should the following offences be considered: • Sex offences • Family violence offences • Traffic Drug of Dependence • Any offence involving a serious injury • Any offence attracting a mandatory sentence • Any offence incurring 'vehicle impoundment' provisions
2 — Medium	All offences other than the above in consideration with: • The attitude of any victim (if any) • The context of the offending • Public Interest considerations
1 — Minor	Any Summary Offences (other than those attracting a mandatory sentence) in consideration with: • The attitude of the victim (if any) • The context of the offending • Public Interest considerations

Source: Liberty Victoria, *Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria*, 2018, p. 14.

The Victoria Police Diversion Criteria Matrix is supplemented by Victoria Police policies which explain that diversion should only be objected to where 'exceptional circumstances exist' and that the common meaning of 'exceptional circumstances' applies.[132]

When a diversion is granted, the magistrate may adjourn proceedings for up to a year to enable the accused person to undertake the actions or meet the conditions specified in a diversion plan, for example:

- apologising to the victim
- undertaking counselling or alcohol and other drug treatment

132 Law Institute of Victoria, *Submission 112*, p. 65.

- completing an educational course, such as a drug awareness program or defensive driving
- undertaking community work
- making a donation.[133]

If these conditions are abided by, Victoria Police drops the charges, and the matter does not proceed further.[134]

A very similar option for diversion is provided to young people accused of offences through the Children's Court Youth Diversion Service. The Children's Court Youth Diversion Service is provided for by the *Children Youth and Families Act 2005* (Vic). Eligibility requirements also include prosecutorial consent, usually from Victoria Police, and the Service facilitates the development of diversion plans with comparable conditions. Victoria Police policy stipulates that it may not consent to a diversion under the Service if it has 'serious concerns' but does not elaborate on what these might encompass. Witnesses suggested that Victoria Police also maintains Youth Diversion Criteria Matrices to guide its decisions to approve or reject an application for youth diversion. However, this is not publicly available.[135]

Stakeholders raised several concerns in relation to the requirement for Victoria Police to consent to court-based diversions. Many reflected that Victoria Police's approach to consenting or rejecting a diversion is highly inconsistent, and at times inappropriate, as it is largely based on individual officer discretion.

The Centre for Multicultural Youth submitted that Victoria Police's approach to consenting to youth diversion differs between regions and demographics of young people, particularly multicultural youth. It noted that limited diversion pathways, unconscious bias and racism are factors informing this inconsistency:

> - Limited diversion pathways, most notably a lack of appropriate, targeted supports for multicultural young people in the community …
> - Failure to consistently enforce the principle of detention as a measure of last resort for all young people, all the time – while it is recognised that diversion is inconsistently used and under- used, particularly in the policing context, prevalence of unconscious bias and racism are also directly impacting upon the unequal use of discretionary power in decisions to divert or remand multicultural young people.[136]

Carmel Guerra OAM, Director and Chief Executive Officer at the Centre for Multicultural Youth, said that young culturally and linguistically diverse people are sometimes not afforded any opportunity for cautioning or diversion. As a result, their engagement with the criminal justice system can quickly escalate:

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133 Victoria Legal Aid, *Diversion programs*; Go To Court, *Referrals to Diversion (Vic)*.

134 Victoria Legal Aid, *Diversion programs*; Go To Court, *Referrals to Diversion (Vic)*.

135 Department of Justice and Community Safety, *Children's Court Youth Diversion Service*, <https://www.justice.vic.gov.au/justice-system/childrens-court-youth-diversion-service> accessed 16 January 2022; Law Institute of Victoria, *Submission 112*; Anglicare Victoria, *Submission 123*, p. 11.

136 Centre for Multicultural Youth, *Submission 95*, pp. 5–6.

> there are certain groups who feel they are overpoliced—using their language, not mine … Some of the young people we work with go with seeing a police officer, not getting cautioned, bypassing the whole diversionary system and ending up in youth detention with no contact with the youth justice system. Again, that speaks to some failure of the police-community interface.[137]

Fitzroy Legal Service said that 'any processes that rely on police discretion are open to stigma, prejudice and discrimination'. It claimed its lawyers have witnessed 'numerous examples of police prosecutors refusing to consent to [adult] diversion in circumstances where it would have been appropriate'. It noted a recent example where a client was refused diversion on the basis of a prior criminal record, despite it being low-level offending over 10 years ago.[138]

> **Nathan was charged with armed robbery of a train station, after he assisted a group of people he recently met. Nathan was not the aggressor, and he passed the weapon to the main offender, who made the demand.**
>
> **Nathan was 15 years old at the time and was diagnosed with an intellectual disability. He had significant supports from his family and the community.**
>
> **The informant and prosecutor did not consent to diversion; however, the lawyer raised the matter to the Magistrate. The Magistrate prompted the prosecutor to reconsider, after noting that the personal circumstances and level of involvement was low. Written submissions were then sent to the Senior Sergeant and the Magistrate.**
>
> Law Institute of Victoria, *Submission 112*, p. 63.

The Victorian Council of Social Services claimed that 'a significant body of evidence indicates that Aboriginal … people are less likely to be provided with opportunities for diversion, more likely to be charged with public nuisance offences and more likely to be targeted for offences such as being drunk in a public place'.[139] Additionally, the Centre for Innovative Justice said Aboriginal women in particular are subjected to discriminatory policing:

> One Australian academic has described police practice as it relates to women, and in particular to Aboriginal women, as "the over-policing as offenders, and the under-policing as victims".[140]

Aboriginal Victorians' access to court-based diversion is discussed further in Chapter 10.

The Law Institute of Victoria also observed inconsistencies in Victoria Police's provision of prosecutorial consent for a court-based diversion. It provided survey data demonstrating that prosecutorial consent to diversion programs differs across cases and different regions.

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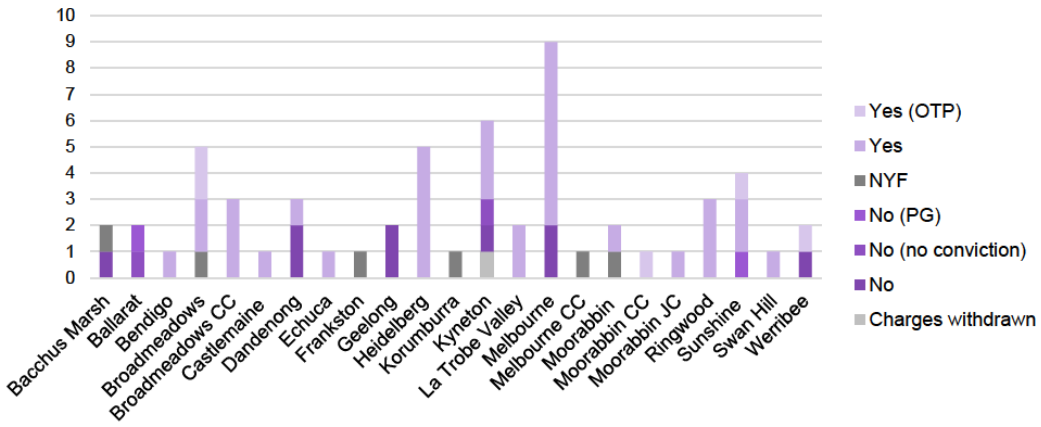
137 Carmel Guerra OAM, *Transcript of evidence*, p. 42.

138 Fitzroy Legal Service, *Submission 152*, p. 48.

139 Victorian Council of Social Service, *Submission 137*, p. 23.

140 Centre for Innovative Justice, *Submission 82*, p. 6.

Figure 5.2 Diversion by court



Note: OTP = On The Papers, NFY = Not Yet Finalised, PG = Plea of Guilty.

Source: Law Institute of Victoria, *Submission 112,* p. 62.

The Institute said the survey data demonstrated inconsistencies, particularly regarding 'family violence matters and concerns in specific courts, such as Bacchus Marsh and Broadmeadows':[141]

> as demonstrated by the LIV [Law Institute of Victoria] survey above, application of the Matrices has resulted in rigid rules surrounding eligibility. For example, family violence matters and driving while suspended offences are considered inconsistently. This results in practitioners being required to establish something akin to "exceptional circumstances" when seeking a diversion for family violence matters. Further, some low-level, otherwise technical breaches of family violence intervention orders are recommended for diversion, whilst others are not. Inconsistency also exists with driving while suspended offences, where one prosecutor at Kyneton recently refused diversion, citing "ineligibility" for that type of offence, whereas another prosecutor, in the same court and only a week prior, recommended a diversion for a young woman for the same offence.[142]

The Law Institute attributed these inconsistencies to the policies and procedures informing how Victoria Police makes decisions in relation to diversion and expressed concern with several elements of Victoria Police's approach. It argued that:

- the Victoria Police Diversion Criteria Matrix is not publicly available and is too broad, resulting in inconsistent decisions regarding whether a recommendation for diversion is granted
- there is no clear protocol which outlines how practitioners should approach Victoria Police to seek a recommendation for diversion, nor is there a process for escalating this request if it is initially denied

141 Law Institute of Victoria, *Submission 112*, pp. 60–62.

142 Ibid., p. 64.

- there is no standardised form for seeking a diversion which requires Victoria Police to consider the circumstances of the offences, as opposed to a 'tick the box' approach based on the type of offence committed
- in cases where Victoria Police refuse to provide a recommendation for referral, there is no mechanism whereby practitioners can request reasons for refusal which impedes the accountability and transparency of the process
- Victoria Police appear to be withholding recommendations for diversion in cases where an accused has exercised their right to silence during a police interview with the justification that this indicates a lack of remorse and the *Criminal Procedure Act 2009* (Vic) requires an accused to admit responsibility for an offence in order to qualify for a diversion.[143]

This issue is discussed in more detail in Chapter 10.

Anglicare Victoria expressed similar concerns in relation to the Victoria Police Youth Diversion Criteria Matrices as those outlined by the Law Institute of Victoria. It suggested that the matrices are resulting in 'perverse outcomes' for young people:

> The matrix for youth diversion technically rules out diversion for young people even when they are charged with relatively minor traffic offences and is more onerous than the legislation. While section 356B of the Children, Youth & Families Act, excludes diversion for some offences, it does not specifically exclude many of the offences caught by Victoria Police's vehicle impoundment exclusion. The result is that a young person charged with a relatively minor offence (e.g. loss of tractions or a 'burnout'), is precluded from the police agreeing to diversion and pushed into the criminal justice system, despite the low maximum penalty for that offence of 5 penalty units (roughly $900).[144]

In addition to these process-related concerns, the Law Institute of Victoria contended that it is inappropriate for diversion programs to require prosecutorial consent in the first place. It felt that this places Victoria Police in a 'quasi-judicial position by usurping the role of the court in preventing the magistrate from considering the viability of a diversion'. It argued that access to a diversion program should be up to the magistrate's discretion.[145]

The Law Institute of Victoria made a series of recommendations to address its concerns. Firstly, it recommended the removal of 'the requirement for prosecutorial consent in section 59(2)(c) of the *Criminal Procedure Act 2009* (Vic)' and replacement of this section with a 'requirement for the Magistrate to consider the recommendation of the prosecutor', and a 'right to reply for the accused'. In lieu of this recommendation, or until such time as it is implemented, the Institute recommended the development of

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143 Ibid., pp. 58–73.

144 Anglicare Victoria, *Submission 123*, p. 11.

145 Law Institute of Victoria, *Submission 112*, pp. 58–73.

a written protocol 'stipulating the steps to take to escalate a matter in the event of disagreement where a diversion is refused' by Victoria Police.[146]

Similar recommendations were made by other stakeholders.

The Office of the Public Advocate made the same recommendation as the Law Institute of Victoria, arguing that empowering magistrates to grant diversions without requiring the consent of Victoria Police will expand the reach of diversion programs.[147]

Brimbank Melton Community Legal asserted that in its experience, 'the discretion of police to recommend diversion programs [is] often exercised inconsistently, and the likelihood of it being recommended for diversion often com[es] down to the views and discretion of an individual police officer'. It also recommended the removal of the requirement under s 59 of the *Criminal Procedure Act 2009* (Vic) that the prosecutor consents to a diversion program. It argued for the transfer of power to magistrates to order a diversion program, even when Victoria Police do not make a recommendation for one.[148]

The Human Rights Law Centre argued that it is inappropriate for Victoria Police to be the 'gatekeeper' for youth and adult opportunities for diversion:

> That is something that applies at the moment for adults and for children, and we think that that should be removed. Police should not be exerting influence over that. Being able to access a diversion program can be life changing for people, and that is something that should be prioritised at every point in the process.[149]

The Victorian Aboriginal Legal Service recommended removing the requirement for prosecutorial consent and Victoria Police discretion as to which offences are suitable for diversion.[150]

The Australian Community Support Organisation supported removing the requirement for prosecutorial consent for court-based diversion and increasing funding to social support services which provide alternatives to remand.[151]

Amnesty International and Smart Justice for Young People advocated specifically in support of removing the requirement for prosecutorial consent for young peoples' access to diversion.[152] Smart Justice for Young People asserted that 'all young people should be provided consistent and equitable access to diversion' and the requirement for Victoria Police to consent should be removed to facilitate this:

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146 Ibid., p. 73.

147 Office of the Public Advocate, *Submission 153*, p. 29.

148 Brimbank Melton Community Legal Centre, *Submission 131*, p. 17.

149 Monique Hurley, Senior Lawyer, Human Rights Law Centre, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 38.

150 Victorian Aboriginal Legal Service, *Submission 139*, p. 161.

151 Australian Community Support Organisation, *Submission 91*, p. 22.

152 Amnesty International, *Submission 89*, p. 20.

> The requirement for Victoria Police to consent to a diversion should be removed. A Magistrate should be able to make orders decide based on arguments from prosecution and defence as to why diversion is appropriate /inappropriate. This should include removing the requirement for prosecutorial consent to diversion in section 356D(3)(a) of the *Children, Youth and Families Act 2005*.[153]

The Law Institute of Victoria also made a series of recommendations to improve Victoria Police's approach to decision making around whether or not to recommend that a diversion be granted or denied. The Institute recommended that the Victoria Police Diversion Criteria Matrix be updated to 'better reflect the eligibility requirements specified in the *Criminal Procedure Act 2009* (Vic), including to define "serious concerns" and "exceptional circumstances"'. It also called for relevant decision matrices for adult and youth diversion schemes to be made publicly available to increase the transparency of decision making.[154]

The Institute suggested that a standard process, such as a form, for approaching Victoria Police to seek a recommendation for diversion be established. This would ensure that officers think carefully about an accused's offending conduct when taking the decision to recommend or deny diversion, rather than the current 'tick the box' approach to certain offences.[155] It also recommended that a provision be inserted into the *Criminal Procedure Act 2009* (Vic) to enable practitioners to request the reasons for the refusal of a diversion by Victoria Police.[156]

The Victorian Aboriginal Legal Service also recommended requiring Victoria Police to complete a 'Failure to Divert Declaration for all police briefs' which requires the identification of the 'precise grounds' for failing to recommend a diversion. It recommended that magistrates be required to review the declaration and if the grounds are found to be inadequate, refer the matter to the Diversion Coordinator for further action.[157]

Fitzroy Legal Service also recommended introducing legislation to guide Victoria Police's consideration of diversion. It envisioned a scheme which requires police to consider diversion in all eligible cases, excludes some factors from informing their decision, and requires demographic information about who is offered or refused a diversion to be publicly reported.[158]

The Centre for Multicultural Youth also argued that 'regulated measures and guidance, that removes discretionary powers, mandates rights-based approaches and holds systems and individuals to account are necessary' and may help address 'racism and unconscious bias in the use of discretionary powers'.[159]

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153 Smart Justice for Young People, *Submission 88*, pp. 8–9.

154 Law Institute of Victoria, *Submission 112*, pp. 59, 65.

155 Ibid., pp. 69–71.

156 Ibid., p. 71.

157 Victorian Aboriginal Legal Service, *Submission 139*, pp. 161–162.

158 Fitzroy Legal Service, *Submission 152*, p. 48.

159 Centre for Multicultural Youth, *Submission 95*, p. 9.

Some stakeholders also argued that it would be beneficial to:

- expand the eligibility criteria for diversion to enable more adults and young people to be diverted from the criminal justice system
- increase the range of diversion programs available, to ensure that courts can direct accused individuals to programs that meet their needs.

For example, Fitzroy Legal Service said it:

> strongly support[s] the expansion of eligibility for and access to police and court diversion programs in Victoria, supported by adequately resourced and culturally appropriate community-based diversion programs where these are not currently available.[160]

The Aboriginal Justice Caucus submitted that the:

> most effective justice system and programs invest in comprehensive interventions to divert people away from justice system involvement, provide access to culturally appropriate interventions to rehabilitate, and … support to help prevent future offending.[161]

It argued that police cautioning or court-based diversion and community support programs are important alternatives to incarceration:

> Alternatives to incarceration, such as diversion, cautioning and community support programs delivered by Aboriginal community controlled organisations (ACCOs), community members or Elders are effective in steering people away from offending behaviour by strengthening connections to community, culture and Country. Diversion programs are typically less expensive and more effective than incarceration.
>
> Gender appropriate community based diversionary support options for Aboriginal adults and children and young people is vital in preventing initial contact and reducing further involvement with the justice system.[162]

The Centre for Multicultural Youth submitted that increasing the use of police cautioning for young people would reduce the pressure on the court system which is already under 'systematic strain'.[163] It argued that Victoria Police legislation, policy and practice should make it clear that the detention of children or young people should be a last resort and support targeted diversion for multicultural youth:

> Victoria has very few legislative protections to ensure that children and young people are diverted away from the criminal justice system and not unnecessarily remanded. This is despite well-documented evidence of the success of diversion for young offenders, that diversion leads to safer communities, that is more cost effective than custodial sentences, and that it can be specifically designed to reduce over-representation.

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160 Fitzroy Legal Service, *Submission 152*, p. 47.

161 Aboriginal Justice Caucus, *Submission 106*, p. 9.

162 Ibid.

163 Centre for Multicultural Youth, *Submission 95*, p. 8.

> Our justice system should prioritise alternatives to formal proceedings, including cautions and diversion and make it more onerous to proceed by way of charge (at the moment it is the other way around), and ensure young people have equitable access to caution and diversion.[164]

WEstjustice noted that Victoria Police is already cooperating with other social and legal support services to increase diversionary options for Aboriginal and culturally and linguistically diverse youth in western Melbourne:

> We recognise and commend genuine efforts by Victoria Police to increase diversionary options for Aboriginal and CALD youth and reduce their overrepresentation in the justice system and earlier referrals to support service at the local level here in the west.[165]

The Committee is concerned that Victoria Police's provision of prosecutorial consent to court-based diversion varies between offences and across courts. In the Committee's view, this contributes to inequalities in the criminal justice system by excluding people from important opportunities to take responsibility for their crime and address offending behaviour without receiving a criminal record or prolonging their engagement with the justice system.

FINDING 20: Victoria Police's provision of prosecutorial consent for a court-based diversion varies between offences and across courts. This is because its policies and decision-making tools poorly reflect the legislative basis for diversion programs and offer vague guidance, leaving it to the discretion of individual officers to grant or reject access to a diversion program.

Like stakeholders, the Committee questions the appropriateness of requiring prosecutorial consent to enable an accused person to access a court-based diversion program. It seems to the Committee that this gives the prosecution more influence in the decision to grant diversion than the defence, which may not be resulting in fair outcomes. Transferring this decision-making power to a magistrate would ensure that arguments and evidence from both the prosecution and the defence as to why diversion is appropriate/inappropriate are considered. It will also ensure that the most appropriate pathway forward—which balances holding an individual accountable for offending with their prospects for rehabilitation—is identified for the accused person.

RECOMMENDATION 24: That the Victorian Government review the requirement for prosecutorial consent for a court-based diversion from s 59(2)(c) of the *Criminal Procedure Act 2009* (Vic) and s 356F of the *Children, Youth and Families Act 2005* (Vic) to consider whether these sections should be replaced with a requirement for the magistrate to consider the recommendation of the prosecutor and/or informant in relation to access to a court-based diversion (as opposed to seeking consent), and the provision of a right to reply for the accused person.

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164 Ibid., p. 9.

165 WEstjustice, *Submission 141*, p. 11.

In support of this recommendation the Committee would like to see the policies, decision-making tools and practices of Victoria Police brought closer in line with the legislative basis for court-based diversion, provide more detailed guidance to officers considering whether to consent to or recommend a diversion and facilitate better documentation of why a diversion is consented to/recommended or not recommended/consented to.

RECOMMENDATION 25: That Victoria Police update its polices, decision-making tools, practices and training in relation to court-based diversion to reflect the outcome of the review of prosecutorial consent, and to:

- ensure that they closely reflect the parameters of court-based diversion as established by the *Criminal Procedure Act 2009* (Vic) and the *Children, Youth and Families Act 2005* (Vic)
- provide detailed guidance as to the factors which should inform any decision to consent to/recommend or withhold a recommendation/consent for diversion which are focused on the individual circumstances of the accused, the nature of the alleged offending and prospects for rehabilitation
- provide a clear process for an accused or their legal representation to seek consent to/a recommendation for diversion.

5.5 Police responses to family violence

Family violence is a pervasive issue in Victorian society with serious consequences for victim-survivors and witnesses who are typically women and children.[166] Victoria Police deals with family violence incidents on a daily basis. Family violence offences currently comprise more than 20% of all recorded offences in Victoria, up from 11.2% in 2013.[167] While the reporting of other offences decreased during the COVID-19 pandemic, family violence offences continued to rise.[168] At a public hearing, Chief Commissioner Patton reported that Victoria Police saw over 93,000 family violence incident reports during the last financial year—the most recorded in one year—and said that police are seeing that continue to 'grow year on year'. However, the Victorian Government submitted that 'there is little evidence that the community prevalence and incidence of family violence has changed over time', rather it is likely that increased recognition of family violence as a crime and 'greater confidence in police to respond' are driving an increase in reporting.[169]

166 Jesuit Social Services, *Submission 119*, p. 22.

167 Victorian Government, *Submission 93*, p. 26.

168 Ibid., p. 12.

169 Ibid., p. 25.

Chief Commissioner Patton said that Victoria Police are doing everything they can to 'address and provide support to those who are victims of family violence, predominantly women'.[170]

Victoria Police has been involved in a suite of family violence reforms during the last decade. In 2011, Victoria Police introduced the *Code of Practice for the Investigation into Family Violence* and a revised second edition was released in 2014. The Code outlines how police officers should deploy their legislative powers to stop family violence. It requires Victoria Police to 'respond to all reports of family violence by thoroughly assessing and managing risk and applying for civil protection'. The Code aims to:

- encourage reporting of incidents of family violence to Victoria Police
- intervene early and stop family violence
- achieve good practice through an appropriate, consistent, transparent and accountable response to, and investigation of, family violence
- support an integrated response to family violence, in partnership with other government and nongovernment agencies.[171]

The Code of Practice includes advice on identifying the primary aggressor when a police officer attends a family violence incident. According to the Code of Practice, 'only one primary aggressor should be identified' and police officers should not make cross applications for intervention orders'.[172] If a police officer is unclear who the primary aggressor is, the Code of Practice advises that it should be determined 'on the basis of which party appears to be most fearful and in most need of protection'.[173] The following factors are listed in the Code of Practice as key indicators which could be used to identify a primary aggressor:

- respective injuries
- likelihood or capacity of each party to inflict future injury
- whether either party has defensive injuries
- which party is more fearful
- patterns of coercion, intimidation and/or violence by either party.[174]

In 2014, Victoria Police collaborated with family violence services to pilot the Alexis-Family Violence Response Model (A-FVRM) in several Melbourne bayside suburbs. A-FVRM facilitated a coordinated response to families experiencing regular incidents of family violence (defined by three or more Victoria Police attendances for family violence in a 12-month period). It embedded a social services response to family violence within the justice system, by situating family violence specialists within a police

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170 Chief Commissioner Shane Patton, *Transcript of evidence*, pp. 26–27.

171 Victorian Government, *Submission 93*, pp. 25, 104.

172 Victoria Police, *Code of Practice for the investigation of family violence*, 2019, p. 23.

173 Ibid.

174 Ibid.

family violence unit. It differed from other responses to family violence because it also sought to address the behaviour of the aggressor, rather than exclusively support the affected family members to leave:

> rather than a program logic designed to support an AFM [affected family member] leaving and subsequently supporting them with post separation issues (such as homelessness, legal and financial), the focus in A-FVRM is to stop the violence occurring within the family. This involves exploring the contributing factors to the violence (such as mental health, alcohol and other drugs etc.), providing social services support to the AFM, children and respondent and where applicable remanding of a respondent.[175]

The family violence specialist embedded within Victoria Police as part of A-FVRM had oversight of all the social services engaged with each of the families in the pilot enabling them to work with both the aggressor and the victim to reduce family violence. Meetings involving social services, Victoria Police and the families involved in the program coordinated the support available and responses of all parties, and held everyone to account. The physical integration of a family violence specialist within Victoria Police encouraged social services and law enforcement to learn from each other and collaborate more closely.[176]

The A-FVRM pilot was independently assessed in 2017. This assessment considered police attendance at family violence incidents for families who had been through the program, but had not been a client for at least 12 months. At that point, 111 families had been supported through A-FVRM, of these 75 had not been clients for 12 months or more. The average number of police call outs to these families for family violence was 0.8 a year after they exited the pilot, versus 5.5 a year prior to them entering the pilot. This represented an 85% reduction in recidivism for family violence perpetrators within the pilot.[177]

In 2015, the Royal Commission into Family Violence made a series of recommendations aimed at improving police responses to family violence. These included recommendations for reviewing family violence policies and police guidance for investigating incidents and identifying aggressors, developing new reporting frameworks and improving the supervision of family violence intervention orders. According to the Victorian Government, all Royal Commission recommendations directed at Victoria Police have now been implemented.[178] These have resulted in changes such as updating the *Code of Practice for the Investigation into Family Violence*[179] and the implementation of a revised

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175 Dr Lisa Harris, Dr Anastasia Powell and Dr Gemma Hamilton, *Alexis-Family Violence Response Model*, May 2017, pp. 7, 22.

176 Ibid.

177 Ibid.

178 Victorian Government, *The family violence recommendations*, 8 September 2021, <https://www.vic.gov.au/family-violence-recommendations?filters%5Bfield_fv_recommendation_category_name%5D%5Btype%5D=term&filters%5Bfield_fv_recommendation_category_name%5D%5Boperator%5D=&filters%5Bfield_fv_recommendation_category_name%5D%5Bvalues%5D=Police%3A+front-line+operations+and+workforce&filters%5Bfield_fv_recommendation_category_name%5D%5Bvalues%5D=Police%3A+leadership%2C+resourcing+and+organisational+systems&filters%5Bfield_fv_recommendation_category_name%5D%5Bvalues%5D=Prevention> accessed 17 January 2021; Shane Patton APM, Chief Commissioner, Victoria Police, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*.

179 Victorian Government, *Submission 93*, p. 104.

Family Violence Risk Assessment and Management Report (L17 form).[180] The launch of the new form was accompanied by officer training in conducting family violence risk assessments.[181]

In 2017, Victoria Police recruited 415 additional family violence specialist officers 'to help stop the harm caused by family violence and free up existing resources to tackle other crime'.[182] Across the 21 Victoria Police divisions there are now 31 family violence investigation units focused on addressing family violence issues and 'try[ing] to mitigate the harm and risk involved'.[183]

Victoria Police are also involved in the delivery of the second *Family Violence Rolling Action Plan (2020–2023)* and *Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families (2018–2028)* (Dhelk Dja). The Action Plan establishes 10 whole-of-government priorities for family violence reform over the next three years—for example, one of these priorities is 'perpetrators and people who use violence'. The Victorian Government said that the goal of this priority is to 'contribute to a system-wide web of accountability that holds perpetrators accountable and promotes behaviour change'.[184] Dhelk Dja is an Aboriginal-led agreement that commits Aboriginal communities, services and the Victorian Government to working together and being accountable for ensuring that Aboriginal communities are free from family violence. It sets out six guiding principles to achieve this vision:

- self-determination (Community-led, self-management and leadership)
- collaboration and partnerships
- strengths-based
- cultural and trauma-informed resilience and healing approaches
- safety (cultural, physical and community)
- accountability, transparency and honesty of all parties.[185]

Chief Commissioner Patton also reported a range of Victoria Police initiatives aimed at ensuring victims of family violence are well supported during police interactions:

> We have got a range of other initiatives as well to try and mitigate the risks for the victims of family violence. We have rolled out a digitally recorded evidence-in-chief [body worn cameras] so we can take their evidence-in-chief at the scene. We have now got a Family Violence Centre of Learning—I do not know of any other one anywhere in the world—where we have specialist training. We have a range of special assessment

180 Ibid., p. 105.

181 Ibid.

182 Ibid., p. 103.

183 Chief Commissioner Shane Patton, *Transcript of evidence*, pp. 26–27.

184 Victorian Government, *Submission 93*, p. 46.

185 *Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families 2018–2028* October 2018.

> tools that we have rolled out to give greater skills to our police officers. We have family violence liaison officers specifically to provide victim support. So there is a whole range of different things that are occurring because there is no quick fix for this.[186]

Victoria Police also launched Operation Ribbon in March/April 2020 in response to the spike in family violence incidents being reported during the COVID-19 pandemic. During Operation Ribbon, Victoria Police proactively engaged with known victim-survivors and perpetrators of family violence. Specialist detectives from the Family Violence Investigation Units around Victoria reached out to people considered to be at greater risk of family violence due to the lockdown measures.[187] Chief Commissioner Patton said that the outcomes of the operation were 'astounding' and have informed an ongoing proactive approach to policing family violence:

> The number of arrests and remands that came out of that and the amount of support that we were able to provide were absolutely astounding. The figures—and when I say 'figures', it is a very easy word to use but they are all individuals who are either conducting criminal behaviour or are victims of crime—resulting from that operation were absolutely astounding, even to me. It was a sustained, proactive engagement strategy, and going from that we have learned that it really is the role of our family violence units to be out there being proactive.[188]

While Chief Commissioner Patton recognised the achievements of Victoria Police in combatting family violence and keeping the community safe, he also acknowledged that ending family violence 'is a very long road' and reiterated that officers are 'absolutely committed' to addressing this issue as they are familiar with the tragedy associated with this type of criminal behaviour.[189]

The Committee acknowledges that officers regularly confront challenging family violence incidents in the course of their police work. It notes the importance of ensuring that officers have access to appropriate resources and training to respond sensitively to these incidents and access to support and services to safeguard their wellbeing.

5.5.1 Stakeholder concerns with family violence policing

Evidence received throughout the Inquiry highlighted that, despite a sustained commitment to family violence reform, Victoria Police responses to family violence incidents are not always appropriate and can resulting in adverse outcomes for families—particularly women and children.

Many stakeholders observed that police officers often misidentify the victim-survivor as the primary aggressor in family violence incidents, particularly in instances involving Aboriginal or culturally and linguistically diverse women. Kerry Burns, Chief Executive

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186 Chief Commissioner Shane Patton, *Transcript of evidence*, pp. 26–27.

187 Victorian Government, *Submission 93*, p. 12.

188 Chief Commissioner Shane Patton, *Transcript of evidence*, pp. 26–27.

189 Ibid.

Officer of the Centre Against Violence—a not-for-profit organisation supporting victim-survivors of family violence in the district of Ovens and Murray—said that misidentification does happen 'at times'. She noted that this is 'incredibly harmful to the victim-survivor', impacting not only their reputation, but their ability to access social and other support services.[190] She suggested that Victoria Police should undertake some investigation before identifying aggressors, 'even a 10 minute investigation', which checks the history of the people involved, to ensure the police response is appropriate.[191]

At a public hearing, Amy, a victim-survivor of family violence, shared her experience of being misidentified as the primary aggressor during an incident attended by Victoria Police. She said that police officers did no investigation into her case beyond their initial attendance at the incident before naming her the aggressor.[192]

> **The police say they can only respond to what they see when they attend a scene, which seems a fair enough statement until you actually examine the response of police attending family violence incidents. In my case the police seemed entirely disinterested in what I had to say, because the argument that started the events of that night involved my husband transferring the proceeds of a house sold during our marriage into his mother's bank account. Instead of recognising this as financial abuse, the police thought it was entirely appropriate to walk away, dismissing the entire incident as a fight about money, as I was halfway through explaining the events of the night to them, which had involved me being held down and strangled. Given the lack of interest in even listening to what I had to say, it is unsurprising that police did not believe my account of what had happened. No further investigation occurred beyond the police's initial attendance and interview with me on the night of my arrest. I felt my experience was isolated, but the more people I speak to the more I realise that it is widespread and that every woman thinks she is the only one.**
>
> Amy, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 4.

Several stakeholders referred to research undertaken by Women's Legal Service Victoria which determined that Victoria Police regularly misidentify female victim-survivors as the primary aggressor during family violence incidents. The Legal Service reviewed over 600 client intake forms relating to police applications for family violence intervention orders and found that approximately one in 10 misidentified a woman as the aggressor in a family violence incident.[193]

The Legal Service's research also identified three common factors informing the misidentification of women as an aggressor by Victoria Police. Firstly, it asserted that some women named as the aggressor in a family violence incident did actually use violence. However, data shows that this strongly correlates with a history of being

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190 Kerry Burns, Chief Executive Officer, Centre Against Violence, public hearing, Melbourne, 30 June 2021, *Transcript of evidence*, pp. 27–28.

191 Ibid., p. 29.

192 Amy, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 4.

193 Women's Legal Service, *Policy Paper 1: "Officer she's psychotic and I need protection": Police misidentification of the 'primary aggressor' in family violence incidents in Victoria* July 2018.

subjected to violence and abuse by the other party involved in the family violence incident.[194] Kerry Burns of the Centre Against Violence provided a case study illustrating how victim-survivors can use violence during an incident.[195]

> **I know specifically of a case where the victim-survivor had been subject to many hours of harm and when she was trying to escape that she did use some aggressive techniques—she threw a pot plant through a window and she scrabbled at the perpetrator and scratched him. She was identified as the respondent because it was the perpetrator that made the report.**
>
> Kerry Burns, Chief Executive Officer, Centre Against Violence, public hearing, Melbourne, 30 June 2021, *Transcript of evidence*, pp. 27–28.

The Women's Legal Service Victoria findings also appeared to align with evidence provided by WEstjustice in a submission to the Inquiry.

WEstjustice has begun providing a legal service specifically targeted at women who have been misidentified by Victoria Police as the aggressor during a family violence incident. It said that many of the women it supports offended in self-defence and that the primary perpetrator of violence is actually their partner or ex-partner:

> We have recently started providing targeted services to women misidentified as perpetrators of family violence through our Restoring Financial Safety Project in partnership with McAuley Community Services for Women. Since commencing this work, we have assisted 11 women. In all of these cases, the alleged offending was in the context of a history of family violence where our client was the primary victim and generally a male partner or ex-partner was the primary perpetrator. Often the alleged offending behaviour was in self-defence. Out of these 11 matters 7 were withdrawn by Prosecutions at Court and 4 received Diversions. Although our numbers are small at present, the demand for this type of support is growing at an exponential rate.[196]

WEstjustice recommended a suite of reforms to improve policing of family violence, including:

- ensure that criminal briefs concerning family violence are reviewed by a Family Violence Liaison Officer and introduce a process by which legal practitioners and case-workers can raise misidentification concerns prior to the brief being finalised
- introduce guidelines for the withdrawal of criminal charges where misidentification has occurred
- update the Victoria Police Manual to support cautions for women, young people and children with family violence related offending where they are also a victim-survivor of violence and there is public interest grounds against a prosecution (for example, they may have an intellectual disability)

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194 Ibid.

195 Kerry Burns, *Transcript of evidence*, pp. 27–28.

196 WEstjustice, *Submission 141*, p. 17.

- introduce a review mechanism for family violence intervention order applications involving Aboriginal and culturally and linguistically diverse women who are at greater risk of misidentification as the aggressor
- link families with social support to address violence as soon as possible
- implement police training around the gendered nature of family violence, coercive control and factors informing the victimisation of women. This should instil a presumption that women and children are much more likely to be the victims in a family violence incident, regardless of who called police.[197]

Research by Women's Legal Service Victoria also indicated that police officers misidentify victim-survivors as primary aggressors in family violence because they lack familiarity with, and therefore fail to implement, the guidance contained in the *Code of practice for the investigation of family violence*.[198] The Victorian Aboriginal Legal Service similarly observed that an individual police officer's perception of a victim-survivor when they attend a family violence incident appears to dictate whether they are misidentified as the primary aggressor:

> [it] relate[s] to whether police perceive a victim-survivor as fitting the stereotype of an 'ideal victim' – with the effect that already marginalised women are much more likely to be subjected to misidentification.[199]

The Victorian Aboriginal Legal Service said that factors which increase the risk of misidentification include:

- Willingness of the victim-survivor to cooperate with police
- The emotional state of the victim-survivor, with police officers often regarding someone 'carrying on' in their presence as more likely to be an aggressor, and the calmer person more likely to be the victim-survivor; domestic violence specialists recognise that the opposite is true
- Mental health and addiction issues
- Existing criminal records, which make police much less willing to think of someone as a victim.[200]

The Victorian Aboriginal Legal Service noted that these factors all place Aboriginal women at greater risk of being misidentified as the aggressor because Aboriginal women do not fit the ideal victim stereotype. They are less likely to cooperate with police, more likely than other women to use weapons and are more likely to have a 'fraught relationship' with police due to colonialism and ongoing issues of racial discrimination.[201]

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197 Ibid., p. 18.

198 Women's Legal Service, *Policy Paper 1*.

199 Victorian Aboriginal Legal Service, *Submission 139*.

200 Ibid., p. 71.

201 Ibid.

Women's Legal Service Victoria also said that women are sometimes misidentified as the aggressor in family violence because male perpetrators of abuse are using family violence intervention orders and the protective role of police to coerce and control their partners and further their abuse:

> Victim-survivors tell our duty lawyers that their partners use threats to call police as a form of coercion, and that they observed a police bias in favour of the person who called.[202]

These observations were consistent with the experiences of stakeholders to the Inquiry. For example, Djirra—an Aboriginal Community Controlled Organisation providing legal and other support to Aboriginal women experiencing family violence—said it has reported instances of perpetrators responding to a family violence intervention order levelled against them by attempting to take one out against their victim:

> If court registrars and Magistrates fail to identify the family violence dynamics, an Interim FVIO may be made against the victim. If the client does not have access to appropriate legal representation or engage in the court process, the perpetrator may be successful in obtaining a final FVIO.[203]

Amy also shared with the Committee how her ex-partner used threats to call the police as a means of controlling her and perpetuating abuse.[204]

> **Despite the instances of physical violence, the worst thing he did to control me was with threats to call the police if I did not behave the way he wanted. It was what I feared the most, and he knew it. He weaponised the system I worked within against me. Since I worked within the criminal justice system, I would lose my job and the kids would be taken away by DHS because I had exposed them to family violence. At the times he followed through with these threats he presented as a calm, rational man—putting up with a crazy, drunk wife—who just did not know what else to do but call the police.**
>
> Amy, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 1.

Amy called for Victoria Police and child protection, family violence and mental health services to be trained to detect the 'weaponisation of support services to further perpetuate abuse and to isolate women experiencing family violence'.[205]

Homes Not Prisons said that perpetrators of family violence are weaponising Victoria Police's 'prejudices' by reporting family violence against Aboriginal women, women of colour, trans or gender diverse women, and women who have previously been criminalised. It provided an example from a survivor of family violence.[206]

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202 Women's Legal Service, *Policy Paper 1*, pp. 1–2.

203 Djirra, *Submission 138*, p. 13.

204 Amy, *Transcript of evidence*, p. 4.

205 Ibid.

206 Homes Not Prisons, *Submission 148*, pp. 11–13.

> **I was at home one evening, it was about 7.30, I was just watching TV. I heard a knock at the door, I knew straight away that it was the police because he'd been sending me text messages taunting me that he was going to do this … it was part of the punishment … and when I opened the door the officer told me there was an interim IO [intervention order] in place against me … my stomach just turned. I knew I was trapped and there was nothing I could do about it. They already knew about his family violence because of his earlier assaults, it was the same police station, but they did this anyway …**
>
> **When I told my family, they insisted I leave town for safety. When I went to the police DV unit in the [regional] area I was staying in to ask for help, they threatened to charge me. Later the original police station pursued eight charges against me.**
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> Homes Not Prisons, *Submission 148*, p. 12.

Brimbank Melton Community Legal submitted that a growing focus of its legal practice is working with women who have been misidentified as aggressors in family violence proceedings. It noted, 58% of the women it is assisting—who are subject to an intervention order—are currently experiencing or at risk of family violence. It observed that this figure aligns with other studies which suggest between 10% and 60% of women named as aggressors in family violence are misidentified. The Legal Centre characterised the current rates of misidentification as a 'systemic failure' of the criminal justice system:

> Misidentifying the victims of family violence as perpetrators can have significant and long-lasting impacts, including by impacting their care of children, and putting them at risk of becoming involved in the criminal justice system.
>
> When misidentification occurs, the justice system may inadvertently collude with perpetrators by providing opportunities for them to further harm and control victim-survivors.[207]

The Brimbank Melton Community Legal Service provided a case study describing the experiences of one of its clients.

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207 Brimbank Melton Community Legal Centre, *Submission 131*, p. 6.

CASE STUDY 5.1: Tanya's story

Tanya had been subjected to severe family violence by her partner over many years. Tanya had made multiple police reports, and police had previously sought intervention orders for her protection on three occasions.

Police attended the family home following an incident where the perpetrator pushed Tanya into a glass window, causing cuts to her arms. At this time, there was a safe-contact order, allowing the perpetrator to live at the family home as long as he didn't commit family violence. Tanya attempted to call the police, but she ended the call to avoid further complications or repercussions in her future interactions with the perpetrator. Following this, the perpetrator called the police and alleged the Tanya had committed violence against him and had been the cause of the broken window.

When police attended, Tanya tried to explain that the perpetrator had attacked her and that there was a long history of family violence that had been reported to the police. Despite this, and the fact the officers had access to records of their previous involvement in family violence incidents perpetrated by Tanya's partner, the police applied for an intervention order against Tanya, telling her that it was because her partner had called first.

In their application, the police acknowledged that there had been multiple reports of family violence committed by Tanya's partner and noted that he had told the police that he wasn't actually in fear and had just reported to the police to ensure that his version of events was recorded. After a miscommunication from Victoria Police, Tanya missed the court date, and a final order was made against her.

Source: Brimbank Melton Community Legal, *Submission 131,* pp. 5–6.

Kerry Burns from the Centre Against Violence said police officers need to have a much stronger understanding of coercive control:

> We also think that there needs to be a much stronger understanding of coercive control … Coercive control is the form of family violence that frequently leads to murder-suicide, and yet there may be no history of a physical assault, so we have really got to understand it, identify it and categorise its risks much more accurately.[208]

She provided a recent example of what coercive control can look like during a family violence incident.[209]

208 Kerry Burns, *Transcript of evidence*, pp. 27–28.

209 Ibid.

> **As an example of a recent issue in understanding family violence in the small town of Mansfield, a perpetrator was chasing a victim-survivor down a street, who had packed her bags. She had told him she needed a break and she had a bus ticket to Adelaide. He said, 'No, you're not going anywhere', in front of our police members, and they wrote on the L17[210] that she was willing to remain with him and felt safe, despite not speaking with her alone.**
>
> Kerry Burns, Chief Executive Officer, Centre Against Violence, public hearing, Melbourne, 30 June 2021, *Transcript of evidence*, pp. 27–28.

The Committee also received evidence that Aboriginal and culturally and linguistically diverse women are at greater risk of being misidentified by Victoria Police as the primary aggressor in family violence proceedings.

Djirra reported that it:

> frequently assists [Aboriginal] women who have called police to seek help for family violence and are then misidentified by police as the primary aggressor/perpetrator rather than the victim of crime.[211]

Djirra suggested that 'stereotyping' is a factor in misidentification and that the issue is more common in regional areas where there is a closer relationship between Victoria Police and the community. Djirra said that misidentification contributes to mistrust between Aboriginal women and Victoria Police and that as a result up to 90% of violence against Aboriginal women goes unreported.[212]

Djirra described the experiences of its client Cara in seeking to obtain police assistance with family violence.

> **Djirra's client Cara called the police when her ex-partner, Jack, arrived at her house with his friends. The police did not report Jack's breach of the intervention order that was in place. When Cara tried to report other breaches such as Jack's constant attempts to call her, Cara couldn't prove it was him, as he ensured to always call from a private number and never messaged. Cara was discouraged from reaching out for support.**
>
> **The final time Jack used physical violence against Cara, she was pregnant with their fourth child and the violence was witnessed by police officers. Police supported Cara immediately following the incident. However, on conviction Jack only received a good behaviour bond, despite offending multiple times. Cara lost trust in the justice system, and reflects, 'My life was in shambles, and he got squat. And I kind of just gave up on the justice system.'**
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> Djirra, *Submission 138,* p. 12.

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210 An L17 form is the referral of a victim survivor to a family violence support service by Victoria Police.

211 Djirra, *Submission 138*, p. 13.

212 Ibid., pp. 12–13.

Djirra suggested that Victoria Police should refer Aboriginal women involved in family violence incidents to Aboriginal community controlled family violence legal services for support. It also advocated for mandatory cultural safety training for police officers and a review mechanism for Family Violence Safety Notices issued against Aboriginal women, to ensure misidentification is identified as soon as possible. Victoria Police can issue a Family Violence Safety Notice to protect a victim of family violence, their child or their property. Safety notices outline conditions which must be complied with to avoid a charge, such as leaving the family home immediately and not re-entering until a Magistrate has decided how a family violence case will proceed. Djirra argued that a review mechanism for safety notices:

> would reduce the unnecessary criminalisation of Aboriginal … women, build trust in the justice system, promote reporting of family violence and ultimately prevent misidentification and its consequences.[213]

Smart Justice for Women also noted that Aboriginal women are at greater risk of misidentification because of the ongoing impacts of colonialism:

> Aboriginal women are more likely to be facing family violence. They are more likely to be seriously injured as a result of family violence. But they are also more likely to be misidentified as a perpetrator of family violence, and that can be because of the way police interact with Aboriginal women when they attend these incidents. I guess it is not confined to a family violence incident space, but the interaction between Aboriginal women and police is fraught. It has foundations in ongoing colonialism, and it has foundations in generational trauma that Aboriginal communities have suffered, which is being perpetuated continually by interactions with police…[214]

Dr Adele Murdolo, Executive Director of the Multicultural Centre for Women's Health, observed that culturally and linguistically diverse women are also at greater risk of misidentification as the aggressor by Victoria Police in a family violence incident due to language barriers. Dr Murdolo provided a case study:

> police attended an incident and did not get an interpreter, which I think is not uncommon, spoke only to the man in the situation and in the end arrested the woman, who had called the police in the first place—and because of language issues. He spoke English, she did not, and that is quite a common thing as well—that men will have better English fluency than women in a relationship.[215]

The vulnerability of Aboriginal and culturally and linguistically diverse women to misidentification as aggressors during family violence incidents was also acknowledged by the Victorian Government. The Victorian Government submitted:

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213 Ibid., p. 14; Victoria Legal Aid, *Family violence safety notices*, 2021, <https://www.legalaid.vic.gov.au/find-legal-answers/family-violence-intervention-orders/what-police-do-about-family-violence/family-violence-safety-notices> accessed 17 January 2022.

214 Elena Pappas, Co-Convenor, Smart Justice for Women public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 22.

215 Dr Adele Murdolo, Executive Director, Multicultural Centre for Women's Health, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 52.

> Research suggests that primary aggressor misidentification, whereby the police charge a victim-survivor as the respondent to a family violence order, is most acutely experienced by marginalised groups, including Aboriginal women. All family violence reports where it is known that there are children in the family, are reported to child protection or the Orange Door which means a victim-survivor may risk having her children removed from her care. The consequence of primary aggressor misidentification can have a lasting and traumatic impact on victim-survivors and foster a culture of mistrust that may deter the victim-survivor from reporting further incidents of family violence, potentially exposing them to further harm. It is important to apply an intersectional lens when assessing family violence in order to ensure the identification of the primary aggressor.[216]

The consequences for victim-survivors who are wrongly identified as aggressors during family violence incidents can be substantial.

Research by the Women's Legal Service Victoria identified a range of adverse consequences which can flow from the misidentification of a victim-survivor as an aggressor during a family violence incident, including:

- criminal charges
- separation from children
- loss of reputation
- loss of access to services, employment, housing rights and access to crisis accommodation, and homelessness
- negative immigration rights and visa status implications
- negative family law and child protection implications
- serious economic costs
- denial of financial payments from crisis services, implications for Victims of Crime Assistance Tribunal claims
- increased vulnerability to further violence
- loss of trust in police and the justice system.[217]

Amy reflected that, for her, misidentification as an aggressor during a family violence incidence has had lifelong impacts.[218]

> **I was misidentified as a primary aggressor, and I thought if I just told the truth people would understand; instead I spent four months in custody and lost almost absolutely everything.**
>
> Amy, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 3.

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216 Victorian Government, *Submission 93*, p. 74.

217 Women's Legal Service, *Policy Paper 1*, p. 2.

218 Amy, *Transcript of evidence*, p. 3.

Amy told the Committee that she finds solace in the fact that she is not the only woman to experience misidentification.[219]

> **As I meet more and more women who have had experiences like mine, I find solace and comfort in the fact that I am not alone; that I am not crazy, as my husband had everyone believe, or dangerous and violent, as the police told the court I was. I am not the monster child protection court reports paint me to be, but I am utterly dismayed that the manipulation by men of systems like police, child protection and CAT teams—services intended to help people—to perpetrate further abuse runs rampant and unchecked, and that police and support services are seemingly blind to the fact that they are being manipulated and weaponised to harm the people they are designed to protect. We need an entirely different system in place that is not punitive and that genuinely supports women to get out of violent relationships without punishing them.**
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> Amy, public hearing, Melbourne, 21 October 2021, *Transcript of evidence,* p. 4.

Amy advocated for increasing Victoria Police training to ensure that family violence incidents are investigated beyond the evidence collected during the call out, and to ensure that factors such as financial abuse or frivolous intervention orders are properly considered.[220]

The Victorian Aboriginal Legal Service highlighted that misidentifying a victim-survivor as an aggressor in family violence incidents increases their vulnerability to further violence and disadvantage as it can preclude them from accessing social support services:

> Identification as a perpetrator is often a bar to accessing domestic violence support services, including emergency housing. More broadly, it can make it difficult for a victim-survivor to find employment or access other kinds of government support. Exclusion from domestic violence services also means that victim-survivors cannot benefit from being screened and having the danger they are in assessed, leaving them alone to confront the risk of further violence. Vulnerability is exacerbated by a heightened risk of homelessness and isolation from other support, which can perversely serve to increase a victim-survivor's dependence on their abuser. Intervention from child protection services or the Family Court is also a major risk, and serious concern for Aboriginal people.[221]

The Legal Service noted that Recommendation 41 the Royal Commission into Family Violence called for improving Victoria Police guidance and training to decrease instances of aggressor misidentification in family violence incidents. It argued that this work 'must continue as training and adherence to protocols remain very inconsistent between police stations and courts across the state, with the effect that misidentification continues to be a major problem'.[222] It recommended that Victoria

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219 Ibid., p. 4.

220 Ibid., p. 8.

221 Victorian Aboriginal Legal Service, *Submission 139*, p. 72.

222 Ibid.

Police work with family violence services, legal organisations and community members to fully implement Recommendation 41 of the Royal Commission.[223]

The Victorian Aboriginal Child Care Agency made a similar recommendation. It advocated for embedding a therapeutic, trauma-informed, culturally appropriate practice within Victoria Police through mandatory Aboriginal family violence training. The Agency said that this should be delivered with a 'cultural lens' so that police officers can identify and respond to violence in Aboriginal families:

> Recognising cultural differences in how family violence can present itself within Aboriginal families and the specific experiences of Aboriginal women and children. Adopting a culturally therapeutic, trauma informed model of care across all service deliver, including the continuum of the criminal justice system, will help create a system responsive to the needs of Aboriginal children and young people.[224]

Springvale Monash Legal Service Inc. said that misidentification as an aggressor criminalises victim-survivors, which is particularly damaging to those who have dependent children because it can trigger Child Protection's involvement. It said more holistic responses to family violence incidents should be explored, which involve police who attend incidents being accompanied by social, youth, alcohol and other drug or mental health practitioners.[225]

The Committee is disturbed to hear that the misidentification of female victim-survivors as the primary aggressor in family violence incidents is common and has serious and long-lasting consequences for them and any dependent children they may have.

FINDING 21: Female victim-survivors of family violence are regularly misidentified by Victoria Police as the primary aggressor/respondent in family violence proceedings. Misidentification has serious repercussions which may include:

- criminal charges
- long term separation from dependent children
- exposure to further violence
- the withdrawal of social, legal and financial supports
- visa cancellation and deportation for migrants.

223 Ibid.

224 Victorian Aboriginal Child Care Agency, *Submission 121*, pp. 15, 21.

225 Springvale Monash Legal Service, *Submission 146*, p. 10.

Evidence indicates that a range of factors are informing misidentification, including:

- the use of violence during an incident by a victim-survivor who has been subjected to long-term abuse
- police officers' failure to apply the guidance contained in the *Code of practice for the investigation of family violence*
- male perpetrators of family violence using intervention orders and the protective role of police to coerce and control their partners and further their abuse
- racial profiling, and cultural and language barriers.

The Committee notes that stakeholders were generally supportive of the approach to policing family violence proscribed by the *Code of practice for the investigation of family violence*, but that they felt that the Code was not well applied. Given this evidence and the frequency with which police deal with family violence matters, the Committee would like to see Victoria Police ensure all frontline officers undertake regular training in dealing with family violence incidents which includes the appropriate application of the Code.

RECOMMENDATION 26: That Victoria Police ensure all front-line police officers undertake regular training in relation to responding to family violence incidents, and that training continues to be provided. This training should include:

- the appropriate application of the *Code of practice for the investigation of family violence*
- the gendered nature of family violence
- the factors informing the misidentification of aggressors (including cultural and language barriers)
- the repercussions of misidentification
- social support available to families to address family violence.

The Committee also notes the good outcomes achieved by the A-FVRM pilot by embedding family violence specialists within Victoria Police. The Committee did not get the opportunity throughout the Inquiry to discuss how this pilot has informed the ongoing operation of Victoria Police's family violence units. It would like to see key learnings from this pilot program inform law enforcement responses to family violence if they do not already. Particularly the advantages of embedding social services within the criminal justice system and the benefits which can flow from close collaboration and increased accountability between social services and Victoria Police.

In the Committee's view, the serious consequences of misidentifying a victim-survivor as the aggressor in a family violence matter merits the establishment of a review process able to facilitate the withdrawal of criminal charges in cases where

misidentification has occurred. However, the Committee does not feel that this Inquiry received sufficient evidence to be able to recommend a specific mechanism at this time. It therefore recommends that Victoria Police work with legal and community stakeholders to identify and implement the most appropriate review mechanism.

RECOMMENDATION 27: That Victoria Police, in collaboration with legal and community stakeholders, implement a review mechanism for family violence matters capable of identifying instances where a victim-survivor may have been misidentified as the primary aggressor in an incident and provide information about a process for the withdrawal of criminal charges.

5.6 Increasing Victoria Police accountability

The Committee consulted many stakeholders throughout the Inquiry which felt that Victoria Police is not adequately scrutinised and is not accountable for shortcomings in its operations and practices. Some stakeholders advocated for the establishment of a new independent body to enhance oversight and investigate complaints against Victoria Police.

Oversight of Victoria Police is currently provided by the Independent Broad-based Anti-corruption Commission (IBAC), an independent statutory authority responsible for preventing and exposing corruption in the public sector and for investigating police misconduct. IBAC was established by the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) and is provided with powers to oversee Victoria Police through the *Victoria Police Act 2013* (Vic).[226] Table 5.2 describes activities within, and outside, the scope of IBAC's powers to investigate Victoria Police misconduct.

226 Independent Broad-based Anti-corruption Commission, *About us*, <https://www.ibac.vic.gov.au/about-us> accessed 18 January 2022.

Table 5.2 Scope of Independent Broad-based Anti-corruption Commission's oversight of Victoria Police

Activities within IBAC's oversight responsibilities	• receiving complaints and notifications about corrupt conduct and police personnel conduct (including complaints received by Victoria Police and mandatorily reported to IBAC) • assessing those complaints and notifications to determine which will be referred to Victoria Police for action, which will be dismissed, and which will be investigated by IBAC • providing or disclosing information to the Chief Commissioner relevant to the performance of the duties and functions of Victoria Police • reviewing investigations of selected matters referred to Victoria Police to ensure those matters were handled in a thorough, impartial and timely manner • conducting 'own motion' investigations about police personnel conduct or corrupt conduct • providing oversight through investigation of deaths and serious injuries associated with police contact (pursuant to a standing 'own motion' investigation) • conducting private and public examinations to assist investigations into police personnel conduct and, in the case of public examinations, exposing systemic issues, encouraging people with relevant information to come forward and to serve as a deterrent to others • ensuring police officers and protective services officers have regard to the *Charter of Human Rights* including through investigations, and reviews and audits of Victoria Police complaint investigations • undertaking research and other strategic initiatives, including auditing how Victoria Police handles its complaints • informing and educating the community and Victoria Police about police misconduct and corruption, and ways it can be prevented.
Activities outside of IBAC's oversight responsibilities	• investigating minor duty failures or service issues by Victoria Police (e.g. officers not wearing the appropriate uniform) • reviewing the outcomes of traffic or court decisions • examining matters where IBAC considers that another person or body is more appropriate to investigate, in accordance with legislation. This includes referring allegations to Victoria Police for investigation where appropriate.

Source: Independent Broad-based Anti-corruption Commission, *What is Police misconduct?*, <https://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-police-misconduct> accessed 18 January 2022.

According to IBAC, police misconduct includes officers 'failing to act consistently with Victoria Police policies and procedures', behaving disgracefully or improperly (on or off duty), and 'discrediting Victoria Police or its personnel'. For example, misconduct by police officers may entail:

- unauthorised access, use and disclosure of police information, eg the Law Enforcement Assistance Program (LEAP)
- drink driving or traffic offences by police members
- using, selling or dealing drugs
- theft
- accepting bribes
- not declaring or managing Declarable Associations, or conflicts of interest
- unauthorised secondary employment
- misuse of police resources and breaches of information security

- stalking, family violence, sexual offences, assault
- discrimination or prejudice motivated by race, religion, disability, age, sex, gender identity, sexual orientation, or other characteristics
- breaches of human rights
- excessive use of force
- duty failure
- distributing offensive material
- misrepresentation in log books, time sheets or registers.[227]

The Victorian Government submitted that accountability mechanisms, such as IBAC 'ensure there is strong public oversight of the activities of all Victorian public sector organisations, including those in the justice system', such as Victoria Police.[228]

However in June 2017, the Parliament of Victoria's Independent Broad-based Anti-corruption Commission Committee (the IBAC Committee) conducted an Inquiry into the external oversight of police corruption and misconduct in Victoria which identified several issues with IBAC's oversight of Victoria Police.[229] The IBAC Committee self-referenced the Inquiry in response to community concerns regarding the impartiality and effectiveness of the existing police complaint-handling and oversight systems in Victoria. Some of its stakeholders felt that a new, independent body was needed to receive, handle and investigate complaints about police, to replace IBAC and internal Victoria Police processes.[230]

The IBAC Committee found during its Inquiry that Victoria's complaints and police oversight system 'needs significant improvement' and made 69 recommendations aimed at enhancing the 'transparency, impartiality, effectiveness and efficiency of the system'. The Hon Kim Wells MP, then Chair of the IBAC Committee, summarised the findings of the Inquiry in his foreword to the Committee's report:

> the [IBAC] Committee considers that IBAC needs to give greater priority to its functions of handling, investigating and oversighting complaints about police. For example, IBAC investigates only approximately 2% of the allegations it determines warrant investigation, referring the rest to Victoria Police, including a range of serious police misconduct matters. In order to enhance the attention IBAC gives to serious police misconduct, and police oversight generally, the [IBAC] Committee has recommended the establishment of an adequately staffed and empowered Police Corruption and Misconduct Division within IBAC. Further, the [IBAC] Committee has recommended that, unless there are exceptional circumstances, IBAC, rather than Victoria Police, investigate serious police misconduct. In order to assist IBAC in carrying out these important

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227 Royal Commission into the Management of Police Informants, *Final report: Summary and recommendations*, November 2020.

228 Victorian Government, *Submission 93*, p. 100.

229 For additional information about the Committee or its Inquiry visit <https://www.parliament.vic.gov.au/58th-parliament/ibacc>.

230 Independent Broad-based Anti-corruption Commission Committee, *Inquiry into the external oversight of police corruption and misconduct in Victoria*, report for Victorian Parliament, Victorian Government Printer, September 2018, p. xv.

> functions, the [IBAC] Committee has recommended the conferral of selected additional investigative and oversight powers on it.[231]

The IBAC Committee made recommendations directed at both IBAC and the Victorian Government which sought to drive improvement across all stages of complaint handling process, including:

- the receipt
- handling
- assessment
- referral
- investigation
- review and oversight.

The Committee has not recommended the establishment of a new independent body to receive, handle and investigate all complaints about police. It felt that the existing system, with improvement, could achieve best practice in complaints handling.[232]

Neither the Victorian Government nor IBAC have tabled a formal response to the IBAC Committee's report. However, both have acknowledged its findings. IBAC noted that it cooperated with the Inquiry, and 'looks forward to the Government's response' and that any 'legislative change as a result of the Committee's recommendations will ultimately be a matter for Parliament'.[233] The Victorian Government acknowledged the Inquiry by commencing a 'systemic review of Victoria's police oversight system with the aim of introducing new laws in this term of government'. The Government noted that the systemic review was also a recommendation of the Royal Commission into the Management of Police Informants:

> That the Victorian Government, within two years, undertakes a review of institutional and legislative structures for the oversight of Victoria Police's exercise of powers, to ensure that Victoria's police oversight system is consistent and coherent and contributes to improved police accountability, including through outcome-focused monitoring of police decisions and actions.[234]

The Royal Commission called for the Victorian Government to undertake this review 'in tandem' with its policy response to the IBAC Committee's Inquiry.[235]

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231 Ibid.

232 Independent Broad-based Anti-corruption Commission Committee, *Improvements recommended for police complaints and oversight system*, media release, <https://www.parliament.vic.gov.au/images/stories/committees/IBACC/Police_corruption/Media_Release_IBAC_2018-08-4.pdf> accessed 4 September 2018.

233 Independent Broad-based Anti-corruption Commission, *IBAC notes Parliamentary Committee report into police oversight*, 4 September 2018, <https://www.ibac.vic.gov.au/media-releases/article/ibac-notes-parliamentary-committee-report-into-police-oversight> accessed 18 January 2022.

234 Royal Commission into the Management of Police Informants, *Final report*, pp. 234–235.

235 Ibid.

The systemic review of police oversight is being managed by the DJCS and will examine:

- how to improve the system of complaints about police misconduct to ensure that it meets the needs of all Victorians
- how to ensure that police misconduct matters are assessed, classified, and addressed consistently and are managed in a way that appropriately reflects the nature and seriousness of the complaint
- how to ensure that the exercise of police coercive and intrusive powers, decisions, and actions is subject to effective oversight.[236]

DJCS published a consultation paper outlining the IBAC Committee's findings in relation to community concerns about IBAC and its oversight of police misconduct, as well as stakeholders' proposals to improve the accountability of Victoria Police. It invited members of the community to complete an anonymous online survey or make a submission addressing the themes of the consultation paper by 1 February 2022. It explained that 'responses to the survey and/or consultation paper will help inform the design, scope and implementation of police oversight reforms in Victoria'. Additional stakeholder consultation will be completed during the first half of 2022 and a draft bill finalised in late 2022. DJCS will report on the outcome of this consultation via the Engage Victoria website.[237]

Many of the community concerns noted by the IBAC Committee during its Inquiry and outlined in the systemic review consultation paper were repeated during this Inquiry into Victoria's criminal justice system. There were calls to strengthen the powers and practices of IBAC or establish a new independent body to enhance oversight of Victoria Police and investigate complaints relating to officer misconduct.

Inner Melbourne Community Legal submitted that there is 'limited confidence in the current police complaints and oversight processes' undertaken by IBAC and Victoria Police:

> Victorians do not trust that these processes are transparent or effective enough for them to engage with.
>
> The current processes result in Victoria Police reviewing complaints in relation to their own members... [238]

The Inner Melbourne Community Legal noted that the Hon. Robert Redlich AM QC, IBAC Commissioner, 'has expressed on numerous occasions that IBAC is not properly funded to undertake the work required to meet its legislative functions'.[239]

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236 Department of Justice and Community Safety, *Consultation paper: Systemic review of police oversight*, 25 November 2021, p. 3.

237 Victorian Government, *Systemic review of police oversight*, <https://engage.vic.gov.au/systemic-review-police-oversight> accessed 19 January 2022.

238 Inner Melbourne Community Legal Centre, *Submission 133*, pp. 10–11.

239 Ibid.

The Federation of Community Legal Centres Victoria Inc. noted that, although IBAC has the legislative power to investigate police misconduct, it refers most complaints back to Victoria Police to examine. It argued that this conflict of interest leaves overpoliced communities vulnerable:

> There is an inherent conflict of interest in vesting investigative powers for police misconduct in the police themselves. This undermines public confidence in the outcomes of police investigations into misconduct and weakens police accountability. This can disproportionally impact communities that are overpoliced. This includes Aboriginal and Torres Strait Islander communities in Victoria where there is a long history of over-policing, a key driver of incarceration.[240]

Smart Justice for Young People said that although 'some young people are mistreated by police', many are hesitant to make a formal complaint because they do not believe police officers will be held to account:

> Many young people are reluctant – or don't realise they have a right – to complain about treatment by police officers. They also regularly say they don't want to make a complaint because they did not think it will do anything, and/or they are fearful of might happen to them if they do.[241]

The Victorian Council of Social Services similarly submitted that existing accountability mechanisms for Victoria Police are 'failing to change systemic behaviour or build community confidence in police'. It asserted that 'police who do abuse the trust of Victorians and undermine the integrity of the justice system must be held accountable' and called for the implementation of 'a system of independent investigation of police misconduct'.[242]

The Victorian Aboriginal Legal Service said that it has serious concerns in relation to IBAC and suggested that the agency is not trusted or viewed as credible by Aboriginal Victorians:

> VALS [Victorian Aboriginal Legal Service] has serious concerns that IBAC has at no point in its history demonstrated a capacity to deliver independent or adequate investigations into police misconduct against Aboriginal people. IBAC has supported and enabled an approach to misconduct complaints which is centred on Victoria Police investigating themselves. This approach, which fails to adequately account for the major racial disparities in misconduct complaints and for the possibility of systemic misconduct issues which cannot be identified or addressed from inside Victoria Police, has little hope of winning trust or credibility with the Aboriginal community.[243]

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240 Federation of Community Legal Centres Victoria Inc., *Submission 132*, p. 15.

241 Smart Justice for Young People, *Submission 88*, p. 13.

242 Victorian Council of Social Service, *Submission 137*, pp. 31–32.

243 Victorian Aboriginal Legal Service, *Submission 139*, p. 135.

The Legal Service detailed a range of criticisms of IBAC and its practices, namely:

- That IBAC does not have a well-established process for handling complaints made by Aboriginal people or organisations in a transparent, professional and culturally appropriate manner. The Legal Service suggested that IBAC's lack of focus on the experiences and needs of Aboriginal Victorians is indicative of its failure to understand racial disparities in police misconduct. Aboriginal Victorians are more likely to make complaints regarding use of 'excessive force, duty failure and demeanour problems including racism' as opposed to general customer service complaints made by the broader population.[244]
- That IBAC does not gather evidence when it is determining whether a complaint about police misconduct should be referred back to Victoria Police for investigation or whether it is a serious matter and should be investigated independently by IBAC. Moreover, its oversight of internal police investigations into misconduct is limited, even in relation to serious allegations.[245]
- That IBAC refers complaints regarding alleged human rights abuses by police officers back to Victoria Police for investigation. The Legal Service suggested this practice breaches the United Nations Human Rights Committee's *International Covenant on Civil and Political Rights* which requires complaints of this nature to be handled by an oversight body with no hierarchical or institutional connections between the investigators and the officers involved in the complaint.[246]
- That IBAC's focus on independently investigating only the more serious cases of alleged police misconduct, leaves Victoria Police to internally investigate all other allegations. In the Legal Service's view, this 'allows for abuse to become entrenched and prevents IBAC from identifying patterns of misconduct', systemic or cultural problems.[247]
- That IBAC is not accessible to the communities who are experiencing overpolicing and making allegations of police misconduct. The Legal Service felt that IBAC should regularly engage with community organisations to improve its understanding of the needs of the Victorian Aboriginal community.[248]

Andreea Lachsz, Head of Policy, Communications and Strategy at the Victorian Aboriginal Legal Service, said that his organisation's concerns about the 'really broken police accountability mechanisms in this state' are shared by some other legal services.[249]

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244 Ibid., p. 137.

245 Ibid.

246 Ibid., pp. 137–138.

247 Ibid., p. 138.

248 Ibid., pp. 139–140.

249 Andreea Lachsz, Head of Policy, Communications and Strategy, Victorian Aboriginal Legal Service, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 38.

The Victorian Aboriginal Legal Service was joined by other stakeholders in advocating for strengthening IBAC's oversight powers, improving its practices and properly resourcing its operations, if it is to retain responsibility for investigating misconduct by Victoria Police.

However, the Legal Service questioned whether 'persistent deficiencies in IBAC's operations can, in fact, be remedied, or whether establishing a new, specialised police oversight body is required'. It asserted that retaining IBAC will require a significant overhaul of its focus and practices:

> for IBAC to be an effective police oversight body, it needs to develop a far more robust investigative capacity and significantly reduce, if not eliminate, the use of referrals back to Victoria Police. This would require a major shift in IBAC's strategic orientation, given the almost total reliance on police referrals at present. In 2019-20, IBAC assessed 3,145 allegations against police and determined 1,392 required investigation. However only 32 were investigated directly by IBAC, and only 59 of those referred back to Victoria Police were comprehensively reviewed. This leaves 93.5% of allegations which were investigated by Victoria Police without any meaningful involvement from IBAC.[250]

The Legal Service argued that IBAC should be focused on addressing systemic racism and improving outcomes and protections for Aboriginal Victorians. It said it would expect IBAC to 'develop a strategy on systemic racism, ensuring investigations into racist police behaviour on an individual level led to systemic responses and are not confined to findings of individual misconduct'.[251]

Inner Melbourne Community Legal said that 'to ensure public confidence in the police complaints processes, investigations must be undertaken by an agency that is completely independent of Victoria Police'. It argued that 'the Victorian Government must sufficiently resource IBAC, or another independent agency, to ensure that there is accountability of Victoria Police members'. It therefore recommended:

> Investigations into misconduct by Victoria Police members must be conducted by an agency that is completely independent of Victoria Police…
>
> Sufficiently resource IBAC, or another independent agency, to investigate complaints against Victoria Police.[252]

The Federation of Community Legal Centres Victoria Inc. argued that the significant investment and expansion of Victoria Police in recent years increases the importance of ensuring that the mechanisms for independent oversight of police are adequate. It did not explicitly call for the establishment of a new independent oversight body for police, but argued that 'critical reforms are required to ensure a robust system of police accountability that services the community', including 'properly resourcing an effective and independent police oversight body'.[253]

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250 Victorian Aboriginal Legal Service, *Submission 139*, pp. 135, 138.

251 Ibid., p. 139.

252 Inner Melbourne Community Legal Centre, *Submission 133*, pp. 10–11.

253 Federation of Community Legal Centres Victoria Inc., *Submission 132*, pp. 14–15.

The Federation argued that whichever body is responsible for investigating police complaints must meet the following human rights standards:

- Independent (that is, hierarchically, institutionally, and practically).
- Capable of conducting an adequate investigation (able to determine whether police actions are unlawful or breach requisite standards leading to disciplinary/criminal sanctions).
- Prompt (the agency must be responsive to ensure trust and confidence in the system).
- Transparent and open to public scrutiny.
- Victim-centred (enables the victim to fully participate in the investigation and safeguards their legitimate interests).[254]

In response to a question from the Committee, the Federation also provided information about the Office of the Police Ombudsman for Northern Ireland, which it felt was an example of a police complaints body that met the five human rights standards articulated. It explained that the 'Police Ombudsman is well regarded by both customers and police officers who are being investigated, with 79% of police officers reporting that they felt they were treated fairly by the Ombudsman'. The Federation outlined what it believed were successful features of the Ombudsman model. The Ombudsman:

- typically investigates all complaints made against police, even customer service complaints
- is appointed by the Queen for seven years and accountable to the parliament through the Minister for Justice
- employs specialised investigators empowered to secure incident scenes, seize documents and property and require information from police in connection to their investigations
- can recommend that police officers be prosecuted or disciplined
- can refer less serious complaints back to police to manage if the complainant consents, but must follow up to check how the complaint was handled
- is subjected to Freedom of Information laws and publicly discloses information about its work.[255]

Smart Justice for Young People likewise did not recommend the establishment of a new independent body outright but called for 'an agency that is not only institutionally independent of police but also practically, culturally and politically independent' to

254 Ibid., p. 15.

255 Federation of Community Legal Centres Victoria Inc., Inquiry into Victoria's criminal justice system hearings, response to question on notice received 19 October 2021, pp. 1–2.

investigate 'allegations of police misconduct, criminality and human rights abuses' by police and PSOs.[256]

Human Rights Law Centre recommended that the Victorian Government 'properly resource an independent police oversight body so that the status quo of police investigating the actions of other police and avoiding responsibility for discriminatory policing ends'. It argued that 'in order to be effective, this body should have sufficient powers to refer matters for criminal investigation'.[257]

The Committee heard that it is the Victorian Aboriginal Legal Service's preference that a new independent statutory body is established to investigate police misconduct and complaints, with a view to increasing Victoria Police accountability. The Legal Service argued that 'the current police complaint system is not working' and that 'there should be an independent oversight body for police complaints'. It recommended that the Victorian Government 'establish a specialist, independent statutory body to adjudicate police complaints' which:

- is characterised by its 'Independence, Capability to conduct adequate investigations, Promptness, Transparency, Victim-centred and victim-participation'
- operates on the principle that it will conduct reviews and investigate allegations of police misconduct in most cases and matters will only be referred back to Victoria Police for internal investigation by exception
- investigates systemic misconduct by Victoria Police, even if it is comprised of multiple minor cases
- will develop and implement a strategy for identifying and investigating systemic racism
- is pursuing Aboriginal justice issues as a key focus of its strategic plan
- is empowered to investigate Aboriginal deaths in Victoria Police custody, to refer historical and future cases of Aboriginal deaths in custody to the Office of Public Prosecutions for criminal charges where there is sufficient evidence, and can provide compensation to victims' families where appropriate
- is able to refer cases for criminal prosecution and suggest disciplinary measures to Victoria Police.[258]

The Legal Service called for the new body to be characterised by the same human rights principles put forward by the Federation of Community Legal Centres Victoria Inc. Namely, that it should be independent, capable of conducting adequate investigations, prompt, transparent and victim-centred.[259] It also canvassed procedural elements which it felt underpin best practice investigation of police misconduct:

- Complaint histories for police should be available to investigators;

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256 Smart Justice for Young People, *Submission 88*, p. 13.

257 Human Rights Law Centre, *Submission 58*, p. 14.

258 Victorian Aboriginal Legal Service, *Submission 139*, pp. 135–136, 141–142.

259 Ibid., pp. 135–136.

- Documents associated with police complaints should be accessible;
- Culturally appropriate mediation should be developed for police complaints, to be available where both parties consent. This should be developed in partnership with Aboriginal communities and organisations, including VALS;
- Additional funding should be provided to VALS and other legal services currently assisting Aboriginal people to make police complaints;
- There needs to be a focus on collecting and publishing accurate data of police complaints, including data on Aboriginal complainants;
- Where complaints continue to be investigated by Victoria Police (for example, customer service complaints), that complainants should have the ability to request an external review of the investigation of their complaint.[260]

Lastly, the Legal Service argued that an important component of any police oversight body is the power to 'refer cases for criminal prosecution and suggest disciplinary measures to Victoria Police', particularly in relation to Aboriginal deaths in custody:

> Prosecutions against the police play an important role in police accountability and providing a sense of justice to family members and the community of the deceased. Criminal prosecutions are important as they hold the individual officer(s) accountable for their criminal conduct and are crucial in upholding the rule of law and demonstrating that police are not above the law and cannot act with impunity.[261]

A similar observation was made by the Federation of Community Legal Centres Victoria Inc. which noted that Victoria Police typically investigates deaths in police custody itself, despite this being a conflict of interest:

> When there is a death in police custody in Victoria, although this is subject to mandatory investigation and inquest by the Coroner, the investigation is in practice carried out for the Coroner by the police. Police also investigate complaints directed at police officers in relation to abuse, assault, racial abuse, degradation, torture or excessive force.[262]

Jill Prior, Principal Legal Officer at the Law and Advocacy Centre for Women, who appeared on behalf of the Federation, noted that Victoria Police investigation of coronial matters where officers have been involved has been a 'point of great contention' and 'a really obvious point of fracture' in community confidence in Victoria Police for as long as she has been practicing law. [263]

In its submission, the Federation asserted that whichever body has responsibility for investigating police misconduct, must also have sufficient powers to refer matters for criminal investigation where appropriate and take complaints from the State in cases

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260 Ibid., p. 136.

261 Ibid., p. 141.

262 Federation of Community Legal Centres Victoria Inc., *Submission 132*, p. 15.

263 Jill Prior, Principal Legal Officer, Law and Advocacy Centre for Women, Federation of Community Legal Centres Victoria Inc., public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 41.

where a 'complainant is unable to make their own complaint due to death or debilitating injury'.[264]

The Committee recognises that criminal justice stakeholders, particularly Aboriginal organisations, have long held concerns regarding the ability of IBAC to properly investigate instances of police misconduct and hold Victoria Police accountable. Inadequate practices, insufficient funding and a lack of engagement with, and focus on, the communities making serious allegations of misconduct is undermining IBAC's ability to identify systemic issues within Victoria Police. It is also fuelling mistrust between the community and Victoria Police.

FINDING 22: Criminal justice stakeholders, in particular Aboriginal organisations, have long held concerns regarding the impartiality and effectiveness of the existing police complaint-handling and oversight systems in Victoria.

The Committee notes the DJCS' ongoing systemic review of police oversight and the Victorian Government's commitment to developing draft legislation within this Parliament capable of ensuring:

> Victoria has a police oversight system that is robust, transparent and effective in meeting the needs of Victoria's diverse communities, with a framework that maintains the highest standards of integrity and public trust in the police force.[265]

The Committee appreciates stakeholders taking the time to formulate thoughtful contributions to this Inquiry which explained their concerns in relation to IBAC and outlined their proposals for improving its operations or establishing a new independent police oversight body. The Committee would like to see this evidence considered as part of the systemic review currently underway and inform any resulting draft legislation.

RECOMMENDATION 28: That the Department of Justice and Community Safety consider, as part of its systemic review into police oversight, the evidence outlined in this report regarding:

- the inadequate impartiality and effectiveness of the existing police complaint-handling and oversight systems in Victoria, as well as investigations into deaths in police custody
- options for strengthening Independent Broad-based Anti-corruption Commission's oversight powers, improving its practices, properly resourcing its operations, and ensuring Victoria Police is held accountable for instances of serious officer misconduct
- the consideration of a possible establishment of a new independent body to investigate allegations of police misconduct and increase the accountability of Victoria Police.

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264 Federation of Community Legal Centres Victoria Inc., *Submission 132*, p. 15.

265 Victorian Government, *Systemic review of police oversight*.

PART C: VICTIMS OF CRIME

6 Victims of crime and the criminal justice system

At a glance

This Chapter broadly examines criminal justice infrastructure related to victims of crime in Victoria. It focuses on agencies, support programs and processes within the criminal justice system which are centred on the experiences and participation of victims of crime. It does not deal with the victims services sector—which provides support to victims of crime prior, during and after their involvement in the criminal justice system—in great detail (see Chapter 8).

Key issues

- The obligations of justice system agencies—such as investigatory and prosecuting agencies—to victims of crime are prescribed under the *Victims' Charter Act 2006* (Vic). The Charter recognises the inherent interest of victims of crime in criminal justice proceedings and codifies the rights of victims of crime to participate in proceedings.
- The criminal justice system has significant infrastructure in place to support victims of crime, including advocacy agencies and support services and programs. However, the Committee believes that infrastructure supporting victims of crime should be expanded.
- The Victorian Government is developing a new victims of crime financial assistance scheme to replace the existing Victims of Crime Assistance Tribunal. The new scheme should embed trauma-informed practices into its operations to ensure it accessible and less adversarial to victims of crime.
- The Victims Assistance Program is a key mechanism for linking victims of crime into support services which facilitate their recovery. However, there is a lack of appropriate resources to meet demand. Alongside this, not enough victims of crime are being referred to services.

Findings and recommendations

Finding 23: Despite the intentions of the *Victims' Charter Act 2006* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the inherent interests and rights of victims of crime could be better upheld throughout the criminal justice system.

Recommendation 29: That the Victorian Government investigate options to strengthen the practical application and use of the *Victims' Charter Act 2006* (Vic) to protect the rights of a victim of crime to participate in justice processes. For example, amendments to s 22 of the Charter should be considered.

Recommendation 30: That the Victorian Government amend the *Victims' Charter Act 2006* (Vic):

- to remove s 9B(3)(b) which exempts the Director of Public Prosecutions from seeking the views of victims of crime if it is not practical because of the speed and nature of proceedings
- to amend s 9B(1) to affirm that the Director of Public Prosecutions' requirement to seek the views of victims of crime should not unnecessarily cause delays which would impact a person's right to a fair trial
- so that all victims of crime have the same entitlements to information and consultation from investigatory and prosecuting agencies, regardless of whether it is related to a summary or indictable offence.

Recommendation 31: In relation to the Intermediary Program, that the Victorian Government:

- expand the Program to include any witnesses eligible under the existing criteria regardless of the criminal offence before Victoria Police or the courts
- consider expanding the program to accused persons with a cognitive impairment or who are under 18
- investigate ways the role of intermediaries could be expanded to include assessment and referral functions for witnesses with unmet needs. Any expansion of the role allowing an intermediary to refer a witness to services should not undermine the intermediary's role as an impartial court officer.

Finding 24: Ground rules hearings support vulnerable witnesses, including victims of crime, by:

- supporting them to give their best evidence through ensuring the process for questioning suits their communication needs
- reducing the stress of giving evidence in court by protecting them against improper questioning.

Recommendation 32: As interim measures, before the new victims of crime financial assistance scheme is in place, the Victorian Government should amend the *Victims of Crime Assistance Act 1996* (Vic), as a matter of urgency, to:

- remove alleged perpetrator notification and appearance provisions provided under ss 34(2) and 35(1)
- limit consideration of an applicant's character or behaviour under s 54, so that only criminal behaviour connected to the criminal act subject to the application is relevant
- prescribe time limits for the Victims of Crime Assistance Tribunal to provide awards to applicants or notify them if an application has been rejected.

Recommendation 33: That the Victorian Government review the funding provided to the Victims of Crime Assistance Tribunal as part of the 2021–22 State Budget to determine if it is sufficient in reducing the backlog of pending applications before the Tribunal.

Finding 25: In developing the new victims of crime financial assistance scheme, the Victorian Government should seek to remedy issues identified with the operation of the Victims of Crime Assistance Tribunal. The Government should have regard to the views expressed by stakeholders such as the Victorian Law Reform Commission, the Victims of Crime Commissioner and people who have experienced violent crimes. In particular, the Government should address the following issues that were identified:

- lack of trauma-informed practices in hearing from and assessing applicants
- overly legalistic language used to communicate with applicants.

Recommendation 34: That the Victorian Government make the new victims of crime financial assistance scheme a prescribed agency under the *Victims of Crime Commissioner Regulations 2020* (Vic), to ensure that the scheme falls within the oversight and compliance functions of the Victims of Crime Commissioner.

Recommendation 35: That the Victorian Government open redress schemes to all eligible people, regardless of their criminal history. This should include advocating to the Commonwealth Government for the National Redress Scheme to be opened to anyone who was a victim of institutional child sexual abuse.

Recommendation 36: In relation to the Victims Assistance Program, that the Victorian Government:

- provide further funding to ensure that participating agencies and services under the program can meet demand
- provide training and guidance to key referral agencies on referring victims of crime to the program sooner so that they can access the full range of support services
- expand the number of participating agencies to improve co-location with other services, particularly in regional and rural Victoria.

Recommendation 37: That the Victorian Government ensure that the Victims Assistance Program can provide culturally safe services and support to Aboriginal Victorians by:

- funding more Aboriginal Community Controlled Organisations to become participating agencies
- provide support, including funding if necessary, to Victims Assistance Program agencies for more Koori Engagement Workers so that the number of positions is commensurate to Aboriginal victims of crime in need of support.

This Chapter examines some of the key infrastructure in place to support victims of crime in Victoria. It is focused on infrastructure within the criminal justice system, therefore does not include detailed consideration of the victims services sector. Chapter 8 discusses the victims services sector in more detail.

The Committee has not undertaken a comprehensive review of all infrastructure or support available to victims of crime within the criminal justice system. It has focused its attention on key supports in place and has made recommendations for improvement. In particular, the Committee has examined:

- the Victim Services, Support and Reform unit within the Department of Justice and Community Safety (DJCS)
- Victims of Crime Commissioner
- Victims' Charter
- intermediary programs available to victims of crime—the Intermediary Program and the Independent Third Persons Program
- Victims of Crime Assistance Tribunal
- Victims Assistance Program.

Other supports in place for victims of crime, including their involvement in criminal justice processes, is discussed in more detail in Chapters 7 and 8.

6.1 A note on language

The Committee recognises that language can have a profound impact on a person's agency and identity. This is especially the case for people who have experienced crime. This report will use the term 'victim of crime' to broadly describe people who have experienced crime. The Committee notes that some people find the term 'victim' problematic because it implies that a person lacks agency or is helpless. However, the Committee received evidence from a broad range of people who had experienced crime, including family members whose loved ones were killed because of crimes committed against them. Therefore, it is essential that this report reflects the diverse range of experiences of victims of crime and that the language used does not exclude anyone. Further, 'victim' is the term used in legislation—for example, the *Victims' Charter Act 2006* (Vic) (Victims' Charter)—to describe a person who has experienced crime.[1]

In this Chapter, and throughout the report, the personal stories of people who have experienced crime are presented. Where a person has used a specific term to describe themselves and their experiences, the Committee has used similar language to present and discuss their evidence.

1 Victorian Government, *Submission 93*, p. 8.

6.2 Victim Services, Support and Reform

Victim Services, Support and Reform (previously called the Victim Support Agency) is a business unit within DJCS which delivers support services to victims of crime. According to the Victorian Government's *Victims of Crime* website, the unit is responsible for linking victims of crimes to service systems and ensuring they receive 'personalised, timely and effective support to manage the effects of violent crime'.[2]

The services offered by the unit include:

- The Victims of Crime Helpline: an information, support, and referral service for all victims of reported and unreported crime.
- The Victims Assistance Program: flexible case management services to meet the practical, emotional and psychological needs of victims to help them manage the effects of crime and assist in the recovery process.
- Support during critical incidents: specialist in-house capability that can quickly and effectively support victims following a critical incident, such as during the 2017 and 2018 Bourke Street incidents.
- The Victims Register: eligible victims can apply to receive certain information about a person's sentence and make submissions to the Adult Parole Board (APB) and the Post Sentence Authority (PSA).
- Family Violence Restorative Justice Service: victims, family members and others who have experienced family violence can access this service option to feel heard, receive support and to aid recovery with respect to their experience of family violence.
- Victim Support for Youth Justice Group Conferencing: support for victims of young people who offend who participate in a legislated, pre-sentence restorative justice program.
- The Child Witness Service: specialist support to child witnesses and their families to assist them throughout the criminal trial process, debriefing support post-trial and referrals to specialist and other community services.
- The Intermediary Program: skilled communication specialists facilitate communication with vulnerable witnesses and help police, lawyers and the judiciary plan their questioning so that victims can understand, participate, feel more confident, and provide better quality evidence.
- The Trauma Clean Program: administering and coordinating the cleaning of crime and suicide scenes in the home to reduce trauma experienced by victims and their families.[3]

2 Victorian Government, *Victim Services, Support and Reform*, <https://www.victimsofcrime.vic.gov.au/victim-services-support-and-reform> accessed 9 December 2021.

3 Victorian Government, *Submission 93*, p. 81

At a public hearing, Rebecca Falkingham, Secretary of DJCS, explained that the Victim Services, Support and Reform unit (referred to as the Victims Support Agency) is:

> responsible for coordinating a whole-of-government response to services for victims of crime and is supported by the statewide victims assistance program to facilitate timely referrals. In addition to delivering critical victim services, the department has delivered a number of reforms to both empower victim-survivors and reduce the trauma that they can experience in criminal proceedings, including changes to the *Judicial Proceedings Reports Act* and the *Victims' Charter Act* and implementing recommendations from the Royal Commission into Family Violence.[4]

Some stakeholders believed that the work of the Victim Services, Support and Reform unit could be improved by incorporating better culturally-informed practices. Culturally-informed practices acknowledge the diversity of needs people have. In supporting victims of crime, it is important that the appropriate support is in place that recognises the trauma of experiencing crime, but also understands the ways that socio-cultural identity can compound trauma and shape specific needs.

In its submission, the Centre for Innovative Justice at RMIT University recommended that the Victim Services, Support and Reform unit engage a Cultural Safety Practice Lead to 'work with the Koori Justice Unit (KJU) to help meet the relevant goals of the fourth Aboriginal Justice Agreement'.[5] Culturally-informed support for Aboriginal Victorian victims of crime is discussed further in Section 6.7.1.

The Victorian Government's submission noted that DJCS is 'working towards achieving Rainbow Tick Accreditation' for the Victim Services, Support and Reform unit.[6] Rainbow Tick is a national accreditation program for organisations who demonstrated commitment to 'safe and inclusive practice and service delivery for LGBTIQA+ people'.[7] The submission stated that through accreditation, the unit will ensure it provides 'welcoming, accessible and inclusive services for LGBTIQ+ victims of crime' and builds and supports 'safe and inclusive workplace culture'.[8]

6.2.1 Victims of Crime Consultative Committee

The Victim Services, Support and Reform unit also provides support to the Victims of Crime Consultative Committee.

The Victims of Crime Consultative Committee was established in 2012 and its establishment and functions are prescribed under the *Victims Crime Commissioner Act 2015* (Vic). The purpose of the Consultative Committee is to:

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4 Ms Rebecca Falkingham, Secretary, Department of Justice and Community Safety, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 3.

5 Centre for Innovative Justice, *Submission 82, Attachment 1*, p. 98.

6 Victorian Government, *Submission 93*, p. 80.

7 Ibid.

8 Ibid.

- provide a forum for victims of crime, justice agencies and victim of crime services to discuss how victim of crime services can be improved through reforming existing policies, practices and delivery models
- provide advice to the Attorney-General on reforms to policies, practices and delivery services for victims of crime, or any other matter referred to it by the Attorney-General
- promote the interest of victims of crime in the administration of the criminal justice system.[9]

The Consultative Committee is made up of:

- members of the community who have been or are family to victims of crime
- the Victims of Crime Commissioner
- Victoria Police
- the Office of Public Prosecutions
- members of the judiciary
- the Adult Parole Board
- representatives from victims of crime service agencies.[10]

The Minister for Victim Support and the Attorney-General also participate in the meetings of the Consultative Committee.[11]

Two members of the Victims of Crime Consultative Committee submitted evidence, in a personal capacity, to the Inquiry—Cathy Oddie and Thomas Wain. Their evidence, along with the insights from other victims of crime, is considered across the report.

6.3 Victims of Crime Commissioner

The Victims of Crime Commissioner is an independent statutory officer established under the *Victims of Crime Commissioner Act 2015* (Vic). The Commissioner is responsible for advocating on behalf of victims of crime in their dealings with the justice system and government agencies. The role was first introduced in 2014 and in 2019, the Victims of Crime Commissioner Act was amended to give the role additional functions. Box 6.1 below outlines the functions of the Victims of Crime Commissioner.

9 *Victims of Crime Commissioner Act 2015* (Vic) s 32(31).

10 Victorian Government, *Victims of Crime Consultative Committee*, <https://www.victimsofcrime.vic.gov.au/victims-of-crime-consultative-committee> accessed 9 December 2021.

11 Ibid.

BOX 6.1: Functions of the Victims of Crime Commissioner

The Victims of Crime Commissioner, and their office, must perform their functions with regard to the objectives of the Victims of Crime Commissioner Act, which are to:

- promote recognition of victims of crime in the justice system
- represent the concerns of victims of crime in the decision-making of government
- promote the inclusion and participation of victims of crime in the justice system.

The Victims of Crime Commissioner must also have regard to the Victims' Charter when performing their functions. An overview of the Victims' Charter is provided in Section 6.4 below.

Section 13 of the Victims of Crime Commissioner Act prescribes the functions and powers of the Commissioner, which are to:

- engage with victims of crime and use their experiences to advocate for improvements to the justice system
- conduct inquiries into systemic issues related to victims of crime in Victoria. For example, issues which affect a large number or specific group of victims of crime
- report and provide advice to the Attorney-General, Minister for Victim Support and government departments.

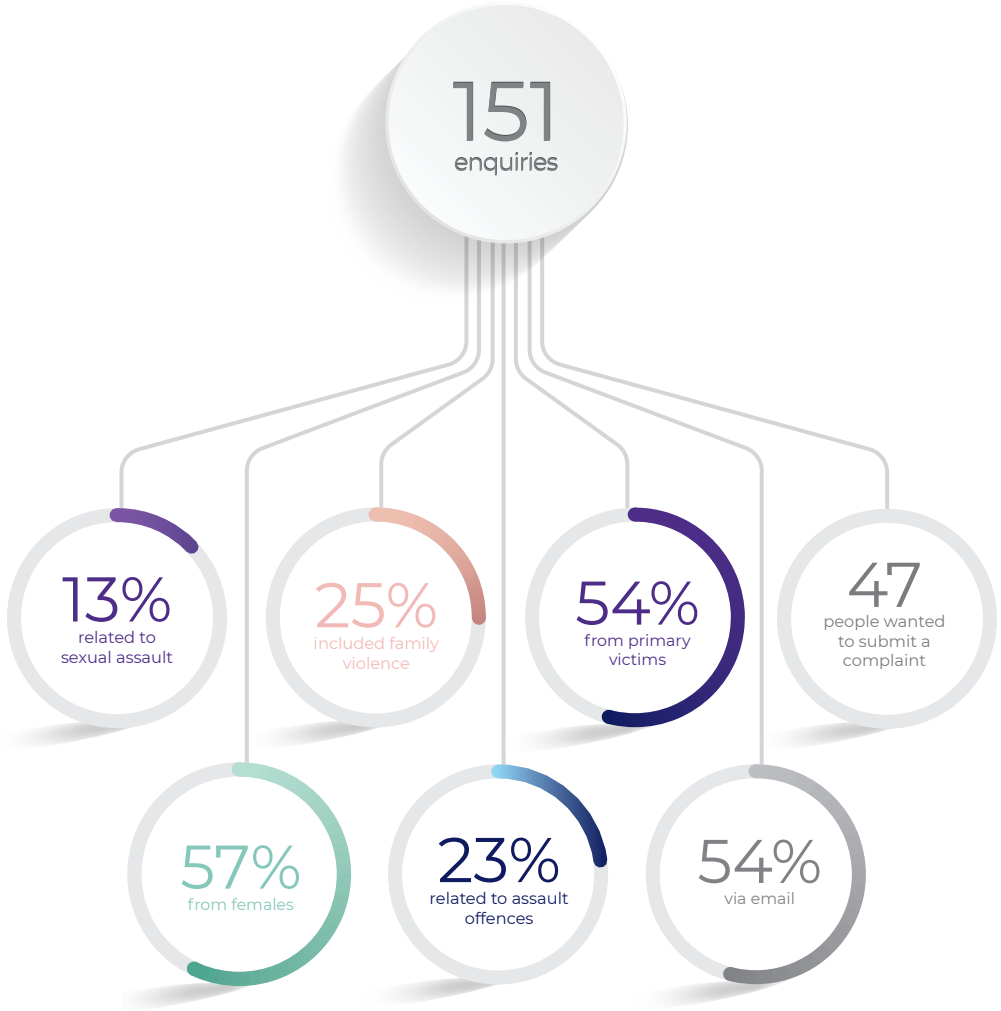
In 2019, the powers of the Victims of Crime Commissioner were expanded to:

- monitor and report on the performance of agencies—for example, investigatory bodies (e.g. Victoria Police) and victims' services (e.g. sexual assault services—in meeting their obligations under the Victims' Charter, including the treatment of victims of crime)
- investigate complaints from victims of crime when agencies do not treat them in accordance with the principles and requirements of the Victims' Charter.

Source: *Victims of Crime Commissioner Act 2015* (Vic) ss 4, 13(1), 14; Victims of Crime Commissioner, *Victims of Crime Commissioner: Annual Report 2020-21*, Victoria, 2021, p. 8.

A core function of the Office of the Victims of Crime Commissioner is to receive and address enquiries from victims of crime about their experiences with the criminal justice system, including agencies and services. In the 2020–21 Annual Report, the Victims of Crime Commissioner noted that it received 151 enquiries from 1 July 2020 to 30 June 2021, with more than half coming from primary victims. Figure 6.1 below shows a breakdown of the enquiries received by the Victims of Crime Commissioner during the 2020–21 financial year.

Figure 6.1 Enquiries received by the Victims of Crime Commissioner, 2020–21



Source: Victims of Crime Commissioner, *Victims of Crime Commissioner: Annual Report 2020-21*, Victoria, 2021, p. 25.

Of the 47 complaints received during the 2020-21 financial year, only 15 progressed to a formal complaint.[12]

In its submission, the Victims of Crime Commissioner—Fiona McCormack—described the approach taken to advocating for victims' interests as one underpinned by the lived experiences of victims of crime. The submission said:

> The Commissioner is committed to ensuring that victims of crime are heard and respected by justice agencies and victims' services, and that these agencies and services provide safe, inclusive and trauma-informed responses to all victims of crime.
>
> While victims' voices and experiences underpin all the Commissioner's work and the Commissioner can receive complaints from individual victims about their individual circumstances, the Commissioner is unable to undertake individual advocacy. Individual

12 Victims of Crime Commissioner, *Victims of Crime Commissioner: Annual Report 2020-21*, Victoria, 2021, p. 26.

> Advocacy could prejudice criminal investigations, civil or criminal proceedings, or the work of other statutory entities like the Independent Broad-based Anti-Corruption Commission. It would also be in breach of the [Victims of Crime Commission] Act.[13]

The Victims of Crime Commissioner's approach to advocacy and engagement is informed by the Commissioner's victim engagement methodology which was established in 2020–21. According to the Commissioner, the victim engagement methodology seeks to ensure 'safe, ethical and trauma-informed engagement with victims of crime'.[14]

Under s 29A of the Victims of Crime Commissioner Act, the Commissioner is responsible for undertaking a review into the operation of the Victims' Charter by 2024.[15] At the time of writing, the review had not commenced.

As noted above, the Commissioner is empowered to undertake systemic inquiries under ss 13 and 23 of the Victims of Crime Commissioner Act. The Committee notes that in June 2021, the Victims of Crime Commissioner launched a systemic inquiry into victim participation in the justice system. According to the Commissioner's website, the systemic inquiry will look into the victims' experiences of support services and justice agencies. It will also consider 'what new laws, policies or programs might be needed to help victims participate, as defined by their entitlements under the Victims' Charter'.[16] At a public hearing, Fiona McCormack provided the Committee with an update on the inquiry, including the anticipated timeframe for completion:

> I am looking at something within the realm of around 12 months, but I do not want to put a definitive time line on it, because I am absorbing the costs of undertaking the systemic review within my current budget. So it is not going to be a parliamentary inquiry, it is not going to be a huge commission. As I have said, victims have had participatory entitlements since those changes were introduced in 2018. I am keen to look at whether they have made a difference; if they have, what difference has that made; and if not, what else can be done. And given that I do have to undertake a review of the victims charter, I am anticipating that I will be able to gather a lot of information to assist with that review, to look at how it may be broadened.[17]

The Committee looks forward to learning the findings and outcomes of the Commissioner's systemic inquiry.

The role of the Victims of Crime Commissioner and evidence provided by the current Commissioner, Fiona McCormack, is discussed throughout this report.

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13 Victims of Crime Commissioner, *Submission 99*, pp. 3–4.

14 Victims of Crime Commissioner, *Victims of Crime Commissioner: Annual Report 2020-21*, p. 14.

15 *Victims of Crime Commissioner Act 2015* (Vic) s 29A.

16 Victims of Crime Commissioner, *Systemic inquiries: Current inquiry - Victim Participation in the Justice System*, 2021, <https://www.victimsofcrimecommissioner.vic.gov.au/systemic-inquiries> accessed 19 January 2022.

17 Ms Fiona McCormack, Commissioner, Victims of Crime Commission, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 3.

6.4 Victims' Charter

As stated above, the Victims of Crime Commissioner must have regard to the Victims' Charter when exercising any of their functions or powers.[18] Furthermore, the Commissioner is responsible for investigating complaints against an agency's compliance with the principles of the Victims' Charter if:

- the complaint has been made by a victim of crime
- the complainant was dissatisfied with the outcome of a complaint on the same matter made to the relevant agency.[19]

The Victims' Charter establishes the 'cultural and behavioural obligations' for justice system agencies which interact with victims of crime, such as investigatory, prosecution and victim services agencies.[20] It prescribes the treatment of victims of crime during justice proceedings and reaffirms their right to participate in certain parts of the process. The objectives of the Victims' Charter are based on the United Nations' Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[21] According to s 4 of the Charter, the objectives are to:

- recognise the impact of crime on the victims, including family members, witnesses and, in some cases, the broader community
- recognise that anyone adversely impacted by crime should be treated with respect by investigatory and prosecuting agencies, and victim support services. This should include the provision of information enabling them to access appropriate services to assist with the recovery process
- recognise that victims of crime have an inherent interest in the response by the criminal justice system to that crime. Recognising the inherent interest of victims of crime to the response includes acknowledging that—
  - this interest gives rise to rights and entitlements under the Victims' Charter
  - the role of a victim of crime in proceedings for criminal offences is as a participant but not a party
- help reduce the likelihood of secondary victimisation by the criminal justice system.[22]

During the second reading debate on the Victims' Charter Bill 2006 (Vic), the Hon Gavin Jennings explained that:

> The [Victims' Charter Bill 2006] sets out principles which will represent minimum standards governing responses to victims of crime across criminal justice and

18 *Victims of Crime Commissioner Act 2015* (Vic) s 14.

19 Ibid., p. 25A.

20 Victims of Crime Commissioner, *Submission 99*, p. 4.

21 *Victims' Charter Act 2006* (Vic) s 4(2).

22 Ibid., p. 4(1).

government agencies. It also provides a benchmark for the development of service standards and victims policy across the criminal justice system.

Enshrining these principles in legislation provides a clear recognition by the government of victims of crime and their important role in the criminal justice process. It will form the basis for future policy development in this area.[23]

The Committee notes that the inherent interest of victims of crime was introduced into the Charter in 2018 when the Charter was amended by *Victims and Other Legislation Amendment Act 2018* (Vic). The Charter's recognition of the inherent interest of victims of crime in the outcome of justice proceedings was in response to the recommendations of the Victorian Law Reform Commission 2016 report into *The Role of Victims of Crime in the Criminal Trial Process*. The Explanatory Memorandum for the 2018 Bill stated that:

> The VLRC [Victorian Law Reform Commission] found that the Victims' Charter Act 2006 is the "central repository of victims' entitlements and the obligations owed to them" during criminal proceedings and therefore, "the Act should clearly acknowledge the victim's role as a participant" (VLRC Report, page 34). This role is given practical meaning through the principles in the Act, as amended by the Bill.[24]

The Victims' Charter establishes and monitors compliance with principles that govern the criminal justice system's response to people adversely affected by crime, including investigatory, prosecuting and victims' services agencies. Table 6.1 below summarises the principles of the Victims' Charter.

Table 6.1 Principles of the Victims' Charter

Principle	Description
Treatment of persons adversely affected by crime	Any person adversely affected by crime should be treated with courtesy, respect and dignity by agencies. Agencies should also be responsive to the particular needs of different cohorts.
Information to be given to persons adversely affected by crime	Agencies should provide clear, timely and consistent information about: • relevant support services • possible entitlements • legal assistance available. Agencies should also refer a person to relevant support services that could provide access to entitlements and legal assistance, if appropriate.
Special treatment of victims	Agencies are to: • respect the rights and entitlements of victims of crime as participants in criminal offence proceedings • as much as reasonably practicable, give regard to the particular needs of victims of crime living in rural and regional locations.

23 Victoria, Legislative Council, 22 August 2006, *Parliamentary debates*, p. 3024.

24 Explanatory Memorandum, Victims and Other Legislation Amendment Bill 2018 (Vic) cl 3.

Principle	Description
Communication with victims	When communicating with victims of crime, agencies must consider: • whether the person wishes to be contacted • the preferred method of contact (which may vary) • any issues which could affect the ability of a person to understand information, including, but not limited— – English proficiency – whether they have a disability – whether they are a child.
Information to be given to victims about investigation	A victim of crime must be given information about: • the progress of an investigation, unless it could jeopardise any investigation of a criminal offence – if disclosure could jeopardise any investigation, only information relevant to the person should be provided so long as it does not jeopardise any investigation – if no information can be provided to a victim, they must be informed of that fact.
Information regarding prosecution	A prosecuting agency must give a victim of crime information about: • the offences charged against the accused person • if no offences are charged, the reason why • if offences are charged, any decision— – which substantially modifies those charges – to discontinue the prosecution of those charges – to accept a plea of guilty for a lesser charge. A prosecuting agency which is not the Director of Public Prosecutions, must give a victim of crime information about: • the date, time and place of the hearing of charges • the outcome of the criminal proceedings, including any sentences imposed. If there is an appeal, the fact, grounds and result of the appeal.
Additional information regarding prosecution to be provided by the Director of Public Prosecutions	The Director of Public Prosecutions must take all reasonable steps to advise a victim of crime of: • the date, time and location for— – any contested committal hearing – trial – plea hearing – sentencing hearing – appeal hearing • the progression of a prosecution, including the outcome of— – any committal mention – contested committal hearing – initial directions hearing – trial – plea hearing – sentencing hearing – appeal hearing – guilty plea.

Principle	Description
Views of victims to be sought by the Director of Public Prosecutions	The Director of Public Prosecution must seek the views of a victim of crime if it makes any decision to: • substantially modify charges • discontinue prosecution • accept a plea of guilty to a lesser charge • appeal a sentence or acquittal • oppose an application for a sentence indication.[a] The Director must provide information about decisions to: • agree to or oppose an application to cross-examine a victim of crime at a committal hearing • apply for, agree to or oppose an application for summary jurisdiction • oppose an application for a sentence indication.[a] The Director is not required to seek the views of a victim of crime if: • the person cannot be contacted after all reasonable attempts • it is not practical to contact the person because of the speed or nature of proceeding(s).
Director of Public Prosecutions to give reasons for certain decisions	As soon as reasonably practicable, the Director of Public Prosecutions should give reasons for certain decisions to a victim of crime either orally or in writing. The Director may decline to provide reasons if the disclosure may jeopardise any investigation of a criminal offence or prejudice any other proceeding.
Applications for bail	A victim of crime should be informed about the outcome of any application for bail by the accused person, as well as any conditions imposed by the court which are intended to protect the safety of them and their family.
Information about court process	A prosecuting agency must ensure that a victim of crime is informed about the court process and their entitlement to any relevant court proceedings, where permitted. If a victim of crime is appearing as a witness, the prosecuting agency should provide information about: • the process of the trial or hearing • victim of crime's role as a witness • the person being able to remain in the court room after giving evidence • any special protections or alternative arrangements for giving evidence, if relevant – the prosecuting agency is responsible for informing the court about the victim of crime's preferences for special protections or arrangements.
Contact between victim and accused in court building to be minimised	During the court proceedings and within a court building, a prosecuting agency and the courts should: • minimise a victim of crime's unnecessary exposure to the accused person, defence witnesses, family members and supporters • protect a victim of crime from intimidation.
Victim impact statements	A victim of a criminal offence may make a victim impact statement to the court sentencing the person found guilty of the offence. Unless the court orders otherwise, that statement may be considered by the court when determining the offender's sentence. A prosecuting agency must inform a victim of crime about their entitlement to make a victim impact statement, as soon as reasonably practicable.[a] (Chapter 8 discusses victim impact statements in more detail)

Principle	Description
Victims' privacy	A victim's personal information, including their address and telephone number, must not to be disclosed by any person except in accordance with the *Privacy and Data Protection Act 2014*.
Storage and return of property held by the State	If the property of a victim of crime is in the possession of an investigatory or prosecuting agency, the agency must: • handle and store the property in a lawful, respectful and secure manner • if possible, return the property as soon as reasonably practicable.
Compensation and financial assistance for victims	A victim of crime may apply to a court that the person convicted or found guilty pay compensation where the criminal offence has caused injury. A person eligible under the *Victims of Crime Assistance Act 1996* may apply to the State for compensation and financial assistance. A prosecuting agency must inform a victim of crime about their entitlement to seek restitution or compensation orders, and refer the victim to any legal assistance available to them.[a]
Information about offender	A victim of a violent crime can apply to be included on the victims register established under the *Corrections Act 1986* (Vic). If a person is included on the register, they may be given certain information regarding the: • length of the sentence • likely date of release • making of an extended supervision order, supervision order or a detention order. If the Adult Parole Board is considering the release on parole of an imprisoned person who has committed a violent crime, a person included on the victims register may make a submission to the Board on the effects of the potential release. The Board should consider any submission received. A person on the victims register can also make a submission to the Post Sentence Authority in relation to any consideration of making an extended supervision order, supervision order, or detention order.

a. Amended requirements from the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021.

Source: *Victims' Charter Act 2006* (Vic) pt 2; Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021.

The Victims' Charter also generally applies to policy development and administration in the criminal justice system. A person or body responsible for developing criminal law or victims' services policies, or the administration of criminal justice or victims' services, must have regard to the principles of the Charter.[25]

In its submission, the Victims of Crime Commissioner, who is responsible for overseeing the Victims' Charter, explained:

> It is vital the Victims' Charter results in the implementation of victim-centred practice within justice agencies and victims' services agencies as well as increased confidence for victims to know their interests are protected in legislation.[26]

25 *Victims' Charter Act 2006* (Vic) s 18(12).

26 Victims of Crime Commissioner, *Submission 99*, p. 5.

Some stakeholders believed that the rights of victims of crime in criminal justice processes could be strengthened. Furthermore, that strengthening the rights of victims could also ensure their interests are considered during criminal justice policy development. Currently, the Victims' Charter expressly prescribes that rights afforded under the Charter do not affect other legal rights. Specifically, the Victims' Charter does not intend to:

- create any legal right or give rise to any civil action
- affect the interpretation of any law in force in Victoria
- affect the validity of any judicial or administrative act, or omission.[27]

To address this, the Victims of Crime Commissioner recommended that the rights of victims of crime be incorporated into the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Human Rights Charter). This could be achieved by amending s 25 of the Act to include victims of crime, recognising their inherent interest in criminal justice proceedings.

In its submission, the Victims of Crime Commissioner stated:

> The incorporation of victims' rights in the Victoria's Charter of Human Rights and Responsibilities would elevate victims' status and improve consideration of their status and interests. It would also provide increased recognition of the Victims' Charter across public institutions and help guide decision making, training and development of policies and procedures ...
>
> Additionally, while the Victims' Charter requires consideration of Victims' Charter principles in the development of policy, administration of criminal justice and the administration of victims' services, unlike Victoria's Charter of Human Rights and Responsibilities, the Victims' Charter does not require law makers to acquit against its principles when making or passing law.[28]

The Victorian Law Reform Commission in its 2016 report into *The Role of Victims of Crime in the Criminal Trial Process* also recommended amending the Victorian Human Rights Charter to include victims of crime in s 25. The report said:

> The Commission considers that incorporating the interest of victims into section 25 of the Human Rights Charter would add to the integrity of a fair trial. The Commission envisages that this would be achieved through a separate provision, modelled on section 25, recognising a right for victims in criminal proceedings, supplemented by a series of minimum guarantees.
>
> Expressly recognising a right of victims in the Human Rights Charter would make it clear that their interest must be protected and secured in the criminal trial process. This would place obligations on the courts, which are not required to comply with the Victims' Charter Act. It would also bring the rights of victims into consideration in statutory

27 *Victims' Charter Act 2006* (Vic) s 22(21).

28 Victims of Crime Commissioner, *Submission 99*, pp. 9–10.

> drafting and interpretation processes and the decision making of public authorities. The Commission acknowledges that care needs to be taken in framing the right to contain it to the context of criminal proceedings and distinguish it from the other Charter rights.[29]

When explaining the effect of including victims of crime in the Victorian Human Rights Charter, the Victorian Law Reform Commission noted:

> The Human Rights Charter does not create a freestanding right for an individual to pursue legal action for breach of a Charter right. At present, a person can bring proceedings for a breach of a Charter right only if they have an existing right to bring a claim on other grounds (commonly referred to as 'piggy-backing'). This aspect of the Human Rights Charter is difficult to apply in practice, and has been widely criticised.
>
> If a right for victims were included in Part 2 of the Human Rights Charter, it would allow victims to add an alleged breach of this right to an existing cause of action … the Victims' Charter Act does not create a legal right or cause of action and does not provide grounds for judicial review.[30]

Explicitly including victims' rights in Victoria's Human Rights Charter would elevate the interests of victims of crime to a clear legal right. However the Committee believes that the interests and rights of victims are already implicitly protected in the Human Rights Charter. The Department of Justice and Community Safety's *Charter of Human Rights and Responsibilities: Guidelines for legislation and policy officers in Victoria* assists agencies with responsibilities under the Charter to understand the practical application of Charter rights. Section 24 of the Guidelines deals with the right to a fair hearing—encompassing ss 24–27 of the Charter. The Guidelines explain that the application of the right to a fair hearing involves a 'triangulation of interests of the victim, the accused and society' and that these interests must be considered together when upholding the right to a fair trial.

Section 24 of the Guidelines explicitly references the person charged with a criminal offence and their right to a 'fair and public hearing'. The Victorian Human Rights Charter implicitly promotes the rights of other parties involved in legal proceedings, including victims of crime. For example, s 25(g) of the Human Rights Charter prescribes that a person charged with a criminal offence is entitled to 'examine, or have examined, witnesses against him or her, unless otherwise provided for by law'. The qualification of 'otherwise provided for by law' ensures that legislation protecting vulnerable witness from cross-examination by their accused is not affected by s 25(g) of the Human Rights Charter. Chapter 7 discusses rules and procedure governing the cross-examination of victim-witnesses in more detail.

The Human Rights Law Centre, in its guide to *Advancing the rights of victim/survivors of crime using Victoria's Human Rights Charter*, also provided an example of how the Charter was applied to promote the rights of a victim of crime. Box 6.2 below taken from the Human Rights Law Centre's guide shows this example.

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29 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 2016, p. 40.

30 Ibid.

BOX 6.2: Protecting victims' rights using Victoria's Human Rights Charter (Human Rights Law Centre)

Example: Helping child victims give evidence: Director of Public Prosecutions v Pottinger (County Court of Victoria, 2011)

In this case, the Director of Public Prosecutions raised children's rights under the Charter to support seeking an extension of time to allow a child who was the victim/survivor of sexual assault to give evidence via audio-visual recording. This method of giving evidence is designed to reduce stress and trauma for the victim/survivor.

The Court took the Charter into account in agreeing to the extension. The Court decided that the application of the Charter led, in part, to the conclusion that it was in the interests of justice to grant the extension. This issue has now been raised in a number of similar cases.

Source: Human Rights Law Centre: *Advancing the rights of victim/survivors of crime using Victoria's Human Rights Charter: Your advocacy guide*, 2018, p. 4.

In the Committee's view, there is opportunity to strengthen the practical application of the Victims' Charter so that the rights and interests of victims articulated in the Charter are better enforced. Currently, s 22 of the Victims' Charter explicitly states that legal rights are not affected by the Victims' Charter.

BOX 6.3: Section 22 of the *Victims' Charter Act 2006* (Vic)

Legal rights not affected

(1) The Parliament does not intend by this Act—

(a) to create in any person any legal right or give rise to any civil cause of action; or

(b) to affect in any way the interpretation of any law in force in Victoria; or

(c) to affect the validity, or provide grounds for review, of any judicial or administrative act or omission.

(2) Subsection (1) does not prevent a contravention of this Act from being the subject of disciplinary proceedings against a relevant official.

Source: *Victims' Charter Act 2006* (Vic) s 22.

Section 22 undermines the purpose of the Victims' Charter to 'govern the response to persons adversely affected by crime' by investigatory, prosecutory and victim service agencies. It significantly limits the enforceability and application of the Victims' Charter and prevents victims of crime from taking legal action for contraventions of principles in the Victims' Charter. This could lead to victims of crime having their rights unnecessarily

infringed on, resulting in feelings of revictimisation and trauma. The Committee believes that the Victorian Government should investigate options to strengthen the practical application of the Victims Charter by amending s 22. The Committee has not proposed specific amendments to s 22 because it believes a review should be conducted to better understand the implications of any amendments and determine the best approach.

FINDING 23: Despite the intentions of the *Victims' Charter Act 2006* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the inherent interests and rights of victims of crime could be better upheld throughout the criminal justice system.

RECOMMENDATION 29: That the Victorian Government investigate options to strengthen the practical application and use of the *Victims' Charter Act 2006* (Vic) to protect the rights of a victim of crime to participate in justice processes. For example, amendments to s 22 of the Charter should be considered.

6.4.1 Monitoring agencies' compliance with the Victims' Charter

Section 19A of the Victims' Charter sets out a complaints system for victims of crime for prescribed agencies under the Charter. Each agency which falls under the Victims' Charter is required to establish and operate a system to receive and resolve complaints related to their compliance with Charter principles.[31] The Victims' Charter prescribes minimum requirements for a complaints system for victims of crime. A complaints system must:

- be accessible and transparent
- offer fair and reasonable remedies.[32]

If a person is not satisfied with the agency's response to their complaint, they have the right to have it reviewed by the Victims of Crime Commissioner. In investigating a complaint, the Commissioner can only:

- review any findings, recommendations, determinations or other decisions of an agency in relation to the complaint
- consider the agency's process for dealing with complaints, the response to the specific complaint and compliance with the Victims' Charter principles.[33]

31 *Victims' Charter Act 2006* (Vic) s 19A(11).

32 Ibid., p. 19A(12).

33 *Victims of Crime Commissioner Act 2015* (Vic) s 25I.

Following an investigation, the Victims of Crime Commissioner can recommend that an agency take certain actions, such as:

- apologise or offer an explanation/meeting to the complainant
- undertake additional training
- change policies
- provide information.[34]

Any recommendations made by the Victims of Crime Commissioner are not binding or considered a required direction that an agency is mandated to follow.[35]

At a public hearing, the Commissioner, Fiona McCormack, explained the complaints process to the Committee:

> So what it means is that there are certain prescribed agencies, about 170 agencies—so these are police, prosecutions, victim services—and they are required to comply with the victims charter. And so if a person believes that what they are entitled to has not been delivered, they can, first of all, as I said, put a complaint in to that agency, and if they are still unhappy, they can put that complaint to me. I have to assess the eligibility of that, so obviously I cannot undertake an investigation if it falls outside of what victims are entitled to or it relates to an agency that is not prescribed or it happened before the changes were introduced—so, you know, it is a later thing. But if I undertake an investigation and it is upheld, then I can provide recommendations to that agency that it might make an apology, meet with the victim or that it might introduce a new policy to strengthen its response or training.[36]

The Victims of Crime Commissioner is also required to report on the compliance of agencies with the Victims' Charter every financial year. In 2020–21, the focus of the Commissioner's compliance report was on agencies' awareness of their obligations and the extent that they have established processes to meet those obligations. Figure 6.2 summarises the Victims of Crime Commissioner's findings in relations to agencies' awareness of their obligations.

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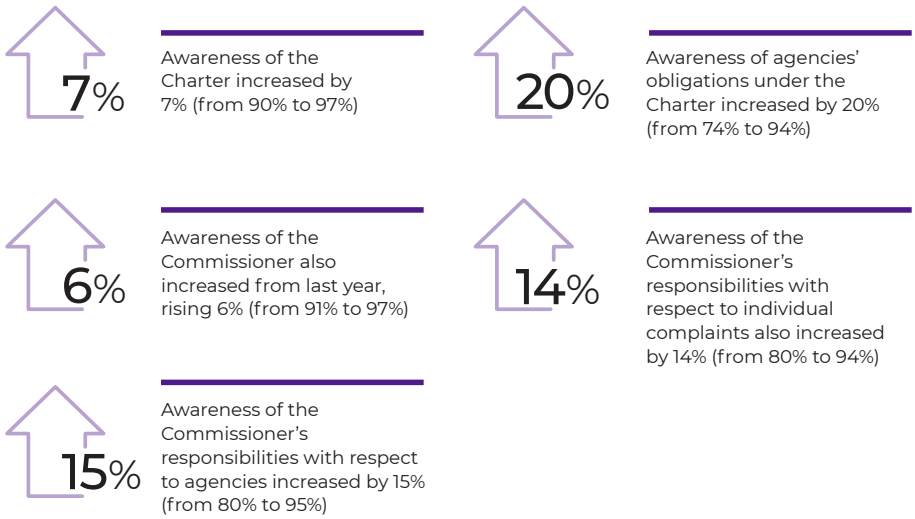
34 Ibid., p. 25J(21).

35 Ibid., p. 25J(22).

36 Ms Fiona McCormack, *Transcript of evidence*, p. 3.

Figure 6.2 Agencies' awareness of the Victims' Charter and role of the Victims of Crime Commissioner, *Victims of Crime Commissioner Annual Report: 2020-21*



Source: Victims of Crime Commissioner, *Victims of Crime Commissioner: Annual Report 2020-21*, Victoria, 2021, p. 30.

On the extent to which agencies have embedded processes and systems to meet their obligations, the Victims of Crime Commissioner found:

- 66% of agencies reported having policies and procedures relating to the Victims' Charter, an increase of 33% compared to 2019–20
- 65% of agencies provided training on the Victims' Charter, an increase of 42% compared to 2019–20
- 84% of agencies report having a complaints process for victims of crime in place specific to the Victims' Charter.[37]

DJCS' 2021–22 budget output measurements paper showed that in 2019–20 the Office of Public Prosecutions undertook 18,007 victim and witness consultations.[38] This is a 24% increase from the intended target of 12,500 to 14,500 consultations. According to DJCS' paper, the increase in consultations is:

> due to increased victim and witness engagement undertaken by OPP solicitors, both generally to meet obligations under the Victims Charter Act 2006, and specifically to victims and witnesses apprised of progress of their case under the changing court listings in response to the COVID-19 pandemic.
>
> The higher 2021–22 target reflects the additional activity undertaken by the OPP in response to its victim and witness engagement obligations reflecting changes to the Victims Charter Act 2006. [39]

37 Victims of Crime Commissioner, *Victims of Crime Commissioner: Annual Report 2020-21*, p. 31.

38 Department of Justice and Community Safety, *Output Performance Measures 2021-22*, 2021, <https://www.dtf.vic.gov.au/state-financial-data-sets/departmental-statements> accessed 4 January 2022.

39 Ibid.

The Victims of Crime Commissioner told the Committee that it is continuing to develop its approach to monitoring agency compliance, with a view to:

- showing if the justice and victim support systems are working
- identifying compliance challenges for agencies with the Victims' Charter
- supporting agencies to improve compliance with the Victims' Charter
- improving the experiences of victims of crime
- enabling victims of crime to better understand their complaint rights
- prioritising victims of crime facing systemic barriers to accessing justice and victim support services.[40]

6.4.2 Enhancing legal entitlements for victims of crime under the Victims' Charter

> **you know, you are revictimising people by not knowing the outcome. I got told all the way through I had a tremendously strong case, and it just—poof!—died.**
>
> Tracie Oldham, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 52.

Victims of crime have inherent, and often enduring, interests in criminal justice processes. Therefore, it is incumbent that, where the justice system interacts with victims of crime it should be fair, respectful, and, to every possible extent, equitable. The Committee heard from victims of crime who felt that the legal entitlements of the perpetrator of the crime against them were prioritised over their rights and interests. This led to further trauma and feelings of victimisation, compounded by the adversarial nature of criminal proceedings.

Cathy Oddie, a victim-survivor of domestic violence, told the Committee about her experiences with the criminal justice system. She believed, in her case, that her rights were considered secondary compared to the person who committed the offence. She said:

> when I questioned what is the current process or legislation sitting behind why I am not allowed to know that identity and why this young woman is not—and the thousands of other victim-survivors that are probably in a similar situation—I was referred back to the victim rights charter, and it was effectively that the offender's right to not have their reputation damaged was seen as more important than a victim being able to take steps to protect their immediate and ongoing safety and also to get appropriate justice outcomes.[41]

The Victims' Charter plays a fundamental role in recognising the interests of victims of crime in the justice system, as well as reaffirming their right as a participant in certain proceedings. However, some stakeholders argued the Victims' Charter lacks sufficient

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40 Victims of Crime Commissioner, *Submission 99*, p. 5.

41 Cathy Oddie, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 38.

legal entitlements for victims of crime. At a public hearing, Fiona McCormack, the Victims of Crime Commissioner, advocated for increased legal protections for victims of crime. This included:

- recognising victims' rights as human rights
- supporting independent legal representation for victims of crime during key points in the trial process
- implementing an independent right to review scheme for decisions of Victoria Police and prosecuting agencies that impact victims of crime.[42]

Fiona McCormack also argued that enhanced entitlements for specific offences, such as sexual assault, would improve the experiences of victims of crime. Enhanced legal entitlements, particularly representation, for specific offences is discussed in Chapter 8.

The Victims' Charter prescribes requirements for victims of crime to be consulted during key stages of the criminal justice process. However, the Charter limits this requirement, particularly for consultation from a prosecuting agency. For example, s 9B(3) prescribes the circumstances in which the Director of Public Prosecutions is not required to seek the views of the victim. These circumstances are: (a) if all reasonable attempts have already been made to contact the victim; and (b) if it is not practical to contact the victim given the speed and nature of proceedings.[43]

The Victims of Crime Commissioner advocated that s 9B(3)(b) of the Victims' Charter be removed so that victims of crime have an 'unrestricted entitlement' to be consulted during key stages of the prosecution process. Its submission said:

> The Victorian justice system must adapt to better accommodate victims' participatory rights as provided for by the Victims' Charter. Practices of the court, prosecution and defence must evolve so that victims' participatory rights are respected and implemented in practice. Section 9B(3)(b) of the Victims' Charter should be removed so that a victim's right to be consulted under the Victims' Charter at key stages of the prosecution process is an unrestricted entitlement.[44]

Thomas Wain, a victim of a violent home invasion, used plea deals as an example of the impact poor consultation can have on a victim of crime, stating:

> you may go to court and it is dragged out, and then all of a sudden a plea deal is agreed upon without victims knowing. So a victim comes to court and a plea deal is done … victims really should have a massive say or at least the prosecution needs to come to the victim and say, 'Look, this is what we're going to put on the table and offer them. How do you feel about that?', so they do not get that shock.[45]

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42 Ms Fiona McCormack, *Transcript of evidence*, pp. 1–2.

43 *Victims' Charter Act 2006* (Vic) s 9B(3).

44 Victims of Crime Commissioner, *Submission 99*, p. 13.

45 Thomas Wain, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*.

The Committee is concerned that s 9B(3)(b) of the Victims' Charter is an unnecessary roadblock for victims of crime to be engaged properly and consistently through the prosecution process. It acknowledges that any delays in justice proceedings can be a preventative factor for a fair trial which should be avoided.[46] This should not, however, come at the expense of the interests of victims of crime. As already stated, this inherent interest in criminal justice processes is well-established. This not only extends to seeing a person held accountable for any crimes committed, but also to the personal safety and wellbeing of a victim. Given that the Victorian Office of Public Prosecutions primarily deals with more serious criminal offending—indictable offences—it is incumbent that any victims of crime are consulted throughout the process. The Committee has recommended that s 9B(3)(b) of the Victims' Charter be removed. The Committee considers it is reasonable that the Director of Public Prosecutions is not required to seek these views so long as all reasonable attempts have been made according to s 9B(3)(a) of the Victims' Charter. To ensure that repealing s 9B(3)(b) does not affect an accused person's right to a fair trial, the Committee has also recommended that s 9B(1) be amended to include a disclaimer that seeking the views of victims of crime should not unnecessarily impact a person's right to fair trial.

Another issue noted by stakeholders was the different entitlements afforded to victims of crime depending on whether their case involved a summary or indictable offence. In its submission, the Victims of Crime Commissioner argued that differing requirements under the Charter had created 'two tiers of victims in Victoria', stating:

> Under the Victims' Charter, victims in the indictable stream (prosecuted by the DPP) are entitled to more specific information and consultation than victims in the summary stream (prosecuted by Victoria Police).
>
> The differing information and consultation requirements under the Victims' Charter effectively create two tiers of victims in Victoria.
>
> When approaching the Victims' Charter entitlements from a trauma-informed and victim-centred lens, there is no sound policy rationale for maintaining two tiers of victim entitlements. The Commissioner advocates for consistency and equity in victim entitlements under the Victims' Charter, regardless of jurisdiction or prosecuting agency.[47]

Fiona McCormack further explained that a 'perverse outcome' of differing requirements was that some victims of crime have access to better entitlements than others:

> The 'victims charter' as it stands reflects the journey that a victim might go through if they are going through a criminal trial process, and that is because the [charter], when it was developed—they were the terms of reference for it to be developed. That means that there is a bit of a perverse outcome in that there are better entitlements for people in the indictable stream as opposed to the summary, and I also hear from different people who are victims of crime who have experiences of the justice system or service system that falls outside of the 'victims charter'.[48]

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46 Victoria Law Foundation, *The Principles of Justice: Equality, Fairness and Access*, 2019, p. 5.

47 Victims of Crime Commissioner, *Submission 99*, p. 11.

48 Ms Fiona McCormack, *Transcript of evidence*, p. 4.

In the Committee's view, victims of crime should have equitable entitlements under the Victims' Charter regardless of the type of offending. All experiences of victimisation or crime is traumatising for victims. Victims' interests are focussed on ensuring an appropriate response from the justice system. Therefore, the Committee recommends that the Victorian Government amends the Victims' Charter so that victims of crime have the same entitlements to information, regardless of whether a prosecuting agency is dealing with a summary or indictable offence.

RECOMMENDATION 30: That the Victorian Government amend the *Victims' Charter Act 2006* (Vic):

- to remove s 9B(3)(b) which exempts the Director of Public Prosecutions from seeking the views of victims of crime if it is not practical because of the speed and nature of proceedings
- to amend s 9B(1) to affirm that the Director of Public Prosecutions' requirement to seek the views of victims of crime should not unnecessarily cause delays which would impact a person's right to a fair trial
- so that all victims of crime have the same entitlements to information and consultation from investigatory and prosecuting agencies, regardless of whether it is related to a summary or indictable offence.

6.5 Intermediary Program

In July 2018, the Victorian Government commenced the Intermediary Pilot Program to improve support for vulnerable witnesses to provide evidence to Victoria Police or the courts. The program was established under the *Justice Legislation Amendment (Victims) Act 2018* (Vic) which amended the *Criminal Procedure Act 2009* (Vic) (Criminal Procedure Act) to allow for intermediaries.

Intermediaries are communication specialists who assist witnesses to communicate and provide evidence. An intermediary is available for victims of sexual offences and witnesses in homicide matters, who have a cognitive impairment or are under 18.[49] If an intermediary has been engaged to assist a witness, then any evidence that witness gives must be taken in the presence of the intermediary.[50]

Box 6.4 below outlines the intermediary process.

49 *Criminal Procedure Act 2009* (Vic) s 389F(381).

50 Ibid., s 389K(381).

BOX 6.4: Intermediary Process

1. **Matching:** Following referral, the Intermediary Matching Service selects an appropriate intermediary to support a vulnerable witness based on their specific needs.
2. **Application:** An application is made to the relevant court (either orally or in writing) in advance of the vulnerable witness providing evidence in criminal proceeding. The application must—
    a. explain the eligibility of the witness
    b. explain why an intermediary would improve the quality of the witness's evidence
    c. provide any information to the court that the witness is aware of the application
    d. provide any other material, including an intermediary assessment report.
3. **Appointment:** Following matching, an application is made to the relevant court to appoint an intermediary. Once an intermediary is appointed, they can assist with obtaining relevant materials for the application.
    a. An intermediary may be appointed for questioning vulnerable witnesses during criminal proceedings.
4. **Rules of court when an intermediary is appointed:** Where an intermediary is appointed, the following rules under s 389K of the Criminal Procedure Act are in place:
    - evidence from the vulnerable witness must be given in the presence of the intermediary
    - any assistance given by the intermediary must be able to be seen and heard by the Court, counsel and jury (if any)
    - the Court and counsel must be able to communicate with the intermediary, even when participating remotely.

Source: County Court Victoria, *Multi-jurisdictional court guide for the Intermediary Pilot Program: Intermediaries and ground rule hearings*, 2021, pp. 15–17.

DJCS described the functions of an intermediary, which includes to:

- assess the witness's communication style and specific communication assistance required
- describe the communication needs of the witness to the investigating police officer, legal practitioners and judicial officers to enable the individual to participate in the court process. This will include providing recommendations on how to best communicate with the witness, explaining concepts that the individual has difficulty understanding and/or making recommendations to the person questioning the witness and the Judicial Officer on how to pose a question to get the most reliable evidence

- facilitate communication between the individual and other parties to prevent or overcome a communication breakdown
- write court reports on the individual's communication needs and provide practical strategies for managing these needs.[51]

As part of their assessment role, an intermediary is required to participate in a 'ground rules' hearing to 'address issues relating to the questioning and communication needs of the witness'.[52] It is important to note that intermediaries are officers of the court and do not facilitate access to broader justice or support systems. Intermediaries do not make referrals to other services, even where they identify unmet support needs.[53]

According to the Victorian Government's website:

- 41 allied health professionals have been appointed to a panel of intermediaries
  - Intermediaries are matched according to the specific needs of complainants or witnesses. The Victim Services, Support and Reform unit is responsible for matching appropriate intermediaries to a witness
- the pilot program is operating:
  - in the Supreme Court, County Court, Magistrates' Court and Children's Court in Melbourne, Geelong and Bendigo
  - across four Sexual Offences and Child-Abuse Investigation Team (Victoria Police) locations in Knox, Bendigo and Moorabbin.[54]

The need for an intermediary scheme to support vulnerable witnesses, including victims of crime, has been long-established. The Victorian Law Reform Commission's 2016 report into *The Role of Victims of Crime in the Criminal Trial Process* recommended the establishment of a professional intermediary scheme in Victoria. The report focused on the use of intermediaries for victims of crime who have a disability, which could undermine the quality of their evidence, and child victims of crime. The Victorian Law Reform Commission argued:

> There is a need for intermediaries during the criminal trial process for child victims and for victims who have a disability that is likely to undermine the quality of their evidence. The scheme should be underpinned by legislation, to reinforce the victim's right to be assisted in this way.
>
> The use of intermediaries may cause some delays in preparing for the trial, and cross-examination- may take longer. However, as the Supreme Court noted, promoting access to the justice system is a strong justification.[55]

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51 Department of Justice and Community Safety, *Victorian intermediaries pilot program*, <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program> accessed 14 December 2021.

52 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, p. 209.

53 Ibid.

54 Victorian Government, *Criminal Justice Report (2017)*, 2021, <https://www.vic.gov.au/victorian-government-annual-report-2019-royal-commission-institutional-responses-child-sexual-abuse/criminal-justice-report-2017> accessed 14 December 2021.

55 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, p. 169.

In 2020, the Victorian Law Reform Commission expanded its position on the use of intermediaries, recommending that they be used for all witnesses with communication difficulties.[56] The Victorian Law Reform Commission again expanded its view in the 2021 report on *Improving the Justice System Response to Sexual Offences*, recommending that the Intermediary Program be extended to 'all witnesses and accused persons with communication difficulties'.[57]

In submissions received earlier in the Inquiry, numerous stakeholders recommended that the Intermediary Pilot Program trial be funded to completion so that it can be properly evaluated, and so an outcomes review could be conducted. These stakeholders also supported the full implementation and roll-out of the Program if the evaluation showed the trial was successful.[58] Some stakeholders also believed that the Program should be extended to accused persons who have communication difficulties.[59]

The Committee notes that the pilot has been completed and the Victorian Government had funded the continuation of the Program. As part of the 2021–22 State Budget, the Victorian Government announced it will invest $9.9 million to continue the Intermediary Program. The Government has also provided funding to increase the number of remote witness rooms through the Virtual Court Support Program. The 2021 Victim Support Update explained that remote room will:

> provide flexible options for victims and witnesses a part of the Child Witness Service and Intermediary Program to engage safely in court hearings online. Co-locating these services has already improved coordination, streamlined referrals and allowed skills to be shared between the programs. In addition, these services are working to embed best practice in cultural safety and whole-of-family care.[60]

The importance of the Intermediary Program was made clear to the Committee, but some stakeholders suggested there could be further improvements.

In its submission, the Office of the Public Advocate contended that the State has obligation to ensure that people with disability have equal access to justice and can participate fully in criminal proceedings. Furthermore, it is essential that people with disability can understand their rights and assert them. It said that intermediary services are an important support tool to ensure that a person with communication difficulties can provide the best evidence to a court.[61]

As noted previously, intermediaries do not give referrals to other support services even if they have identified that a witness has unmet needs. Given the trauma of experiencing crime, especially sexual offence or homicide matters, consideration should be given to

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56 Victorian Law Reform Commission, *Committals*, 2020, p. xvi.

57 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, 2021, p. 324.

58 For example, see: Victorian Council of Social Service, *Submission 137*; Victims of Crime Commissioner, *Submission 99*; Amaze Autism Connect, *Submission 114*; Office of the Public Advocate, *Submission 153*; Victoria Legal Aid, *Submission 159*; In Good Faith Foundation (IGFF), *Submission 38, Attachment A*.

59 For example, see: Office of the Public Advocate, *Submission 153*; Amaze Autism Connect, *Submission 114*.

60 Minister for Victim Support, *Victim Support Update*, Department of Justice and Community Safety, December 2021, p. 26.

61 Office of the Public Advocate, *Submission 153*, p. 28.

whether an assessment and referral function could be added to the role. The Centre for Innovative Justice discussed this in its 2020 report into *Strengthening Victoria's Victim Support System: Victim Services Review*. The Centre noted:

> while the program's focus is on witnesses, it is highly likely that these witnesses will be victims of crime as well. This includes where they have been the victim of a crime other than the one being prosecuted, given that people with additional communication needs, including cognitive impairments or other forms of disability, are likely to be more vulnerable to victimisation throughout their lives. Where [Intermediary Pilot Program] clients are victims of crime, or otherwise have unmet support needs, the program represents an important opportunity to refer into broader supports and consideration should be given to how this broader needs assessment and referral function might be performed without conflicting with the intermediary's role as an impartial officer of the court.[62]

The Victims Services Review was commissioned by DJCS in order to conduct a comprehensive review and redesign of Victoria's service and support system for victims of crime.[63]

The Committee strongly supports the implementation of the Intermediary Program following the successful trial which commenced in 2018. For many people, the criminal justice process can be confusing and overwhelming. This can be compounded for people with disability, such as a cognitive impairment, or who are young. It is essential that vulnerable people are supported to understand their rights when giving evidence in criminal proceedings and can advocate for their rights to the court. This is at the heart of the intermediary service.

The Committee believes that the Intermediary Program should be expanded so that any victim of crime or witness who has communication difficulties can be appointed an intermediary, regardless of the offence before the court. Furthermore, the Committee encourages the Victorian Government to consider whether this service should be extended to accused persons with a cognitive impairment, or persons under 18, to ensure they properly understand proceedings.

Alongside these suggestions, the Committee has also recommended that the Victorian Government investigate expanding the intermediary role to include assessing whether a vulnerable witness has unmet needs and make referrals to other support services. Under the Criminal Procedure Act, intermediaries are required to have qualifications in areas such as psychology, social work, speech pathology or occupational therapy.[64] These qualifications, coupled with experience in criminal justice, means intermediaries are capable of being an important nexus between the justice system and broader support services. This could be particularly valuable for addressing the trauma that victims of crime (or witnesses) experience which often requires ongoing support beyond what is offered during proceedings.

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62 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 210.

63 Centre for Innovative Justice, *Victim Service Review*, <https://cij.org.au/research-projects/victims-services-review> accessed 19 January 2022.

64 *Criminal Procedure Act 2009* (Vic) s 389H.

RECOMMENDATION 31: In relation to the Intermediary Program, that the Victorian Government:

- expand the Program to include any witnesses eligible under the existing criteria regardless of the criminal offence before Victoria Police or the courts
- consider expanding the program to accused persons with a cognitive impairment or who are under 18
- investigate ways the role of intermediaries could be expanded to include assessment and referral functions for witnesses with unmet needs. Any expansion of the role allowing an intermediary to refer a witness to services should not undermine the intermediary's role as an impartial court officer.

6.5.1 Ground rules hearings

Under the Criminal Procedure Act, ground rules hearings are required if an intermediary is appointed.[65] Legal counsel (both prosecution and defence) and the intermediary are required to attend a ground rules hearing, but the witness is not required.[66] In some circumstances, the court may make an order that a witness not attend a ground rules hearing.[67]

Ground rules hearings bring to the attention of judicial officers—including counsel—the communication needs of a vulnerable witness. At the hearing, all present parties (including the intermediary) discuss the questioning of the witness during proceedings, considering their communication needs and any arrangements that may need to be made.[68] Following discussion, the court will give directions for questioning the witness which ensures fair and efficient conduct of the proceeding. Directions can address:

- the manner of questioning
- the duration of questioning
- questions that may or may not be put to a witness
- where there is co-accused, how topics can be allocated to a specific accused person
- the use of models, plans, body maps or other aids to help the witness communicate
- that if legal counsel intends to contradict or challenge the evidence of the witness, they are not obliged to put any evidence supporting that to the witness during cross-examination.[69]

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65 Ibid., s 389B.

66 Ibid., ss 389D(381)–(382).

67 Ibid., s 389D(383).

68 County Court Victoria, *Multi-jurisdictional court guide for the Intermediary Pilot Program: Intermediaries and ground rule hearings*, 2021, p. 6.

69 *Criminal Procedure Act 2009* (Vic) s 389E.

Ground rules hearings can also be held in relevant criminal proceedings, even where an intermediary has not been appointed, if the proceedings are related to the following offences:

- a sexual offence
- an offence constituting family violence within the meaning of the *Family Violence Protection Act 2008* (Vic)
- an indictable offence involving assault, injury or threat of injury
- common assault or aggravated assault offences under the *Summary Offences Act 1966* (Vic), if the offences related to one of the above offences.[70]

The Victorian Law Reform Commission in its report on the *Role of Victims of Crime in the Criminal Trial Process* believed that ground rules hearings should form part of any intermediary scheme in Victoria, stating:

> Ground rules hearings appear to be vital in bringing to the attention of lawyers and judicial officers the comprehension capacity and communication needs of the witness. This helps the parties in planning questions and communication and the running of the trial. If a ground rules hearing is done effectively, there should be less need for an intermediary to intervene during cross-examination.[71]

In its submission, Victoria Legal Aid explained that ground rules hearings allow vulnerable witnesses to 'give their best evidence but also to protect them from improper questioning and reduce the stress associated with the court process.'[72]

FINDING 24: Ground rules hearings support vulnerable witnesses, including victims of crime, by:

- supporting them to give their best evidence through ensuring the process for questioning suits their communication needs
- reducing the stress of giving evidence in court by protecting them against improper questioning.

Recommendation 31 above concerning the Intermediary Program would also include ground rules hearings.

6.5.2 Independent Third Persons Program

The Independent Third Persons Program is administered by the Office of the Public Advocate. The Program involves a trained volunteer supporting a person with

70 Ibid., s 389A(381).

71 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, p. 170.

72 Victoria Legal Aid, *Submission 159*, p. 14.

cognitive impairment and/or mental illness who is being interviewed by Victoria Police. Independent Third Persons are unable to provide any legal advice to a person but can:

- facilitate communication between the person and police officers
- contact a lawyer or other people (e.g. a parent or guardian) if requested
- help the person understand their rights and any legal advice given
- ensure the person understands the questions
- inform Victoria Police if they believe a person does not fully understand their rights or circumstances
- request breaks during an interview if they feel the person is becoming distressed or is no longer paying attention.[73]

An Independent Third Person can support victims, witnesses, or people accused of committing a criminal offence of any age who have a disability and/or mental illness.

In a submission to the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, the Office of the Public Advocate described the guidance in the Victoria Police Manual on circumstances which require an Independent Third Person to attend an interview:

> The Victoria Police Manual sets out the circumstances in which ITPs are required to attend police interviews: "An ITP is to be present during the interview of any person with a cognitive impairment, who is fit to be interviewed or have a statement taken as a suspect, an accused, an offender, a victim or a witness." The manual's definition of 'cognitive impairment' is inclusive of intellectual disability, Acquired Brain Injury (ABI), mental illness, and neurological disorders. In determining whether a person may have a cognitive impairment, police members rely on experience and knowledge, observations of the person, and active questioning.[74]

The Office of the Public Advocate provided some data around the use of the program, which showed in 2019–20:

- the program supported 2,869 clients in 3,718 interviews
- of the people who required an Independent Third Person:
  - 8.2% were victims of crime
  - 2.4% were witnesses
  - 55.7% had an intellectual disability

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73 Office of the Public Advocate, *Independent Third Persons*, <https://www.publicadvocate.vic.gov.au/opa-volunteers/independent-third-persons> accessed 16 December 2021.

74 Office of the Public Advocate, submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2020, p. 24.

- 35.8% had a mental illness
- 23.3% had an Acquired Brain Injury.[75]

According to the Office of the Public Advocate, the number of Aboriginal Victorians requiring an Independent Third Person has increased from 13% in 2017–18 to 18% in 2019–20. Over the last three years, 849 (out of a total of 1,037) Aboriginal Victorians required an Independent Third Person on multiple occasions. The high proportion of recurring engagement required by Aboriginal Victorians:

> suggests a high degree of disadvantage experienced by Aboriginal Victorians with disability that requires targeted and adequate supports to keep this cohort out of the criminal justice system and supported in community.[76]

The Victorian Aboriginal Legal Service believed that the program is 'heavily underutilised' with 'some police stations making almost no calls to the [Independent Third Person] service each year'.[77] It noted that this has particularly affected Aboriginal Victorians:

> In early 2020, during the early stages of pandemic restrictions, VALS received 145 notifications about Aboriginal people in custody requiring support from an [Independent Third Person], but only 81 were able to access it. 14 of these 81 accessed support only via telephone, which cannot provide the same safeguards given that [Independent Third Person's] responsibilities include observing the person in custody for signs of distress and requesting breaks in interviews if necessary.[78]

In its submission to this Inquiry, the Office of the Public Advocate recommended that the Independent Third Person Program be legislated in Victoria, to ensure that it is used more consistently and has adequate resources. It specifically recommended that:

> The Victorian Government should introduce legislative reform to require Victoria Police to have an [Independent Third Person] present when interviewing a person with a cognitive impairment or mental illness, irrespective of age. This should include alleged offenders, victims, and witnesses.
>
> The legislative provisions should include:
>
> - a requirement for an [Independent Third Person] to be present when interviewing a person with an apparent cognitive impairment or mental illness:
> - irrespective of age
> - whether they are an alleged offender, victim, or witness
> - a requirement for the [Independent Third Person] program to be adequately resourced to meet its legislated functions, based on modelling of demand.[79]

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75 Office of the Public Advocate, *Submission 153*, pp. 24–25.

76 Ibid., p. 25.

77 Victorian Aboriginal Legal Service, *Submission 139*, p. 156.

78 Ibid.

79 Office of the Public Advocate, *Submission 153*, p. 26.

Youth Affairs Council Victoria and the Victorian Aboriginal Legal Service also supported legislating the Independent Third Person Program.[80]

The Victorian Aboriginal Legal Service contended that legislating the program would support further reforms, including cultural awareness training for police officers. It said:

> The critical starting point is that the requirement to call an [Independent Third Person] when interviewing people who may have a disability or mental illness should be included in legislation, not only in Victoria Police policy as at present. This core reform would support further steps, including the expansion of resourcing, improved training for police about the [Independent Third Person] service, and improved cultural awareness training for [Independent Third Persons]. Extensive training on cultural awareness is particularly important given the disproportionate rates at which Aboriginal people have disabilities, mental illness and acquired brain injuries. Cultural competence training and anti-racism training for police is also necessary to reduce the risk that signs of a disability are, due to racial stereotyping, perceived by police simply as an Aboriginal person being uncooperative or under the influence of drugs or alcohol.[81]

In the Committee's view, the Independent Third Person Program is an important intermediary service for people with disability and/or mental illness. An Independent Third Person is an important safeguard to support people with disability and/or mental illness during police interviews. For many people, being interviewed by law enforcement can be an overwhelming experience, even more so for victims of crime. The Independent Third Person Program plays an important role in ensuring the right of people with disability to access justice is protected. The Committee recommends that the Victorian Government legislate the program.

80 Youth Affairs Council Victoria, *Submission 118*, p. 24; Victorian Aboriginal Legal Service, *Submission 139*, p. 157.

81 Victorian Aboriginal Legal Service, *Submission 139*, p. 139.

6.6 Victims of Crime Assistance Tribunal

Note from the Committee:

As part of the 2021/22 State Budget, the Victorian Government announced it will replace the Victims of Crime Assistance Tribunal with a 'more accessible and trauma-informed financial assistance scheme'. At the time of writing, the Victims of Crime Assistance Tribunal was still in place and a replacement scheme had not been announced in detail.

Many stakeholders, including victims of crime, discussed the operation of the Victims of Crime Assistance Tribunal as well as financial assistance available to victims of crime. The Committee believes this evidence is still of great importance. The evidence related to the Victims of Crime Assistance Tribunal provides key insights which should be used to inform the development of the new financial assistance scheme for victims of crime.

The Legal and Social Issues Committee's findings and recommendations related to financial assistance for victims of crime is forward-thinking. It acknowledges that the current scheme is due to be replaced but there are several lessons which should be considered in the new scheme.

Source: Premier of Victoria, *Better Outcomes for Victims and Young People*, media release, Victorian Government, 20 May 2021.

The Victims of Crime Assistance Tribunal commenced in 1997 and is established under the *Victims of Crime Assistance Act 1996* (Vic). It replaced the Crimes Compensation Tribunal. The Victims of Crime Assistance Tribunal provides financial assistance to victims of crime committed in Victoria to assist with their recovery. The Tribunal hears and determines applications for financial assistance made by victims of violent crime which were committed in Victoria. Financial assistance supports the recovery of victims of crime, paying for expenses that have been incurred, or are likely to be incurred, as a direct result of the crime.

Box 6.5 below summarises key parts of the Victims of Crime Assistance Act, including the types of victims of crime eligible for financial assistance and what assistance is available.

BOX 6.5: *Victims of Crime Assistance Act 1996* (Vic)

The Victims of Crime Assistance Act prescribes a framework for providing financial assistance to victims of violent crime. This financial assistance is intended to help with recovery and acknowledge the adverse effects experiencing violent crime has on a person. The Act sets out the types of financial assistance available to victims of crime, as well as the roles and function of the Victims of Crime Assistance Tribunal.

The objectives of the Act are to:

- assist the recovery of victims of crime by providing financial assistance
- pay certain victims of crime financial assistance (including special financial assistance) as a symbolic expression by the State of Victoria of the community's sympathy and condolences, as well as recognise the significant adverse effects experienced
- allow victims of crime recourse to financial assistance where compensation for injury cannot be obtained from the person who committed the offence or other sources.

The Act prescribes three types of victims of crime which are eligible for financial assistance:

- **Primary victims—**a person who is injured or dies as a direct result of an act of violence committed against them. A primary victim includes a person who was injured or died when:
  - trying to arrest a person that they had reasonable grounds to believe had committed an act of violence
  - trying to prevent an act of violence
  - trying to aid or rescue another person they had reasonable grounds to believe was a victim of an act of violence.
- **Secondary victims—**a person present at the scene of an act of violence, who was injured as a direct result of witnessing that act. A secondary victim includes a parent or guardian of a primary victim under the age of 18 years old, if they become aware of an act of violence committed.
- **Related victims—**a person, who at the time an act of violence occurred:
  - was a close family member of
  - was a dependant of
  - had an intimate personal relationship with
    - a primary victim who died as a direct result of an act of violence committed against them.

The type and amount of financial assistance available to a person depends on what type of victims of crime category they fall under within the Act.

(Continued)

BOX 6.5: Continued

Table 6.2 below summarises the financial assistance available to each type of victim of crime. However, as a broad overview, the Victims of Crime Assistance Tribunal can award financial assistance for:

- reasonable counselling expenses
- reasonable medical expenses
- replacement of damaged clothing worn at the time a crime occurred
- reasonable safety-related expenses
- reasonable funeral expenses
- lost earnings
- special financial assistance
- distress and dependency.

Source: *Victims of Crime Assistance Act 1996* (Vic); Victims of Crime Assistance Tribunal, *Financial Assistance Available*, 2016, <https://www.vocat.vic.gov.au/assistance-available/financial-assistance-available> accessed 10 December 2021.

Table 6.2 Financial assistance available under the *Victims of Crime Assistance Act 1996* (Vic)

Category of victim of crime under the Victims of Crime Assistance Act	Financial assistance available		
Primary victim	Up to $60,000 may be awarded by the Victims of Crime Assistance Tribunal for expenses actually incurred, or reasonably likely to be incurred, related to: • medical expenses • counselling services • safety-related expenses • loss or damage of clothing worn at time of the act of violence. Up to $20,000 may be awarded by the Tribunal for loss of earnings suffered, or reasonably likely to be suffered.		
Primary victim (special financial assistance for significant adverse effects)	In addition to financial assistance available to any eligible primary victim, there is also special financial assistance for primary victims who experienced significant adverse effects as a direct result of an act of violence. The amount is determined by which category a victim of crime falls under:		
	Category A	Minimum: $4,667	Maximum: $10,000
	Category B	Minimum: $1,300	Maximum: $3,250
	Category C	Minimum: $650	Maximum: $1,300
	Category D	Minimum: $130	Maximum: $650

Category of victim of crime under the Victims of Crime Assistance Act	Financial assistance available
Secondary victim	Up to $50,000 may be awarded by the Tribunal for expenses actually incurred, or reasonably likely to be incurred, related to: • medical expenses • counselling services. In exceptional circumstances: • $20,000 of the award could be paid to a secondary victim for loss of earnings suffered, or reasonably likely to be suffered • the award could cover other expenses actually, or reasonably likely to be, incurred from witnessing the act of violence • the award could cover other expenses actually, or reasonably likely to be, incurred from becoming aware of the act of violence.
Related victim	Up to $100,000 may be awarded cumulatively to **all** related victims of **one** primary victim, minus any amount awarded for funeral expenses. Up to $50,000 may be awarded by the Tribunal to a single related victim for expenses actually incurred, or reasonably likely to be incurred, related to: • medical expenses • medical or funeral expenses • distress experienced • loss of money that the person would have been reasonably likely to receive from the primary victim • other expenses actually, or reasonably likely, incurred as a direct result of the death of the primary victim.
Person incurring funeral expenses for primary victim	A person who is not a related victim, but incurred funeral expenses for the primary victim may be awarded assistance by the Tribunal.

Source: *Victims of Crime Assistance Act 1996* (Vic) ss 8–8A, 10–10A, 13–15.

In its submission, the Victims of Crime Commissioner outlined several issues related to the Tribunal which should be addressed, including:

- **Delays—**The Tribunal's 2019-20 Annual Report indicated that there are 8,169 pending applications and that the number of pending cases has continued to grow over the previous six years. The Commissioner believed that 'the Victorian Government should continue to monitor [Victims of Crime Assistance Tribunal] delays and further investment should be made if needed to reduce the backlog'.[82]
- **Time limits for processing applications—**The Tribunal is not required to process applications according to any prescribed timelines, despite timelines being imposed on victims of crime for making applications and providing documentation.[83]
- **Communication with applicants—**The Tribunal uses overly legalistic phrases which are inconsistent with a trauma-informed and plain English approach.[84]
- **Perpetrator notification and appearance provisions—**Under the Victims of Crime Assistance Act, alleged perpetrators have provisions to know when an application

82 Victims of Crime Commissioner, *Submission 99*, p. 32.

83 Ibid., p. 33.

84 Ibid.

is before the Tribunal and if they have 'substantial interest' to appear before the Tribunal to give evidence.[85] The Commissioner argued that the perpetrator notification and 'right to appear' provisions in the Victims of Crime Assistance Act are 'counter-productive to a victim's recovery and fundamentally unnecessary in the context of state-funded financial assistance'. The Commissioner recommended that these provisions be removed urgently, regardless of the timeframe to implement the new financial assistance scheme.[86]

- **Consideration of victim's character and behaviour—**Under s 54 of the Victims of Crime Assistance Act, the Tribunal must have regard to the character, behaviour (including past criminal activity) or attitude of the applicant at any time (whether before, during or after the commission of the act of violence) when determining whether to make an award.[87] The Commissioner believed that any consideration of a victim of crime' character or behaviour should be limited to criminal behaviour connected to the criminal act subject to the application.[88]

Other stakeholders, including victims of crime, noted similar issues with the Tribunal. For example, Fitzroy Legal Service noted that a victim of crime's personal history, particularly any past criminal activity, can adversely affect their ability to get compensation from the Tribunal.[89] The Committee supports the view of the Victims of Crime Commissioner that consideration of an applicant's character or behaviour should be limited, and that only criminal behaviour connected to the criminal act subject to the application is relevant. The Committee has further considered the issue of victim-perpetrators more broadly in Chapter 7.

The Victims of Crime Commissioner further believed that the oversight and complaints process for the Tribunal was too complex for victims of crime. It said:

> While judicial officer conduct relating to VOCAT [Victim of Crime Assistance Tribunal] matters falls within the jurisdiction of the Judicial Commission of Victoria, if a victim of crime has concerns about the conduct of a VOCAT staff member, these matters fall under the Magistrates' Court of Victoria complaints process. Given issues victims experience with a VOCAT matter may cross issues relating to both staff and judicial officer conduct, this is an added layer of complexity for victims of crime to navigate.[90]

The Commissioner advocated for the new financial assistance scheme to be compliant with the intentions of the Victims' Charter. It recommended that the new scheme should be a prescribed agency under the *Victims of Crime Commissioner Regulations 2020* (Vic).

The Committee notes that the issues raised by the Victims of Crime Commissioner could be important guiding considerations for the Victorian Government as it develops

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85 *Victims of Crime Assistance Act 1996* (Vic) ss 34(32), 35(31).

86 Victims of Crime Commissioner, *Submission 99*, p. 33.

87 *Victims of Crime Assistance Act 1996* (Vic) s 54.

88 Victims of Crime Commissioner, *Submission 99*, pp. 33–34.

89 Fitzroy Legal Service, *Submission 152*, p. 5.

90 Ibid., p. 31.

the new victims of crime financial assistance scheme. It is important to ensure that the process that victims of crime use to seek financial assistance is trauma-informed and has their recovery in mind.

The Council of Single Mothers and their Children expressed concern that applying to the Tribunal for financial assistance can be traumatising for some people. It stated:

> An area of concern to us is feedback from women who attend VOCAT seeking help with costs to deal with medical, psychological or other treatment or assistance for themselves and/or their children in relation to injuries received from family violence. Many of these women and/or their children now live with a diagnosed disability as the result of this violence. They describe the process of VOCAT as 'shattering', 'unexpected', and 're-traumatising'. Some have felt that they had been thrust back into the adversarial Federal Court. Others trying to represent themselves have described being grilled by the Commissioners as though they should know the law.[91]

> **So 7.5 sessions per year over four years is what I have been given. When we applied for 10 more sessions, the language I received back on my [Victims of Crime Assistance Tribunal]—I got it knocked back—was really interesting. It was like they had gone through all my history somewhere, I am not sure where, and basically said, 'She's used Medicare. She's got so many mental health issues and had so much suicidality, and plus there's been other abuse. We're not paying for this anymore'. It was astounding. So we are appealing … in September, and I guess to me this particular case has caused so much trauma.**
>
> Hope, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 6.

Dianne McDonald, who was subject to stalking, domestic violence and coercive control, discussed her experience with the Tribunal. She said:

> In regard to any Victims of Crime compensation, I have been rejected several times … I went to the hearing with my lawyer and I was thinking a tribunal was more than one person, I was wrong. [The Magistrate] looked over my application and files and told me to come back when I have a case. Then he smirked again. This is devasting and humiliating. I have now gone back to Victims of Crime … I have only been reimbursed for money for security and medical. My lawyer has received a payment and I have received a $1300 payment for SFA-CAT[92] … I have not received any payment for suffering, mental illness as a result of the stalking and coercive control. I am grateful to receive some money as I have been withdrawing from the equity in my home to pay for everything I have done to keep safe and replace things [redacted] has destroyed. With all the receipts I added up totalled $43,000.00 I have received $12,965.97 from Victims of Crime which I will repay back into my mortgage.[93]

Stories like Hope and Dianne McDonald's demonstrate the necessity of the criminal justice system using trauma-informed practices, particularly for proceedings and processes involving victims of crime. Trauma-informed legal practices recognise

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91 Council of single mothers and their children, *Submission 151*, p. 5.

92 Special Financial Assistance Category.

93 Dianne McDonald, *Submission 20*, p. 3.

and respond to the trauma a person can experience participating in criminal justice processes, particularly judicial proceedings. Trauma-informed practices should extend across the entire justice system from interactions with law enforcement to the court room. The Committee's recommendations for embedding trauma-informed practices into the criminal justice system are discussed in Chapter 7.

At a public hearing, Cathy Oddie, a victim-survivor, told the Committee about her experiences making financial assistance claims to the Tribunal. She explained that she experienced substantial delays in receiving an outcome for her claims and emphasised the importance of compensation for a victim-survivor, stating:

> I have had three successful VOCAT claims regarding the first three offenders, and I am currently waiting for the outcome to be decided of my fourth claim in relation to my second perpetrator for domestic abuse. It took three years to receive a decision on the first VOCAT claim I lodged in response to being raped, and it is unacceptable that victims of crime are made to wait such lengthy durations to receive an outcome. To my knowledge there is currently a backlog of about 5000 VOCAT claims waiting to be processed. This is simply not good enough.
>
> Receiving VOCAT compensation, participating in the Royal Commission into Family Violence, being involved in the advocacy work that I do as well as appearing here today is the only justice I am likely to receive.[94]

The Victims of Crime Commissioner made several recommendations to improve the Tribunal which it believed should be implemented as interim measures until the new financial assistance scheme was operating. The Commissioner's recommendations included:

- That the Victorian Government:
  - evaluate whether recent funding has reduced the backlog of applicants
  - monitor delays with a view to providing further funding if the backlog has not been reduced over 2020-21 financial year
  - introduce regulations to prescribe time limits for the Tribunal to make awards
  - address the Victorian Law Reform Commission's recommendations to amend the Victims of Crime Assistance Act to remove:
    - perpetrator notification and appearance provisions
    - consideration of a victim of crime's character and behaviour when determining an award.
- That the Victims of Crime Assistance Tribunal review the language used to communicate with applicants to ensure they are consistent with a trauma-informed and plain English approach.[95]

94 Cathy Oddie, *Transcript of evidence*, p. 35.

95 Victims of Crime Commissioner, *Submission 99*, p. 34.

In 2018, the Victorian Law Reform Commission published its *Review of the Victims of Crime Assistance Act 1996* which argued for a new model to provide financial assistance to victims of crime. As noted by the Committee already, the Victorian Government has signalled its intent to establish a new financial assistance scheme to replace the Tribunal. However, the Committee believes it is important to highlight some of the findings of the Victorian Law Reform Commission's report which should guide the development of the new scheme. The Victorian Law Reform Commission found a new financial assistance scheme for victims of crime was needed because:

- the existing Scheme is not victim-centred because it prioritises procedural and evidentiary processes over the needs of victims of crime
- the existing Scheme's ability to minimise trauma for victims of crime is limited and for some applicants it is an adversarial process
- financial assistance often represents more than monetary assistance to victims of crime—it also recognises their victimisation and validates their experiences
- a financial assistance scheme should be removed from Victoria's court system, thereby removing the need for victims of crime to attend courts, provide evidence or be cross-examined, or need to face an alleged perpetrator at a hearing
- the increasing demands on Magistrates' workloads is contributing to delays in awards from the Tribunal, therefore the existing Scheme is no longer the most efficient and sustainable model for state-funded financial assistance for victims of crime.[96]

In its report, the Victorian Law Reform Commission concluded that:

> the most effective model to meet each of the reference objectives and to deliver Victoria's state-funded financial assistance scheme is a new administrative model, focussed on assisting victims in their recovery from a criminal act, separate from Victoria's criminal court system and any potential for involvement by the alleged perpetrator. Accordingly, the Commission recommends that a new state-funded financial assistance scheme be established, led by an independent and dedicated decision maker whose powers and functions are prescribed in legislation (proposed scheme), and that the [Victims of Crime Assistance Act] be repealed and replaced with a new Act (proposed Act) which establishes the proposed scheme and incorporates the legislative reforms recommended in this report.

Box 6.6 below outlines the Victorian Law Reform Commission's proposed new model for a victims of crime financial assistance scheme.

96 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, 2018, p. 123.

BOX 6.6: Victorian Law Reform Commission's proposed new model for a victims of crime financial assistance scheme

In its 2018 review, the Victorian Law Reform Commission recommended that a new administrative scheme, with an independent and dedicated decision-maker, to provide financial assistance to victims of crime be established in Victoria. The review further recommended that the functions and powers of Victoria's Victims of Crime Commission be expanded to administer the new proposed Act and scheme.

The review outlined some of the key elements the Victorian Law Reform Commission believed should be incorporated into the new scheme, including:

- further funding to the office of the Victims of Crime Commissioner to support the employment of deputy decision-makers and case managers to support the administration of the scheme
- providing non-pecuniary victim recognition by entitling all eligible victims of crime to receive a recognition statement acknowledging the effect of the criminal act
- case management to support victims of crime, as well as give applicants ability to engage legal representation to assist with applications
  - the scheme should be responsible for awarding a lawyer the reasonable costs of assisting with a victim of crime's application, and prevent lawyers from charging applicants directly
  - there should be provisions and resources for specialised case management and decision-making
- a scheme decision-maker should have the ability, where requested by an applicant, to refer them to appropriate restorative justice initiatives.

The Victorian Law Reform Commission's report outlined a proposed new Act, replacing the Victims of Crime Assistance Act, to govern the new scheme and guide decision makers and the courts. The purpose of the new Act would be 'to assist victims in their recovery'. It also recognises that some victims of crime may never recover from the crime but that monetary payments can play an important role in their journey. In its report, the Victorian Law Reform Commission recommended the following objectives for the new Act, to:

- recognise, on behalf of the state, victims and the impacts of a criminal act on a victim, through the provision of a respectful forum for victims to be heard and to have their experiences properly acknowledged by the state
- assist victims in their recovery from a criminal act through the provision of financial and other practical assistance
- complement other services provided by government to victims of crime
- enable victims to have recourse to financial assistance under the Act, noting such assistance is not intended to reflect the level of compensation that may be available at common law or otherwise.

(Continued)

BOX 6.6: Continued

The Victorian Law Reform Commission also recommended guiding principles for any decisions or actions taken under the new Act. The proposed guiding principles were:

- victim benefit—the Act and scheme are intended for the benefit of victims
- victims should be protected from undue trauma, intimidation or distress
- victims' needs, safety and wellbeing should be paramount
- in recognition that victims' needs may vary, the scheme should be flexible in the assistance provided.

Source: Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996,* 2018.

Following the release of the Victorian Law Reform Commission's report the Victorian Government agreed in principle to all recommendations and signified its intention to improve the financial assistance scheme for victims of crime. In November 2020, the Parliament of Victoria passed the *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic) which amended the Victims of Crime Assistance Act to enhance the delegation powers of the Tribunal. It established Tribunal officers which the Chief Magistrate could delegate any powers of the Tribunal to, except:

- the power to review a final decision of the Tribunal
- the power to delegate any powers of the Tribunal to another person.[97]

In the second reading speech for the Bill, the then-Attorney-General the Hon Jill Hennessy explained the intent of the amendments were to address the backlog of pending applications before the Tribunal. She said:

> Increased demand at the Tribunal has resulted in delays in determining applications and an increase in the number of 'pending' applications (known as the 'backlog'). Notwithstanding the significant efforts of the Tribunal and the introduction of several efficiency measures, the backlog compromises the Tribunal's efforts to provide timely assistance to victims.
>
> Accordingly, Part 9 of the Bill amends the [Victims of Crime Assistance Act] with the aim of supporting the Tribunal to reduce the backlog by increasing flexibility in decision-making. The Chief Magistrate's power to delegate final award decisions will be broadened to include a new class of Tribunal staff called 'Tribunal officers'. Tribunal officers will be legally qualified or have the requisite skills or experience to carry out their functions, and have the power to obtain information and make final award decisions.[98]

97 *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic) s 7.

98 Parliament of Victoria, Legislative Assembly, 14 October 2020, *Parliamentary debates*, p. 2666.

In December 2021, the Minister for Victim Support released the *Victim Support Update* which provided an update on the Victims Support portfolio and the Victorian Government's commitments to improving the service system for victims of crime. The update discussed the reforms to victims of crime financial assistance, stating:

> The message from victims is clear, the current judicial model administered by VOCAT does not serve them well. That is why the 2021–22 State Budget invested $54.6 million to develop a new Financial Assistance Scheme for victims of crime to replace VOCAT and give victims meaningful and long-anticipated reform.
>
> The new Financial Assistance Scheme will enable victims to access the support they need to recover from injuries sustained from the impact of violent crime. Financial assistance enables victims to access funding for a range of purposes including safety related expenses, funerals, counselling and other health related expenses.[99]

It also noted that $9.9 million has been provided to the Tribunal to address the backlog of pending applications and assist with the transition to a new scheme.[100]

On 1 December 2021, the Victorian Government introduced the *Workplace Safety Legislation and Other Matters Amendment Bill 2021* (Vic) to amend the Victims of Crime Assistance Act. The Bill inserts a prohibition for the person(s) accused of committing the offence to be notified of the hearing or to attend hearings at the Tribunal for family violence or sexual offence matters.[101] At the time of writing, the Bill was awaiting second reading debate.

The purpose of a financial assistance scheme for victims of crime should be to recognise the trauma and adverse effects victimisation can have on an individual. Therefore, the provisions for perpetrator notification and appearance should be removed from the Victims of Crime Assistance Act to acknowledge that the scheme's ultimate purpose is to support the recovery of a victim of crime. The Committee acknowledges that the *Workplace Safety Legislation and Other Matters Amendment Bill 2021* (Vic) seeks to remove these provisions for family violence or sexual offence matters. However, it should extend to all victims of crime to acknowledge the trauma any person can experience when a crime is committed against them.

The Committee has also recommended additional amendments to the Victims of Crime Assistance Act which should be introduced as interim measures until the new financial assistance scheme is in place. Specifically, the Act should be amended to limit consideration of an applicant's character or behaviour, as well as prescribe time limits for the timely provision of awards to applicants, or to notify them of an adverse outcome. It is unclear when the new financial assistance scheme will take effect, therefore it is incumbent that the existing scheme is fit for purpose and assisting with their recovery.

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99 Minister for Victim Support, *Victim Support Update*, p. 19.

100 Ibid.

101 *Workplace Safety Legislation and Other Matters Amendment Bill 2021* (Vic) ss 87–88.

The Committee supports the development of a new financial scheme to assist victims of crime, particularly one which increases its focus on recovery and acknowledgement of trauma. It is clear from the evidence that the existing scheme is not working, with some victims of crime finding the process itself adversarial and traumatising in its own right. At the time of writing, the Victorian Government had only recently announced its intention to replace the Victims of Crime Assistance Tribunal with a new scheme. Therefore, the Committee has been unable to assess the nature of the new scheme or its efficacy, including whether it properly prioritises the recovery of victims of crime. Instead, the Committee emphasises that any new scheme should look to the failings and challenges of its predecessor as a guidepost for what needs to change. In particular, the Committee urges the Victorian Government to consider the following issues as it develops the new victims of crime financial assistance scheme:

- that it is trauma-informed and, through its practices, avoids revictimising applicants
- trauma-informed practices need to extend to language used to communicate with victims of crime by taking a plain English and emphatic approach, rather than using overly legalistic language.

RECOMMENDATION 32: As interim measures, before the new victims of crime financial assistance scheme is in place, the Victorian Government should amend the *Victims of Crime Assistance Act 1996* (Vic), as a matter of urgency, to:

- remove alleged perpetrator notification and appearance provisions provided under ss 34(2) and 35(1)
- limit consideration of an applicant's character or behaviour under s 54, so that only criminal behaviour connected to the criminal act subject to the application is relevant
- prescribe time limits for the Victims of Crime Assistance Tribunal to provide awards to applicants or notify them if an application has been rejected.

RECOMMENDATION 33: That the Victorian Government review the funding provided to the Victims of Crime Assistance Tribunal as part of the 2021–22 State Budget to determine if it is sufficient in reducing the backlog of pending applications before the Tribunal.

FINDING 25: In developing the new victims of crime financial assistance scheme, the Victorian Government should seek to remedy issues identified with the operation of the Victims of Crime Assistance Tribunal. The Government should have regard to the views expressed by stakeholders such as the Victorian Law Reform Commission, the Victims of Crime Commissioner and people who have experienced violent crimes. In particular, the Government should address the following issues that were identified:

- lack of trauma-informed practices in hearing from and assessing applicants
- overly legalistic language used to communicate with applicants.

RECOMMENDATION 34: That the Victorian Government make the new victims of crime financial assistance scheme a prescribed agency under the *Victims of Crime Commissioner Regulations 2020* (Vic), to ensure that the scheme falls within the oversight and compliance functions of the Victims of Crime Commissioner.

6.6.1 Victims Legal Service

As part of the 2021–22 State Budget, the Victorian Government announced that it will provide $7.3 million in funding to establish the Victims Legal Service.[102] The service will support victims of crime to access the new financial assistance scheme, as well as providing support to access applications for restitution or compensation orders. Box 6.7 below provides an overview of the Victims Legal Service.

BOX 6.7: Victims Legal Service

In May 2021, the Victorian Government announced that $54.6 million of the 2021/22 Victorian State Budget will be used to improve the support for victims of crime. Part of the 2021/22 funding was dedicated to creating the Victims Legal Service, offered through Victoria Legal Aid and other community legal centres.

The Victims Legal Service will provide legal advice and support victims of crime seeking to access the new victims of crime financial assistance scheme, as well as victims of crime applying for restitution or compensation orders.

Source: Victorian Government, *Submission 93*, p. 15; Premier of Victoria, *Better Outcomes for Victims and Young People*, media release, Victorian Government, 20 May 2021.

The Victims of Crime Commissioner's submission recommended the expansion of the Victims Legal Service to assist victims of crime with the 'full range of complex legal issues that arise as a result of victimisation.'[103] Specifically it recommended that:

> The Victorian Government's proposed new victims' legal service should be expanded—in addition to supporting victims seeking state-funded financial assistance, restitution and compensation orders, the proposed new victims' legal service should provide assistance with the full range of complex legal issues that arise as a result of victimisation.[104]

The Commissioner noted some of the unique legal challenges victims of crime experience that could be addressed through a more comprehensive victims legal service. The submission stated:

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102 Minister for Victim Support, *Victim Support Update*, p. 23.

103 Victims of Crime Commissioner, *Submission 99*, p. 37.

104 Ibid., p. 38.

> Victims of crime often find themselves facing a range of legal issues as a result of victimisation and engaging with the justice system. These legal needs may include matters relating to financial assistance, restitution and compensation orders, but may also relate to parallel legal issues such as civil law issues (defamation, intervention orders), child protection, family law and criminal law issues that may intersect with their victimisation.[105]

The Commissioner further noted that trauma can be compounded for victims of crime involved in legal processes or proceedings related to their victimisation:

> Victims also have several participatory entitlements at key points in the criminal justice process where legal advice would enable victims to be more aware of and exercise their entitlements. These points include:
>
> - making a Victim Impact Statement and /or reading it aloud in court
> - in sexual offence cases, seeking leave to appear and make submissions in response to applications to access confidential medical or counselling records
> - providing views before the DPP makes certain prosecutorial decisions, like modifying charges, discontinuing the prosecution or accepting a plea of guilty to a lesser charge.
>
> The trauma caused by victimisation, compounded by complex legal processes, means many victims may not be aware of their entitlements or are unable to meaningfully advocate for them to be upheld during the criminal trial process. In practice, this means that although victims may have rights 'on paper', they may not be meaningfully realised for many victims.[106]

The recommendation to expand the remit of the Victims Legal Service was echoed by Victoria Legal Aid. In its submission, Victoria Legal Aid stated that 'Victoria needs a dedicated specialised legal service for victims of crime' and that the 'new legal service should be expanded to provide for legal assistance to victims of crime for a broader range of legal issues'.[107]

Stakeholders emphasised that enhanced legal support for victims of crime is necessary because the process is often confusing and can lead to secondary trauma. The Committee spoke to several victim-survivors and family members who consistently mentioned the difficulty they, or their loved ones, experienced navigating the criminal justice system. Hope,[108] a survivor of childhood sexual abuse, spoke to the Committee at a public hearing about their experiences in navigating the criminal justice system when they reported their abuse. Hope discussed the secondary trauma they experienced because of the confusion and lack of support they received during legal proceedings. Hope stated that:

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105 Ibid., p. 37.

106 Ibid.

107 Victoria Legal Aid, *Submission 159*, p. 14.

108 A pseudonym.

> I was not informed of anything that was happening. There seemed to be multiple cases, and I was not understanding what they were for. It was never explained … I think I had to contact the prosecutor, the head prosecutor in the regional town that I am living in, to ask, 'Am I even going to be required to testify? Because if that is the case, I'm going to be very anxious and not cope'. When they said, 'We're not going to have a case unless you testify, because the defendant is contesting', I had to put in place measures so that I could safely testify, and that required outsourcing to Centacare and Orange Door to work out how I could not go in a courtroom and remotely testify. So I brought in all these services.[109]

The impacts of the criminal justice system on victims of crime, including the secondary trauma and revictimisation experienced during justice processes is discussed further in Chapter 7. The legal representation of victims of crime in criminal justice proceedings is discussed further in Chapter 8.

6.6.2 Redress schemes

Depending on the offence(s) committed against them, some victims of crime are also able to receive a redress. A victim of crime can seek redress through civil litigation or, if eligible, via a scheme such as the National Redress Scheme (see Box 6.8 below). Redress schemes typically take a multi-faceted approach in responding to a victim of crime, such as a mix of monetary payments, providing access to support services and personalised responses to the crime. Recently, governments have established different redress schemes which acknowledge historical and/or institutional crimes that have been committed.

BOX 6.8: National Redress Scheme

The National Redress Scheme is the most prominent redress scheme in Australia. It was established in 2018, following recommendations from the Royal Commission in Institutional Responses to Child Sexual Abuse. The National Redress Scheme supports people who experienced child sexual abuse in an institution by providing:

- a redress payment
- access to counselling
- a direct personal response to the crime committed against them. For example, an apology from the responsible institution(s).

The National Redress Scheme can offer a monetary payment up to $150,000.

The National Redress Scheme commenced on 1 July 2018 and will run for 10 years, with the deadline to lodge an application occurring on 30 June 2027.

(Continued)

109 Hope, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, pp. 3–4.

BOX 6.8: Continued

The Victorian Government has joined the National Redress Scheme, meaning that people who experienced child sexual abuse whilst in a Victorian Government institution may be eligible for redress. The Victim Services, Support and Reform unit is responsible for coordinating Victoria's participation.

Source: National Redress Scheme, *About*, <https://www.nationalredress.gov.au/about> accessed 17 December 2021; Department of Justice and Community Safety, *National Redress Scheme*, 2021, <https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/national-redress-scheme> accessed 17 December 2021; Knowmore, *What is the National Redress Scheme?*, <https://knowmore.org.au/for-survivors/redress-scheme/> accessed 17 December 2021.

In 2020, Victoria established the Restorative Engagement and Redress Scheme for Victoria Police employees (former or current) who experienced sexual discrimination or harassment in the workplace.[110] Like the National Redress Scheme, the Restorative Engagement and Redress Scheme offers a multi-faceted response to participants, including:

- a redress payment, ranging from $10,000 to $45,000 based on the severity of the behaviour
- counselling or therapeutic services
- a voluntary restorative engagement process which gives a participant the opportunity to share their experiences with a senior representative from Victoria Police.[111]

At a public hearing, Sergeant Wayne Gatt, Secretary and Chief Executive Officer of the Police Association Victoria, discussed the role of the Restorative Engagement and Redress Scheme and similar schemes in developing a 'culture of responsibility within organisations':

> the strong messaging from Victoria Police on this has been important in terms of changing and slowing culture that we had sought to injure our members, particularly with respect to this nature of offending. More broadly, I think that redress within other crime categories and perhaps other organisations—and we see it within institutional sex abuse, for example—has a real role to play in developing a culture of responsibility within organisations to self-manage their responsibility for people within their care, in this case Victoria Police with their employees in the case of institutional sexual offending. Perhaps in other areas it is young people within their care. But similarly, there are other areas and other institutions that hold a responsibility to the people that they engage with. A proper and effective method of redress to provide victims of crime

110 Victorian Government, *Restorative Engagement and Redress Scheme*, 2021, <https://www.vic.gov.au/redress-police-employees#about-the-scheme> accessed 17 December 2021.

111 Ibid.

> the opportunity not only to seek compensation and restorative justice but also to hold employers, to hold agencies and organisations, to account drives positive moves to actually self-regulate their behaviour in a way that provides a safe or a safer community and a safer Victoria.[112]

In 2020, the Victorian Government also announced that it would establish the Stolen Generations Reparations scheme to address the trauma caused by the forced removal of Aboriginal children from their families, culture and Country. At the time of writing, the scheme was not yet implemented.

Adjunct Professor Aunty Muriel Bamblett, Chief Executive Officer of the Victorian Aboriginal Child Care Agency, told the Committee that a redress scheme should be about 'acknowledging the community harm of government policies'. She criticised the decision to exclude people in prison or with serious criminal convictions from redress schemes, arguing this decision does not acknowledge the 'domino effect' historical victimisation may have had.[113]

As discussed in Chapter 7, many people in the criminal justice system are both victims of crime and commit criminal offences. The Committee heard that experiencing crime can be a significant risk factor for later offending. Whilst it is essential that any person who commits a crime is held accountable, this does not mean their own victimisation or trauma is erased. Acknowledging and addressing the complex factors which lead to criminality, which too often includes being a victim of crime, is an important part of developing strategies to prevent initial and ongoing offending. Redress schemes are an important way to acknowledge the trauma and adverse impacts for victims of crime. These schemes should be open to anyone affected.

RECOMMENDATION 35: That the Victorian Government open redress schemes to all eligible people, regardless of their criminal history. This should include advocating to the Commonwealth Government for the National Redress Scheme to be opened to anyone who was a victim of institutional child sexual abuse.

6.7 Victims Assistance Program

The Victims Assistance Program is comprised of a network of community-based agencies around Victoria which deliver support services to victims of crime. The program is funded by DJCS. Victims Assistance Program agencies are located across Victoria with caseworkers positioned at key outreach locations, such as police stations, community centres and other key community hubs.[114]

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112 Sergeant Wayne Gatt, Secretary and Chief Executive Officer, Police Association Victoria, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, pp. 23–24.

113 Adjunct Professor Aunty Muriel Bamblett, Chief Executive Officer, Victorian Aboriginal Child Care Agency, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 34.

114 Victorian Government, *Submission 93*, p. 99.

Program agencies provide flexible and tailored case management services which aim to:

- address the needs of victims of crime, including emotional and psychological needs
- help manage the impacts of experiencing a violent crime
- promote the recovery process.[115]

Services offered are based on the needs of the individual, but can include:

- assistance with communicating with Victoria Police and making a report
- organising counselling, transport and/or medical services
- support to help a victim of crime prepare for court
- helping to prepare a victim impact statement
- assisting with finding information about the person who committed the offence.[116]

Jane O'Neill, Team Leader of the Victims Assistance Program in Merri Health Hume Region, explained that there is no time frame for support under the Victims Assistance Program. Instead, it depends on the 'length of the criminal justice system process'. She noted:

> Our remit or our guidelines are to provide—we work with criminal justice tasks, so we work with a client whilst there are criminal justice tasks such as helping people make statements or report to police and right through to the other end of the court matter being finalised. So we will definitely remain involved for the whole criminal justice process while it is occurring.[117]

In 2020–21, 10,358 victims of crime accessed a support service through the Victims Assistance Program. DJCS' 2020–21 Annual Report noted that the number of actual services offered through the program was -13.7% than the target of 12,000. The Department explained that:

> The 2020–21 actual is below the target due to decreased referrals to the Victims Assistance Program (VAP) during the COVID-19 pandemic due to a reduction in Victoria Police referrals. This resulted in fewer referrals being made to the VAP for 'new' clients.[118]

There are several pathways for referral to services under the Victims Assistance Program, however the Victims of Crime Helpline is the central intake pathway. Victims of crime are commonly referred to the Helpline via Victoria Police. In its review on Victoria's victims services system, the Centre for Innovative Justice found between 2014–2019:

- 24% of Helpline referrals were via the Victoria Police e-Referral Program

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115 Ibid.

116 Ibid.

117 Jane O'Neill, Team Leader, Victims Assistance Program, Merri Health Hume Region, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*, p. 5.

118 Department of Justice and Community Safety, *Annual Report 2021-21*, 2021, p. 131.

- 56% were Victoria Police L17 referrals for male victims of family violence
- 15% were self-referrals.[119]

The Centre for Innovative Justice discussed the limitations of the existing referral pathways into the victim services sector:

> To date, no structured referral pathways to the Helpline exist other than through Victoria Police (VPeRs or L17s). This means that, where a crime is not reported; where a victim of crime does not engage with police when they attend; or where police fail to make a referral, victims of crime are significantly less likely to be linked in with victim services. Another limitation is that current police practice is to offer a VPeR only during first contact with the victim, typically when attending an incident. This does not reflect contemporary understandings of trauma, which recognise that victims of crime may be feeling overwhelmed or in shock during their initial engagement with police or may not have had time to process what has happened and the ways in which they may be impacted.[120]

Accessing victims services is discussed further in Chapter 8.

A significant proportion of the work undertaken by Victims Assistance Program agencies is support related to victim impact statements. In 2019–20, the Victims Assistance Program provided 5,358 victim-impact related support calls in response to 14,099 calls to the Victims of Crime Helpline.[121]

In its 2021 report on *Improving victims' experiences of summary proceedings*, DJCS found that service availability under the Victims Assistance Program is 'limited by crime type' and 'subject to overall case load and resources'.[122] The Committee did receive evidence that some victims' services were unable to meet demand and required more resourcing to ensure all victims of crime were being supported. This is particularly a concern for victims of crime residing in rural and regional Victoria where there are often limited services available.

Kathleen Maltzahn, Chief Executive Officer of Sexual Assault Services Victoria, told the Committee that services offered by the organisation all operate on waitlists, with staff frequently needing to decide who they will not be able to service:

> So if we are talking about just in our case victims of sexual violence being able to access services … almost all of our services—I think all of them—operate waitlists. [Staff] try and manage those waitlists. They do everything they can. If you survived a recent sexual assault, you will not wait, but other people will and our services make this impossible choice. It is a … dilemma of who you choose not to get a service. So absolutely, better

119 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 70.

120 Ibid.

121 Department of Justice and Community Safety, *Improving victims' experiences of summary proceedings*, 2021, p. 66.

122 Ibid., p. 41.

> referral systems, the police referring to us more quickly, and resourcing them and us to do that is important.[123]

Jane O'Neill discussed the lack of services for victims of crime in regional Victoria:

> [the] difficulty with the regional area team as well, [is] that there are very few services and resources out there to support community members in all sorts of ways—mental health, drug and alcohol, health services, victims assistance programs—so many gaps in service provision.[124]

As a result, Merri Health has implemented the practice of staying engaged with clients until they are engaged with another service, even if that person is no longer involved with criminal proceedings. Jane O'Neill explained this was because Merri Health believed it was important to maintain continuous support for victims of crime, many of whom need long-term support beyond the scope of the Victims Assistance Program:

> our practice is we stay involved with clients until we can refer them on to the most appropriate service to continue to support them longer term depending on what their need is, not only once we have made a referral, but we will remain involved—and I feel very strongly about this—until that client is engaged with that service. We cannot leave people hanging without supports, and it is a major issue within this region and I am sure other regional areas as well. And we identified that in our collaborative practice with all the other agencies as well, so we just work together to ensure clients are supported post the work that we do.[125]

Melanie Heenan, Executive Director of Victim Services, Support and Reform, DJCS, acknowledged that victims services could be better co-located in regional and rural Victoria:

> The victims assistance program does have a reach into the regional and rural parts of this state. They have co-locations with police stations and with other support services, some of those in Aboriginal Community Controlled Organisations. Again, I think we can do better at co-locating VAPs in other contexts as well, where victims may be presenting in the first instance, but we need obviously the benefit and expertise of our victims assistance program workers, who understand how to navigate that system.[126]

Alongside concerns about lack of adequate resourcing to meet demand, stakeholders also felt that not enough victims of crime were being referred to the program, with many victims of crime not receiving support until criminal trial proceedings commenced.[127] As noted above, DJCS reported a decrease in referrals during the 2020–21 financial year.

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123 Kathleen Maltzahn, Chief Executive Officer, Sexual Assault Services Victoria, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 19.

124 Jane O'Neill, *Transcript of evidence*, p. 5.

125 Ibid., pp. 5–6.

126 Melanie Heenan, Executive Director, Victim Services Support and Reform, Department of Justice and Community Safety, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 8.

127 Jane O'Neill, *Transcript of evidence*, p. 3.

At a public hearing, the Committee spoke to representatives from Merri Health, which is a participating agency under the Victims Assistance Program. Jane O'Neill told the Committee that victims of crime are not referred often enough to the program:

> victims of crime are not referred often to the Victims Assistance Program, and we may find victims of crime right at trial stage that have had no support throughout the process. So we are doing a lot of work with police and other services to make early referrals for victims of crime to ensure that they have the type of support that we offer, which is very important support all the way through the process right from the time of the crime occurring.[128]

The purpose of the Victims Assistance Program is to provide support to a victim of crime as they navigate the criminal justice system. Therefore, it is important that they are engaged as early in the process as possible so that they can access the full range of support services they require. The Committee believes the operation of the Victims Assistance Program could be improved by increasing funding to ensure participating agencies have adequate resources to meet demand, improving referral processes and addressing service gaps across Victoria.

RECOMMENDATION 36: In relation to the Victims Assistance Program, that the Victorian Government:

- provide further funding to ensure that participating agencies and services under the program can meet demand
- provide training and guidance to key referral agencies on referring victims of crime to the program sooner so that they can access the full range of support services
- expand the number of participating agencies to improve co-location with other services, particularly in regional and rural Victoria.

6.7.1 Supporting Aboriginal Victorians under the Victims Assistance Program

To ensure that the Victims Assistance Program is equipped to provide culturally safe support to Aboriginal Victorians who are victims of crime, the Victorian Government has recruited Cultural Safety Practice Leads and Koori Engagement Workers. These roles have been recruited as part of the Victorian Government's commitments under *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement (Phase 4)*(Aboriginal Justice Agreement) which identified the need to provide culturally-informed support to Aboriginal Victorian victims of crime.[129] As part of the Aboriginal Justice Agreement, the Victorian Government committed to:

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128 Ibid.

129 *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement (Phase 4)*, 2018, <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-12-aboriginal-communities-are-safer> accessed 4 January 2022.

- Work collaboratively with the Victims Assistance Program's Aboriginal Support Workers to strengthen pathways for Aboriginal children to access the Child Witness Service when needing to attend court as a result of being a witness to a violent crime.
- Recruit additional Aboriginal Victims Assistance Support Workers in the Victims Assistance Program resulting in 9.3 FTE [full time equivalent] by 2021.
- Enhance access to supports for Aboriginal victims of crime and improve links between local Aboriginal and mainstream services using the case management support model.[130]

In the 2021 Victim Support Update, the Minister for Victim Support noted 'there are currently 10 full-time equivalent Koori Engagement Worker positions funded across the state, surpassing the target' established under the Aboriginal Justice Agreement.[131] The Update also explained that the role of a Koori Engagement Worker is to 'provide confidential and culturally sensitive support to Aboriginal victims of crime in the community through the Victims Assistance Program'.[132]

At a public hearing, Melanie Heenan from DJCS further explained the role of Koori Engagement Workers:

> we have Koori engagement workers that operate out of our victims assistance programs. They are specialist workers who work in the context of those [Victim Assistance Programs] that are themselves in a host organisation. They are across the state. At least one Koori engagement worker operates out of each of the [Victim Assistance Programs]—in fact I think there may be 10 FTE that are funded—to deliver the Koori engagement work.[133]

As well as Aboriginal Victorian victims of crime, it is also important that Koori Engagement Workers feel culturally safe in their workplaces so that they can properly support their clients. Melanie Heenan said:

> [Koori Engagement Workers] too need to feel culturally safe in their workplaces, and [the Department of Justice and Community Safety] are in the throes of developing some good practice guidance for organisations to make sure that they are appropriately supporting their staff but also that they keep their caseloads at an appropriate level, because one of the things that we are really cognisant of is the extent to which Koori engagement workers need to do work with communities. Because if communities do not feel safe, and understandably so, to come into our services, then we need to go to them to talk with communities about what might help them to feel safer in coming into services—or deliver the services where they feel safer.[134]

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130 Ibid.

131 Minister for Victim Support, *Victim Support Update*, p. 28.

132 Ibid.

133 Melanie Heenan, *Transcript of evidence*, p. 10.

134 Ibid.

Despite the Victorian Government exceeding its target number for Koori Engagement Workers under the Aboriginal Justice Agreement, some participating agencies are struggling to recruit. Jane O'Neill from Merri Health told the Committee that, as at 30 June 2021:

> we do have a Koori engagement worker position funded with our program through the Department of Justice and Community Safety. Unfortunately our position is vacant at the moment. I have been advertising that position for over 12 months now, and there are so many competing positions occurring right throughout the region that I think most of our services who have those positions vacant are finding it very, very difficult on behalf of the community.[135]

Jane O'Neill explained that Merri Health still aims to provide culturally safe support for Aboriginal Victorian clients but acknowledged that it can be difficult because of the historical trauma Aboriginal communities have experienced in relation to the criminal justice system.[136] She said that to 'allay those fears' Merri Health works with services and communities to ensure clients are properly supported.[137]

Along with the trauma of being a victim of crime, Aboriginal Victorians also have compounded cultural and historical trauma, meaning they often have acute and differing needs. The specific and varying cultural needs of Aboriginal Victorians requires support agencies to implement trauma- and culturally-informed practices so that the support they provide can properly promote a victim of crime's recovery. Adjunct Professor Aunty Muriel Bamblett from the Victorian Aboriginal Child Care Agency emphasised the importance of placing a 'trauma lens' over the work with Aboriginal Victorians, especially children.[138]

These intersecting harms, including experiencing crime, can be a risk factor for future offending. The Committee heard that the majority of Aboriginal Victorians in contact with the criminal justice system have also been a victim of crime, many when they were young. The Koorie Youth Council's 2018 report—*Ngaga-Dji: young voices creating change for justice*—noted that:

> Support children who are victims of crime with access to justice and early, community-centred services to address trauma resulting from removal, family violence, homelessness and other abuses. The majority of children who have contact with the justice system are victims of crime themselves. Most participants in Ngaga-dji never received adequate supports to address traumas which became root causes of their contact with the justice system.[139]

In its submission, the Victorian Aboriginal Child Care Agency argued that more Aboriginal Community Controlled Organisations should be funded to participate in the

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135 Jane O'Neill, *Transcript of evidence*, p. 4.

136 Ibid.

137 Ibid.

138 Adjunct Professor Aunty Muriel Bamblett, *Transcript of evidence*, p. 39.

139 Koorie Youth Council, *Ngaga-Dji: young voices creating change for justice*, 2018, p. 46.

Victims Assistance Program, including themselves.[140] Aboriginal Controlled Community Organisations are best placed to provide support to Aboriginal victims of crime as they are specifically designed to promote the health, wellbeing and safety of Aboriginal people. As Aboriginal-led organisations, they have capacity to design services and ensure the appropriate direction of funding to suit the needs of their community.[141]

The Committee believes that the Victorian Government should fund more Aboriginal Controlled Community Organisations to provide services under the Victims Assistance Program. This will increase the availability of services equipped to support Aboriginal Victorian victims of crime in their recovery.

RECOMMENDATION 37: That the Victorian Government ensure that the Victims Assistance Program can provide culturally safe services and support to Aboriginal Victorians by:

- funding more Aboriginal Community Controlled Organisations to become participating agencies
- provide support, including funding if necessary, to Victims Assistance Program agencies for more Koori Engagement Workers so that the number of positions is commensurate to Aboriginal victims of crime in need of support.

140 Victorian Aboriginal Child Care Agency, *Submission 121*, p. 3.

141 Department of Health and Human Services, *Aboriginal community controlled organisations - Family and community services*, October 2020, p. 2.

7 Experiences of victims of crime in navigating the criminal justice system

At a glance

A victim of crime's experiences within the criminal justice system are varied and are often influenced by external factors, such as their involvement in court proceedings, whether they belong to a vulnerable cohort or any other interactions with the justice system they have experienced. It is essential that Victoria's criminal justice system and its practitioners are equipped to deal with the diverse range of needs victims of crime have and offer appropriate support to prevent secondary trauma or revictimisation.

Unfortunately, an overwhelming message from victims of crime who have provided evidence is that the justice system is failing in this regard. Too many victims of crime are experiencing secondary trauma during their engagement with the criminal justice system. For some, this is compounded by a lack of trauma-informed or culturally safe support.

Key issues

- A victim of crime's experiences within the criminal justice system can have a significant impact on their recovery. Positive experiences can facilitate healing, but negative experiences can exacerbate trauma and result in revictimisation.
- Victims of crime who provided evidence to the Committee consistently emphasised the importance of feeling recognised and validated by the criminal justice system.
- In Victoria, the operation of current justice processes involving victims of crime are too often traumatising for people.
- Justice processes would benefit from increasing trauma-informed and culturally safe practices so that they are more accessible to victims of crime and promote recovery.
- The experiences of victims of crime are unique and can be influenced by a range of external factors. Vulnerable cohorts—such as Aboriginal Victorians, culturally and linguistically diverse people, members of the LGBTIQ+ community and people with disability—often experience intersecting trauma compounding the harm they experience engaging with the criminal justice system.
- Experiencing crime can be a risk factor for future offending, with many people currently in Victorian prisons having been a victim of crime at some point.

Findings and recommendations

Recommendation 38: That the Victorian Government amend the *Criminal Procedure Act 2009* (Vic) so that a 'protected witness' is eligible to use any alternative arrangements for giving evidence which are prescribed under s 360 of the Act.

Recommendation 39: That the Victorian Government provides funding, where necessary, to Victorian courts to update their facilities to improve standards in victim safety and wellbeing. Facility updates could include:

- dedicated entrances and exits for victims of crime
- dedicated waiting spaces and interview rooms for victims of crime, as well as specific spaces such as:
  - child friendly spaces
  - culturally safe spaces
  - quiet or sensory rooms
- increased number of remote witness facilities.

Finding 26: A significant proportion of crimes committed against Aboriginal Victorians go unreported. Despite this, Aboriginal Victorians are still overrepresented in victims of crime statistics.

Finding 27: A lack of culturally safe support for Aboriginal Victorians is a key barrier to victims of crime from these communities accessing services.

Finding 28: Victims of crime from culturally and linguistically diverse communities face several barriers to reporting crimes committed against them. As a consequence, the rates of victimisation among culturally and linguistically diverse communities are not well known. Particular barriers to reporting include:

- language barriers
- limited awareness of:
  - available support services
  - rights and legal protections afforded to victims of crime
- mistrust of the criminal justice system and other support sectors
- social stigma and shame associated with certain offences.

Finding 29: Victims of crime from culturally and linguistically diverse backgrounds may experience unique forms of disadvantage which adversely shape how they interact with victim services, such as:

- a lack of culturally appropriate or safe services
- facing familial or community pressure to not report crimes
- citizenship or visa status which may determine what services are or are not available to a victim of crime.

Recommendation 40: That the Victorian Government increase the number of multicultural community organisations contracted as participating agencies under the Victims Assistance Program.

Recommendation 41: That the Victorian Government finalise and make public the *State Disability Plan 2021–2025* as a matter of urgency.

Recommendation 42: That the Victorian Government commit to improving the delivery of victim support services for people with disability. This commitment should involve:

- prioritising trauma recovery for victims of crime with disability
- improving the delivery of support services for victims of crime with disability, including addressing barriers experienced by victims, such as:
  - physical access and communication barriers
  - negative or biased attitudes expressed by authorities or agencies operating within the criminal justice system, including victim support agencies
  - the accessibility of adjustments or supports for people with disability participating in criminal justice proceedings
- undertaking research into whether a Disability Justice Strategy is necessary. If a dedicated strategy is deemed unnecessary, the Government should provide a report to the Parliament outlining the reasons for its decision.

Finding 30: LGBTIQ+ Victorians experience high rates of victimisation, including discrimination, physical violence and sexual violence. However, many LGBTIQ+ victims of crime do not report to police or seek out support from the criminal justice system. Barriers that are deterring LGBTIQ+ victims of crime from engaging the criminal justice system include:

- feelings of mistrust towards law enforcement and the broader criminal justice system, which has been compounded by the historical criminalisation of the LGBTIQ+ community
- lived experience of discrimination or stereotyping from police or other practitioners in the criminal justice system
- lack of LGBTIQ+-inclusive services and programs.

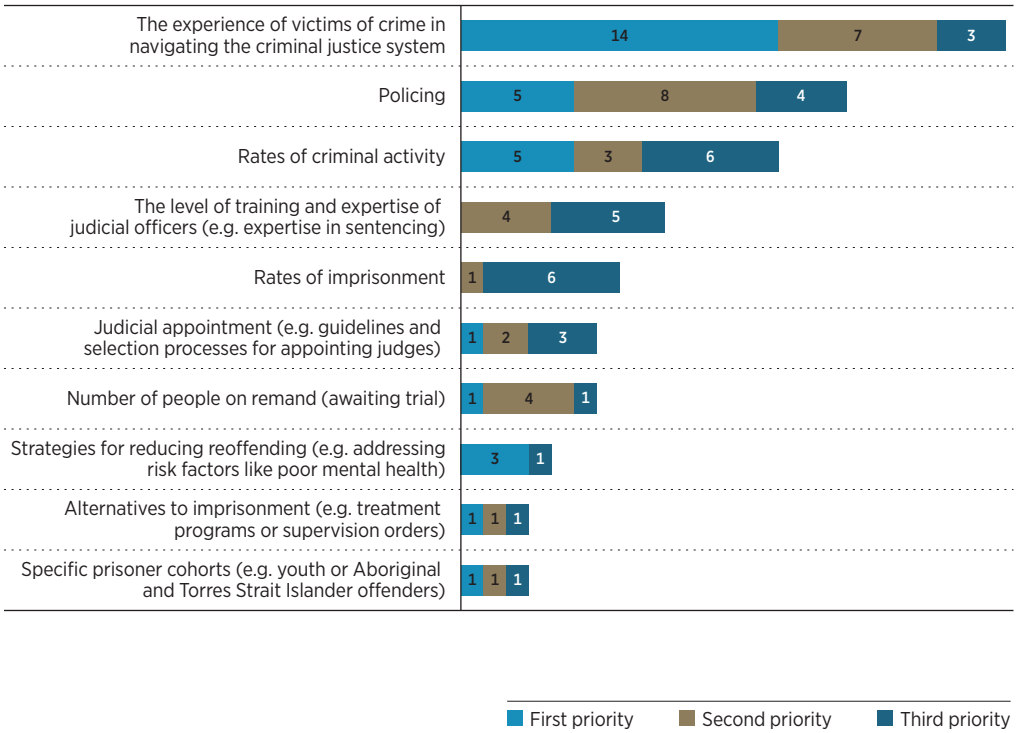
Finding 31: Evidence suggests that being a victim of crime can be a risk factor for future criminal behaviour. Many people in contact with the criminal justice system who have committed an offence have previously been a victim of crime.

Recommendation 43: That the Victorian Government undertake a trial in the Magistrates' Court of Victoria on the use of Victim Peer Support Workers to assist victims of crime attending court proceedings, whether as a witness or otherwise. Following the conclusion of the trial, the Government should table a report in Parliament on the trial's outcomes, as well as its position on the continuation and/or expansion of the program.

As part of its online survey included on the Inquiry's e-submission portal, the Committee included an option for submitters to indicate whether they were a victim of crime. The Committee received 31 survey responses from people who identified as a victim of crime, accounting for nearly half (40%) of all survey responses.

Figure 7.1 below shows the top three Inquiry priorities from survey respondents who identified as a victim of crime. These views are also reflected in the evidence from victims of crime in submissions and at hearings.

Figure 7.1 Top three Inquiry priorities from respondents who identified as a victim of crime



Source: Legislative Council Legal and Social Issues Committee.

As shown in Figure 7.1 above, the top priority for survey respondents who identified as a victim of crime was the 'experiences of victims of crime in navigating the criminal justice system'. This is the focus of this Chapter.

The Committee has found that the experience of navigating the criminal justice system varies significantly for each person. It can be influenced by a number of factors, such as whether a victim of crime is Aboriginal, culturally and linguistically diverse or a person with disability.

This was reiterated by the Victims of Crime Commissioner which reflected on consultations with victims of crime, stating:

- each victim's experience is unique to them and that crime impacts everyone differently
- victims need and want different things to achieve justice and recover from the impact of the crime they have experienced

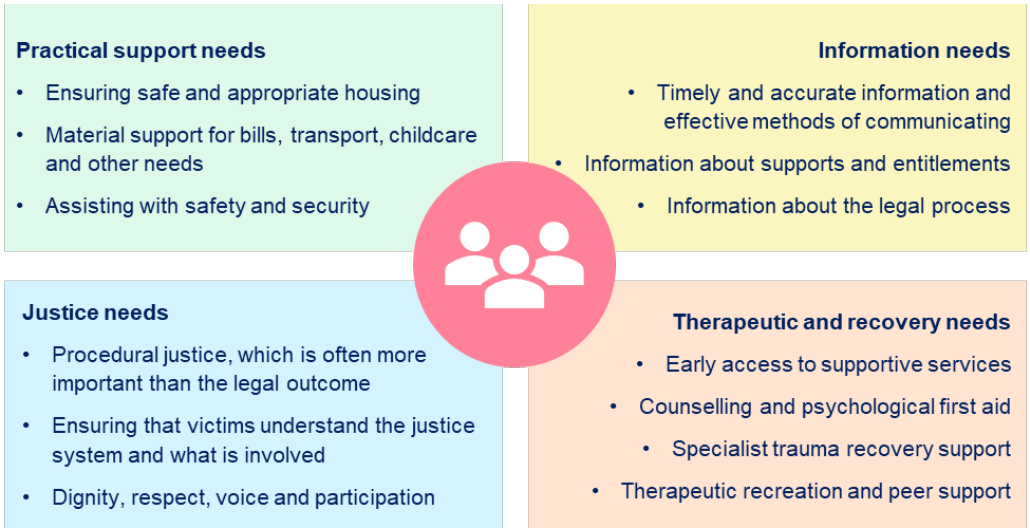
- the justice system often adds to the trauma they've already experienced and some state clearly that the trauma caused by the system is equivalent to or worse than the crime they experienced
- the justice system process does not adequately recognise or demonstrate respect for victims' experiences and the impact of crime.[1]

Victims of crime have a broad range of needs from the criminal justice system. In its review of Victoria's victim services sector, the Centre for Innovative Justice outlined some of the justice needs expressed by victims of crime. It described:

> the broader understanding of justice needs as referring to elements such as participation, voice, validation and vindication, as well as offender accountability and prevention. These needs can be met through alternative processes, such as those offered by restorative justice engagement, but some of these needs may also be met through an overall system response that makes a victim of crime feel recognised, heard and that the harm they experienced matters.[2]

Figure 7.2 below from the Centre for Innovative Justice places the needs of victims of crime into four key categories: practical support needs, information needs, justice needs and therapeutic and recovery needs.

Figure 7.2 Categories of victims of crime's needs



Source: Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, p. 222.

A victim of crime's experience of the criminal justice system can have a significant impact on their recovery, particularly if their needs are not met. A key need which is common for many victims of crime is to feel recognised and validated by the justice system.[3] Invalidating a victim of crime and what has happened to them can have

1 Victims of Crime Commissioner, *Submission 99*, p. 44.

2 Centre for Innovative Justice, *Improving support for victims of crime: key practice insights*, 2020, p. 13.

3 Ibid., p. 8.

a retraumatising effect. Retraumatisation, or secondary victimisation, can have a detrimental impact on a victim's wellbeing and their recovery journey. This issue is discussed further in Section 7.7 below.

This Chapter examines the experiences of some specific victims of crime cohorts, namely:

- victim-witnesses
- Aboriginal Victorians
- culturally and linguistically diverse communities
- people with disability
- LGBTIQ+ people.

7.1 Victim-witnesses

The criminal justice system has moved beyond understanding victims of crime as merely witnesses for the prosecution. Now, it recognises that victims of crime, including those indirectly victimised, have an inherent right to participate in the process and have their voices heard. This is reflected in the development of financial assistance schemes, such as the Victims of Crime Assistance Tribunal, which recognises the harm caused when a person or their family experiences crime.

When a victim of crime also acts as a witness, it is essential that the appropriate support is in place for them as they participate in criminal proceedings. In particular, it is important that victim-witnesses feel empowered to give evidence and do not feel intimidated in the court room.

In Victoria, witness-specific support is only available for:

- child witnesses through the Child Witness Service
- witnesses in the indictable stream through the Victims and Witnesses Assistance Service
- witnesses under 18 and/or those with a cognitive impairment through the Intermediary Program (however, this is limited by crime type).

Other supports provided to witnesses include the use of dogs to provide comfort to victims and witnesses during the legal process:

- as part of the Child Witness Service, the Victorian Government introduced Kiki the Court Support Dog who is trained to 'provide calming support and help reduce further traumatisation' for children giving evidence at court
- the Office of Public Prosecutions Victoria has adopted a trained and accredited dog to accompany people at various stages of the legal process, including case conferences, trials, plea and sentence hearings, appeals and other legal processes.

The Victims and Witness Assistance Service is administered by the Office of Public Prosecutions, which is the agency responsible for prosecuting indictable offences. Box 7.1 below provides an overview of the Victims and Witness Assistance Service.

BOX 7.1: Victims and Witness Assistance Service

The Victims and Witness Assistance Service was established by the Office of Public Prosecution in 1995 to support victims and witnesses of serious crime through the court process. The Service is available to all victims of crime and prosecution witnesses in cases being handled by the Office of Public Prosecution.

Victims or witnesses which require assistance to navigate through the court process will have access to a social worker who can assist before, during and after the court process.

A Victims and Witness Assistance Service's social worker can provide:

- information about the prosecution process and/or progress
- support through the pre-court conferences with solicitors and prosecutors
- help with understanding the legal process
- help with arrangements for being in court
- referrals to other specialist support services.

Source: Office of Public Prosecutions Victoria, *Victims and Witness Assistance Service*, 2017, <https://victimsandwitnesses.opp.vic.gov.au/witnesses/witness-assistance-service> accessed 4 January 2022; Victoria Legal Aid, *How victims of crime can get help*, <https://www.legalaid.vic.gov.au/find-legal-answers/victims-of-crime/get-help> accessed 4 January 2022.

In 2020–21, the Victims and Witness Assistance Service assisted 4,942 victims and witnesses. It provided 43,800 consultations, including debriefings, remote witness assistance and court tours. Of these:

- 17.8% related to sex offences
- 6% related to homicide/culpable driving
- 67.5% related to general crime
- 8.6% related to other matters.[4]

In its 2020–21 Annual Report, the Office of Public Prosecutions explained that:

> In 2020/2021 VWAS [Victims and Witness Assistance Service] prioritised assistance for matters involving a death, sexual assault, family violence, and particularly vulnerable victims and witnesses. Some matters were referred to the Child Witness Service and the Victims Assistance Programs, particularly for regional matters.[5]

4 Office of Public Prosecutions Victoria, *Annual Report 2020/2021*, 2021, p. 29.

5 Ibid., p. 28.

The Victims of Crime Commissioner described witness and at-court support for victims of crime as 'fragmented'.[6] In its submission, the Commissioner said:

> Witness support and at-court support services are overseen by different organisations and agencies, with varying levels of service provision, specialisation, eligibility and scope. This results in:
>
> - some service provision entirely separate from victim support
> - different types of support integrated in one service
> - crossover between different types of support
> - support services being limited by jurisdiction, court location or cohorts.
>
> … For example, witness support for adults in the Magistrates' Court of Victoria is a key gap. Although adult witnesses can access Court Network, this is a volunteer-based, generalised service provided to all court users and is not a witness support service. Despite the value provided by Court Network, it aims to complement other services within the court system. Court Network does not provide the level of service provided by a witness support service. This places an increased onus on police prosecutors to directly support vulnerable victims and witnesses, including in serious sexual assault cases.[7]

It also noted that witness-specific support is time-limited compared to victim support, as it is typically only available during court proceedings. However, it is more intensive than 'court support', which is usually 'limited to practical or emotional support 'on the day' at court'.[8]

A need for better witness assistance was highlighted by the Royal Commission into Institutional Responses to Child Sexual Abuse's *Criminal Justice Report* (2017). The report noted that a key responsibility of 'Witness Assistance Services'—which could include intermediaries—was to 'to liaise between the victim and prosecutors as well as other agencies involved in the prosecution, such as the police, counsellors and victim support services'.[9] It stated:

> [Witness Assistance Services] can contribute to a number of the aspects of prosecution responses that are of particular importance to victims, including by:
>
> - contributing to the prosecution response a professional understanding of the nature and impact of child sexual abuse
> - contributing to continuity in the non-legal part of the prosecution team if a single witness assistance officer can be allocated to support the victim or survivor throughout the prosecution
> - helping to maintain regular communication with and providing information to victims and survivors.

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6 Victims of Crime Commissioner, *Submission 99*, p. 27.

7 Ibid.

8 Ibid., p. 26.

9 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III-VI*, 2017, p. 282.

> However, the contribution of the WAS should not relieve the prosecutors and solicitors of the obligation to provide an effective prosecution response, including by having a basic level of understanding of the nature and impact of child sexual abuse and maintaining regular communication and providing information to victims and survivors.[10]

The Royal Commission recommended:

> Witness Assistance Services should be funded and staffed to ensure that they can perform their task of keeping victims and their families and survivors informed and ensuring that they are put in contact with relevant support services, including staff trained to provide a culturally appropriate service for Aboriginal and Torres Strait Islander victims and survivors. Specialist services for children should also be considered.[11]

The Committee agrees that these are important recommendations by the Commission.

Chapters 5 and 6 discuss the Intermediary Program and Independent Third Persons Program which provide support to victims and witnesses.

7.1.1 Questioning and cross-examining victim-witnesses

When a victim is also appearing as a witness in a criminal trial, they can be questioned and cross-examined in the court room. Victorian legislation has protections in place to protect a witness from being harassed or treated unreasonably during questioning. However, despite these protections, the Committee was told that many victim-witnesses find the experience confronting or even traumatising.[12] The Committee heard from victims of crime and victim advocates about the experience of being cross-examined, which was described as revictimising. Some stakeholders expressed concern that judicial officers presiding over a criminal trial did not properly control the manner of questioning toward victim-witnesses often or early enough.[13]

This Section focuses on the way victim-witnesses are questioned in the court room and the impact this has on them. Court safety for victim-witnesses in at court processes and infrastructure is discussed in the next Section.

The *Evidence Act 2008* (Vic) (Evidence Act) governs the way witnesses can be questioned and cross-examined in the court room. Section 29 of the Evidence Act states a witness may be questioned in any way that a party thinks fit, unless other parts of the Act or a court direct otherwise.[14] A court has control over the questioning of witnesses in relation to:

- the way a witness is questioned

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10 Ibid., p. 304.

11 Ibid., p. 320.

12 Victims of Crime Commissioner, *Submission 99*, p. 27.

13 For example, see: ibid.

14 *Evidence Act 2008* (Vic) s 29.

- the production and use of documents and other things connected to questioning a witness
- the order parties can question a witness
- the presence and behaviour of any person in connection to questioning a witness.[15]

In its submission, the In Good Faith Foundation discussed the trauma that victim-witnesses experience when providing evidence, particularly during cross-examination. It believed that there is a 'clear power imbalance' between defence counsel and the victim-witness during cross-examination which often contributes to 're-traumatisation and the sense of injustice experienced by many victim-survivors'.[16]

The In Good Faith Foundation also noted that the trauma of being cross-examined can be exacerbated where the person who committed the offence is representing themselves in court and is the one questioning witnesses. This was discussed in the context of victim-survivors of childhood sexual abuse who are seeking redress being cross-examined by the person who perpetrated their abuse. However, the concerns raised are still applicable to direct cross-examination by an alleged offender in criminal trials.

The In Good Faith Foundation acknowledged that under the Evidence Act, the court has discretion to make orders to protect witnesses and that s 355 of the *Criminal Procedure Act 2009* (Vic) (Criminal Procedure Act) allows courts to declare witnesses involved in sexual or family violence-related criminal proceedings a 'protected witness'.[17] However, the Foundation contended that cross-examination is an 'inherently coercive and high-stress experience' which is heightened where an accused person is conducting the questioning.[18]

The In Good Faith Foundation also believed that the allowance for judicial discretion in managing the questioning of witnesses:

> reduces both the appearance and reality of consistency and fairness; could incentivise parties raising concerning arguments around different victim-survivors' relative vulnerability; creates new grounds for appeals which can drag out cases; and causes procedural uncertainty and delay for all parties (and for the Legal Aid system).[19]

As stated above, the court has control over the questioning of witnesses in the court room. This includes the power to declare a question, or series of questions, as improper. The Evidence Act prescribes the process for dealing with improper questions. The court must disallow improper questions or inform the witness the question does need to be

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15 Ibid., p. 26.

16 In Good Faith Foundation (IGFF), *Submission 38, Attachment A*, p. 14.

17 A 'protected witness' can only be declared for criminal proceedings relating to sexual or family violence offences. If a person is declared a protected witness by a court they cannot be directly cross-examined by the accused persons during criminal proceedings.

18 In Good Faith Foundation (IGFF), *Submission 38*, p. 2.

19 Ibid.

answered.[20] An improper question, or improper questioning, relates to questions which are:

- misleading or confusing
- unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
- put to the witness in a manner or tone which is belittling, insulting or otherwise inappropriate
- based on stereotype.[21]

Some stakeholders believed that despite provisions in place to protect witnesses during cross-examination, some victim-witnesses are still subject to traumatising questioning. This was largely attributed to the ability for judicial officers to exercise discretion in interrupting or stopping questioning during cross-examination.

Jane O'Neill from Merri Health told the Committee about the inconsistent approach courts can take in managing improper questioning of a victim-witness:

> Sometimes we see defence going right to that—you know, just this side of the magistrate or the judge having to stop their cross-examination because it is so traumatic for the clients. I see that those kinds of practices need to stop earlier rather than retraumatising clients to the extent that we see them retraumatised in court, as well, through cross-examination.
>
> ...
>
> But in terms of inconsistencies in courts, we do see inconsistencies as well in terms of magistrates and judges who do not pull up the cross-examinations by the defence at a time before it becomes even more traumatic for the clients. But there are other judges and magistrates who do that very well and who are protective of the people giving evidence, so there are inconsistencies most definitely.[22]

In its submission, the Victims of Crime Commissioner summarised the findings of the Victorian Law Reform Commission's 2016 report on *Victims of Crime in the Criminal Trial Process*. The submission said:

> many victims felt the judicial officer presiding over their case did nothing, or too little, to protect their legitimate interests. It was suggested that in some cases, judges have permitted 'practices that further humiliate and traumatise victims, as well as wasting time.'

20 *Evidence Act 2008* (Vic) s 41(41).

21 Ibid., p. 41(43).

22 Jane O'Neill, Team Leader, Victims Assistance Program, Merri Health Hume Region, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*, p. 7.

> At the time, the VLRC was told by the Law Institute of Victoria, the Victorian Bar and Criminal Bar Association that improper questioning of witnesses was rare and that judicial officers are adequately enforcing existing protections. In contrast, victims, victim support workers, legal professionals and some members of the judiciary told the VLRC that judicial intervention is not always adequate and improper questioning still occurs. The VLRC concluded there was 'clearly a gap between what victims and the legal profession consider appropriate questioning'.[23]

At a public hearing, the Victims of Crime Commissioner, Fiona McCormack, stated that proper judicial appointment and training could better ensure judges approach the treatment of witnesses during questioning from a trauma-informed perspective:

> a trauma-informed approach means that we have protections around victims and that we can have confidence that judicial officers would be intervening when there are unduly harassing, belittling questions made from a defence, considerations about the victims' wellbeing and that victims are treated with respect. All those things are really fundamental in the appointment of judicial officers and in their ongoing training and support.[24]

The Victims of Crime Commissioner recommended that the Judicial College of Victoria provide trauma-informed training for judicial officers which included an 'examination of defense counsel questioning, including whether the questioning is improper or inappropriate'.[25] Judicial education and training is discussed in more detail in Chapter 15.

The Judicial College of Victoria's *Victims of Crime in the Courtroom: a guide for judicial officers* instructs judges and magistrates to 'remain vigilant' during questioning and cross-examination. The Guide also provides information on understanding trauma and how this can impact a person's experience giving evidence at court.[26] In addition, the College conducts training sessions for judicial officers on trauma and communicating with victims of crime.[27]

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23 Victims of Crime Commissioner, *Submission 99*, p. 16.

24 Ms Fiona McCormack, Commissioner, Victims of Crime Commission, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, pp. 7–8.

25 Victims of Crime Commissioner, *Submission 99*, p. 18.

26 Judicial College of Victoria, *Victims of Crime in Courtroom: A Guide of Judicial Officers*.

27 Samantha Burchell, Chief Executive Officer, Judicial College of Victoria, *response to the Inquiry into Victoria's criminal justice system*, correspondence, 22 December 2021.

7.1.2 Court safety

CASE STUDY 7.1: Hope's story

Hope is a survivor of child sexual abuse, which was committed by a high-profile person. In 2013, Hope reported the abuse to Victoria Police and her case proceeded to trial.

As part of giving evidence at court, Hope was granted permission to use a witness protection screen in the court room which would prevent her seeing or being seen by the accused. Sections 360 and 364 of the *Criminal Procedure Act 2009* (Vic) allow the court to permit a witness giving evidence in a sexual offence proceeding to use a witness protection screen. During the initial trial, Hope used a witness protection screen when giving evidence which she described as the 'one thing the assisted [her] testifying safely'.

The person who offended against Hope was found guilty by a Magistrate and subsequently appealed the verdict.

Hope was again asked to give evidence for the prosecution as part of the appeal. She requested that she be allowed to use a witness protection screen in court. The County Court judge presiding over the case refused her request, instead suggesting Hope testify remotely. Hope did not feel comfortable testifying remotely as she felt it would mean she would not have anyone in the room to support her.[28]

In Hope's view, the decision by the judge to disallow her from using a screen in court demonstrated a lack of understanding of the trauma she was experiencing recalling her sexual abuse. Hope's trauma was exacerbated by having to see her alleged abuser and she believed this significantly impacted her ability to give evidence.

Hope told the Committee:

> There was the re-traumatisation from retelling the sexual abuse situation to police, then the court experience, the cross examination and being refused the one thing that assisted my testifying safely—the witness protection screen, which would have at least afforded me the same conditions as other victims who wish to be protected from the visible trauma of seeing their childhood sexual abuser again.
>
> ...

(Continued)

28 The Committee notes that s 365(2) of the *Criminal Procedure Act 2009* (Vic) allows a support person to be present with a victim-witness regardless if that person is giving evidence inside a court room or in another place remotely.

CASE STUDY 7.1: Continued

> I felt quite safe with the detective that was in the room—in the courtroom—but I needed the screen to not see my accused. That was the situation I was safe with. It is different for everyone. Some survivors are quite happy to see their perpetrators. I do think if they ask, it needs to be respected without question. And it is in the legislation, it is part of the law, but it just was not followed in this case. It made a huge difference. In the first case I was able to testify very confidently and a guilty verdict was given.

The appeal was upheld, and the guilty verdict and sentence was dismissed.

Hope believes that more needs to be done to ensure that victims of crime are properly supported throughout the criminal trial process. In particular, she asked that judicial officers undergo trauma-informed training and that victims of crime are better supported through the whole process, not just when they are attending court.

Source: Hope, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*.

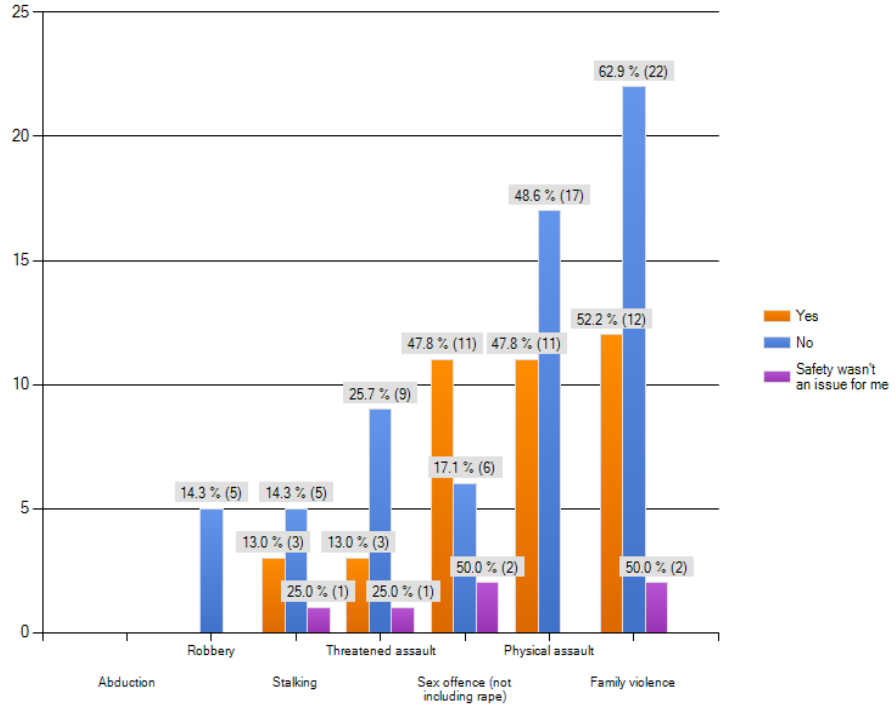
For many victim-witnesses there is a significant risk of retraumatisation when they give evidence. Reliving the events or facing the people who committed offences against them can have a harmful effect on a person's health and wellbeing. As well as promoting understanding of trauma amongst court officers—including judges and magistrates— court infrastructure and safety processes can help to limit the trauma that a victim of crime may experience in the court room.

In 2013, the Victims Support Agency published the results of a survey it conducted looking at the *Information and support needs of victims and witnesses in the Magistrates' Court*. The study found that 54.7% of respondents did not feel safe at court.[29] Figure 7.3 below shows the correlation between crime-type and safety. The Committee notes that most respondents who were victims of sexual offences indicated that they felt safe at court (47.8%) or safety was not an issue for them (50%). This was attributed to reforms made to giving evidence in sexual offence cases.[30]

29 Victims Support Agency, *Information and support needs of victims and witnesses in the Magistrates' Court of Victoria*, 2013, p. 19.

30 Ibid., p. 20.

Figure 7.3 Correlation between crime type and feelings of safety in the Magistrates' Court, 2013



Source: Victims Support Agency, *Information and support needs of victims and witnesses in the Magistrates' Court of Victoria*, 2013, p. 20.

The Committee heard from victims of crime about their experiences in a court room. Like Hope, they found the experience confronting. A submitter explained their experience giving evidence at a criminal trial:

> I was completely devastated, in shock at seeing my accused and my testimony was not good. I went into a dissociative state really and was trying to hear what the Barrister was saying and the person cross-examining me, I have extreme audio sensitivities when under severe stress so I struggled to hear, comprehend and reply well and I was trying my hardest to appear 'normal'. My head felt the age of 13 again, the age I was abused. It was a disaster; I was not given the optimal conditions to testify in that all other witnesses of childhood sexual abuse are and I folded.[31]

Lee Little, whose daughter Alicia was killed by a former partner, believed that the safety and wellbeing of the person who offended was prioritised over the family present in the court room. She stated:

> When her offender was first brought to court, Alicia's family members felt very confronted by the sense of protection he had. They were instructed not to look at the offender, but all they wanted to do was to look him in the eye. After all, he had just taken their mother, their sister, their cousin from them. They were told they would be intimidating the offender by simply looking at him. Fast-forward to when we were reading our victim impact statements to the court, and the offender repeatedly smashed

31 Name Withheld, *Submission 43*, p. 3.

> his hand on the dock and was yelling, yet he was not told to stop banging his hands. Why were we as victims not allowed to look at the man that took our Alicia, yet he could show such disrespect toward our impact statements?[32]

The safety of victims of crime is recognised in the *Victims' Charter Act 2006* (Vic) which states that:

> So far as is reasonably practicable, a prosecuting agency and the courts should, during the course of a court proceeding and within a court building—
>
> (a) minimise a victim's exposure to unnecessary contact with the person accused of the criminal offence, defence witnesses and family members and supporters of the accused person; and
>
> (b) protect a victim from intimidation by the accused person, defence witnesses and family members and supporters of the accused person.[33]

Victims of crime who are particularly vulnerable, such as children or victims of sexual offences, may be allowed to have special arrangements to further protect their safety in the court room. Table 7.1 provides some examples of special arrangements which a court can direct be put in place for victims of certain offences.

Table 7.1 Example safety measures for victims of certain offences

Offence type	Special safety arrangements
Sexual offences	• give evidence from somewhere other than the courtroom via remote video facilities • give evidence in court with a screen present, so that a person does not have to see an accused person • have an approved support person next to them whilst giving evidence
Family violence or sexual assault	An accused person is not allowed to directly cross-examine, although a lawyer representing the defence may.

Source: Victorian Government, *Victims of Crime: Protection at court*, 2021, <https://www.victimsofcrime.vic.gov.au/the-crime/keeping-safe/protection-at-court> accessed 5 January 2022.

For proceedings involving sexual offences, a judge must order an alternative arrangement for a victim-witness to give evidence, unless the judge is satisfied that they are aware of alternative arrangements available to them but would prefer to give evidence without them.[34]

The requirement for a judicial officer to order any alternative arrangement for giving evidence only extends to victims of sexual offences.

The Committee notes that in October 2021, the Victorian Government introduced the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021. The Bill amends the Criminal Procedure Act to require a court to direct

32 Lee Little, *Submission 28*, p. 1.

33 *Victims' Charter Act 2006* (Vic) s 12.

34 *Criminal Procedure Act 2009* (Vic) ss 360–365.

the use of CCTV or other facilities which enables a complainant in a family violence proceeding to give evidence remotely, including from a different location to the courtroom. As noted in Table 7.1 above, this option was already available to witnesses for sexual offence proceedings. However, the Committee also notes that the Bill does not seek to expand the use of any alternative arrangements prescribed under s 360 of the Criminal Procedure Act to complainants in family violence proceedings. The Bill further does not extend the use of remote provision of evidence to victims of other offences.

Outside of these requirements, a victim of crime is not eligible for alternative arrangements. However, a person may be declared a protected witness by a court which prevents them being cross-examined directly by the accused (see Section above).

The Victorian Law Reform Commission argued that the use of alternative arrangements in court rooms should be expanded to all child victims and any 'protected victims' under the Criminal Procedure Act.

Another example of special arrangements for victims of specific offences can be found in Victoria's Specialist Family Violence Courts. Matters heard in a Specialist Family Violence Court can use alternative arrangements for victims of crime to give evidence. Following the recommendations of the Royal Commission into Family Violence, the Victorian Government established these courts, with the first opening in Shepparton in 2019. One feature of the courts' operating model is the use of targeted infrastructure aimed at maximising the safety for victims of crime attending court. In its submission, the Victorian Government outlined some of the court infrastructure in place at Specialist Family Violence Courts to enhance safety:

> Victim-survivors who have attended [Specialist Family Violence Courts] have described the experience as supportive and easier than they expected. In particular, safe waiting areas help victim-survivors and their families to feel comfortable during their day at court and give them greater choice in how they participate in their hearing. This includes the option to use remote witness facilities to give evidence via [audio-visual link], or enter the court room through a secure entrance directly connected to the safe waiting area, and appear from behind a screen so that the respondent cannot see them.[35]

Victoria's Specialist Family Violence Courts were also discussed by the Victims of Crime Commissioner in its submission. The Commissioner noted that these courts demonstrated 'significant progress' in altering court infrastructure to support victims of family violence. The submission stated that the safety features of these courts were 'designed with victims' wellbeing and safety in mind'. Furthermore, the development of online court participation as a result of COVID-19 measures was another positive development. Online hearings have added to the participation choices that a victim of crime has to feel safe in the court environment. However, the Victims of Crime Commissioner emphasised that 'remote participating should not be dependent on

35 Victorian Government, *Submission 93*, p. 109.

crime type or the jurisdiction in which a matter is heard'. It also argued that 'all court infrastructure should accommodate the needs of victims—regardless of crime type, or what court they are attending.'[36]

The Victims of Crime Commissioner recommended that:

> The Victorian Government should audit all Victorian courts to assess their compliance with contemporary standards in victim safety and wellbeing to ensure courts meet contemporary standards including:
>
> - safe court entrances and exits for victim-survivors
> - safe waiting spaces and interview rooms, including child-friendly spaces and culturally safe spaces
> - remote witness facilities.[37]

In its submission, Amaze Autism Connect discussed the importance of accessible spaces in court rooms for people with autism spectrum disorders. The submission recommended the creation of accessible court rooms which could be used by people with an autism spectrum disorder. The submission said:

> Accessible court rooms are required to enable autistic people to engage in proceedings that affect them and give their best evidence, whether as a victim, witness or accused person. Further research is required into adjustments that may be made to the built environment and services offered to ensure true accessibility. Adjustments may include quiet rooms, court rooms designed to meet sensory and communication needs and adjustments to rules relating to whether the public are permitted in the court room, permitted staff numbers etc.[38]

In the Committee's view, court processes for enhancing the safety and wellbeing of a victim of crime can be improved. Giving evidence in a courtroom can be a confronting and overwhelming experience for any person, but for victim-witnesses there is an increased chance of retraumatisation. This can undermine a victim-witness' ability to give clear evidence and tell their story in the way they hope to. It is important that courts, to the extent possible, have processes in place so that victims of crime are supported to feel safe when giving evidence. The Victims' Charter recognises the importance of minimising unnecessary contact between a victim of crime and the person who committed the offence. With victim-centric infrastructure, such as a dedicated entry/exit points and waiting areas, it is easier to prevent unnecessary contact. As such, court safety processes should also extend to the design and infrastructure of a court building.

When in the court room, alternative arrangements, such as witness protection screens, are used to support a victim of crime to give evidence without feeling undue pressure or intimidation. However, alternative arrangements are only prescribed when proceedings

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36 Victims of Crime Commissioner, *Submission 99*, p. 40.

37 Ibid.

38 Amaze Autism Connect, *Submission 114*, pp. 12–13.

involve sexual offences, or with limited options for family violence proceedings. The Committee believes that the Victorian Government should amend the Criminal Procedure Act so all 'protected witnesses' have the option to use any prescribed alternative arrangements for giving evidence. Furthermore, the Committee has recommended that the Victorian Government support all Victorian courts to implement victim-centric infrastructure which promotes their safety and wellbeing in court rooms.

RECOMMENDATION 38: That the Victorian Government amend the *Criminal Procedure Act 2009* (Vic) so that a 'protected witness' is eligible to use any alternative arrangements for giving evidence which are prescribed under s 360 of the Act.

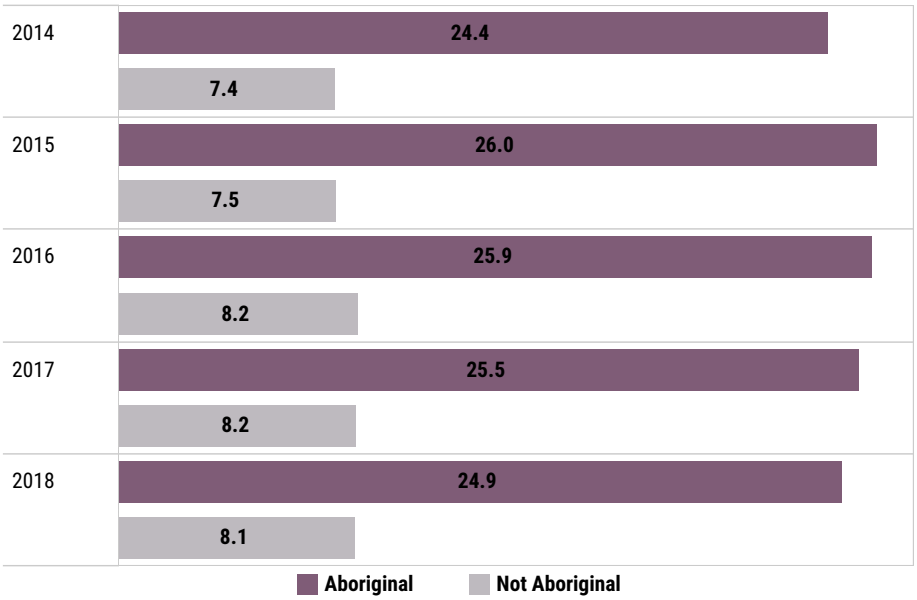
RECOMMENDATION 39: That the Victorian Government provides funding, where necessary, to Victorian courts to update their facilities to improve standards in victim safety and wellbeing. Facility updates could include:

- dedicated entrances and exits for victims of crime
- dedicated waiting spaces and interview rooms for victims of crime, as well as specific spaces such as:
  - child-friendly spaces
  - culturally safe spaces
  - quiet or sensory rooms
- increased number of remote witness facilities.

7.2 Aboriginal Victorians

Aboriginal Victorians are significantly overrepresented in all parts of the criminal justice system, including as victims of crime. In 2018, an Aboriginal Victorian was 3.1 times more likely to be recorded as a victim of crime than a non-Aboriginal Victorian. Figure 7.4 below from the Crime Statistics Agency shows the rates of Aboriginal versus non-Aboriginal people who were recorded as a victim of crime between 2014 and 2018.

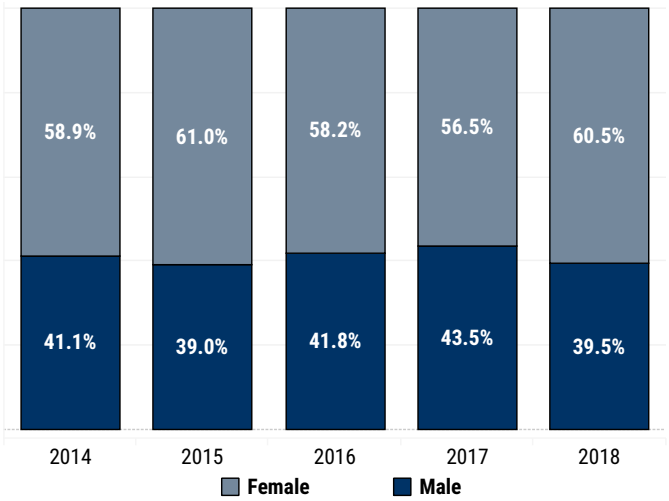
Figure 7.4 Rates of victims who were recorded as a victim of crime against the person, Aboriginal vs non-Aboriginal, Victoria, 2014–2018



Source: Crime Statistics Agency, *Aboriginal justice indicators*, <https://www.crimestatistics.vic.gov.au/crime-statistics/aboriginal-justice-indicators> accessed 11 January 2022.

Aboriginal women were more frequently a victim of a crime than men. Females accounted for over half the total number of Aboriginal Victorian victims of crime between 2014 and 2018 (see Figure 7.5 below).

Figure 7.5 Aboriginal Victorians who were victims of a crime against the person, by sex, 2014–2018



Source: Crime Statistics Agency, *Aboriginal justice indicators*, <https://www.crimestatistics.vic.gov.au/crime-statistics/aboriginal-justice-indicators> accessed 11 January 2022.

It is of great concern to the Committee to note that these statistics underreport the number of Aboriginal Victorians who have been victims of crime. Evidence suggests that a significant proportion of crimes committed against Aboriginal and Torres Strait

Islander people go unreported. The Centre for Innovative Justice explained that not enough information is known about the 'profile of Aboriginal and Torres Strait Islanders as victims of crime' compared to the breadth of information on offending by Aboriginal Victorians.[39]

Djirra suggested that 90% of violence committed against Aboriginal and Torres Strait Islander women is underreported.[40] It believed that Aboriginal Victorian women underreport crimes committed against them because there is a 'profound mistrust' in the criminal justice system, with many believing they will experience inaction from law enforcement if they report.[41] Djirra also noted that some women fear reporting crimes because it 'may result in child removal, incarceration and victim/perpetrator misidentification'.[42] Section 7.6 discusses the criminalisation of victims of crime, including perpetrator-misidentification in family violence cases, in more detail.

Some stakeholders believed that stigma and stereotypes faced by Aboriginal Victorians are a key barrier to reporting crimes. Social stigma is a recognised barrier to reporting crime not just for the Victorian Aboriginal community but also Victoria's culturally and linguistically diverse communities. The Victorian Aboriginal Legal Service argued that 'Aboriginality is also a risk factor in its own right'. In its submission, it said:

> Police stereotypes about Aboriginal women and men, and the prevalence of family violence in their relationships, lead to a bias towards thinking an Aboriginal person has been violent. This raises the risk of misidentification, particularly for Aboriginal people in a relationship with a non-Aboriginal person.[43]

At a public hearing, Aunty Linda Bamblett, Chief Executive Officer of the Victorian Aboriginal Community Service Association Ltd, explained that Aboriginal victims of crime are often met with suspicion by law enforcement, even when they are the victim:

> it is really, really difficult for Aboriginal people to consider themselves victims of crime and quite often to be seen by the system as victims of crime. If an Aboriginal person walks into a police station, police are more likely to say … what have you done? You know, 'What are you here for?' and that. So it is very difficult. If there is an altercation between an Aboriginal person and a non-Aboriginal person, it is always: what did the Aboriginal person do?[44]

This was echoed by Adjunct Professor Aunty Muriel Bamblett from the Victorian Aboriginal Child Care Agency, who described the experiences of some Aboriginal women being misidentified as a perpetrator in family violence situations:

> Eighty-five per cent of the women that we see coming to VACCA have had violence perpetrated by non-Aboriginal men. That is a very high number. So for an Aboriginal

39 Centre for Innovative Justice, *Submission 82, Attachment 1*, p. 98.

40 Djirra, *Submission 138*, p. 11.

41 Ibid.

42 Ibid.

43 Victorian Aboriginal Legal Service, *Submission 139*, pp. 71–72.

44 Aunty Linda Bamblett, Executive Officer, Victorian Aboriginal Community Service Association (VACSAL), public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 16.

> woman, she gathers the courage and rings police to help her as she has just experienced physical violence and worse. The police arrive and a number of things happen: the non-Aboriginal perpetrator manages to convince police that the Aboriginal woman is the actual aggressor, and so she is taken away; police arrive, assess the situation, and the woman has a history of petty crimes related to drugs or alcohol, so she is taken away; or what happens, too often, is both the Aboriginal woman and the perpetrator have warrants against them for petty crimes, they are both then arrested and then the children end up in child protection, often for very long periods of time.[45]

The Victorian Aboriginal Child Care Agency also discussed that intergenerational trauma within Victoria's Aboriginal communities is another facet of victimisation that they face. Intergenerational trauma and a history of forced removal from their communities too often results in compounded disadvantage for Aboriginal Victorians, leading to their overrepresentation in 'rates of violence, trauma and discrimination'. The Victorian Aboriginal Child Care Agency believed that rather than addressing these harms and promoting recovery, 'the criminal justice systems current response to these experiences is a punitive one'. The Agency contended that the justice system positions Aboriginal people as perpetrators instead of 'prioritising healing and addressing the multiple and complex sources of trauma'.[46]

Perpetrator misidentification is discussed further in Chapter 5.

In its submission to the Victorian Law Reform Commission's Inquiry into improving the response of the justice system to sexual offences, Djirra recounted examples of clients who had experienced racism when reporting family violence and/or sexual assault. It said:

> It is common for Djirra clients to go to the police to make a report and then return to Djirra saying 'I didn't make the statement because the police said [x] to me'. Where the women insist on actually lodging the complaint, they are frequently faced with further racism, deterrence and/or diminishment in the interview room—'I don't even think you're going to say this in court, so why would I even write it down…'. While the more abhorrent content and detail does not need to be included here, the comments often reflect a deep bias towards Aboriginal women as violent and aggressive themselves, promiscuous or highly sexualised, likely to withdraw the complaint and/or untrustworthy as witnesses.[47]

Any victim of crime should feel comfortable reporting a crime and have confidence that they will be supported. This should be at the foundation of the criminal justice system. Supporting victims to report can play a key role in protecting broader community safety, increasing the rehabilitation of people who have committed criminal offences and preventing reoffending. Moreover, there is a clear link between victimisation and offending. The majority of Aboriginal Victorians who are in contact with the justice

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45 Adjunct Professor Aunty Muriel Bamblett, Chief Executive Officer, Victorian Aboriginal Child Care Agency, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 33.

46 Victorian Aboriginal Child Care Agency, *Submission 121*, pp. 5–6.

47 Djirra, *Submission 9*, submission to Victorian Law Reform Commission, Inquiry into improving the response of the justice system to sexual offences, 2020, p. 7.

system are also victims of crime. Therefore, it is essential that Aboriginal Victorians feel safe reporting crimes committed against them when they occur as it may play a crucial step in preventing them offending later in life.

Victoria Police acknowledged the importance of improving Aboriginal Victorians' trust in reporting crimes. At a public hearing, Victoria Police's Chief Commissioner, Shane Patton, said that gaining the trust of Aboriginal Victorians to encourage reporting crimes is an important objective. However, he recognised that:

> gaining the trust of Aboriginal persons so that they feel confident as victims to come and report on every occasion to [Victoria Police] is something that is not going to happen overnight.[48]

Chief Commissioner Patton noted that improving Aboriginal Victorians' trust in the criminal justice system, particularly Victoria Police, requires direct engagement with communities about reform to the current system. Aboriginal Victorians are best placed to self-determine their own needs and identify the best outcomes to improve their experiences in the criminal justice system.[49] This is discussed further below.

Despite being overrepresented in victims of crime statistics, Aboriginal Victorians only make up a small proportion of clients in the victim services sector. In its 2020 review of the Victoria's victim support system, the Centre for Innovative Justice found that Aboriginal Victorians only made up 3% of the Victims Services, Support and Reform client group.[50] The review also found that other cohorts which are known to experience higher rates of victimisation were underrepresented, including older people, people with disabilities, and members of the LGBTIQ+ community.[51]

A key reason for the underrepresentation of Aboriginal Victorians accessing victim services could be the lack of culturally safe options available, particularly those delivered by Aboriginal Community Controlled Organisations. The Centre for Innovative Justice's review into Victoria's victim support system found that there was a 'need for substantial uplift in cultural safety and competency across existing [victim support agency] services'.[52]

Cultural safety, or culturally safe practices, occur when an organisation creates an environment which is safe for Aboriginal and Torres Strait Islander people and does not challenge or deny their identity and experiences.[53] Figure 7.6 shows the cultural safety framework developed by the Victorian Government to assist the health, human and community services sectors to become culturally safe for Aboriginal Victorians.

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48 Chief Commissioner Shane Patton, Victoria Police, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 29.

49 Ibid.

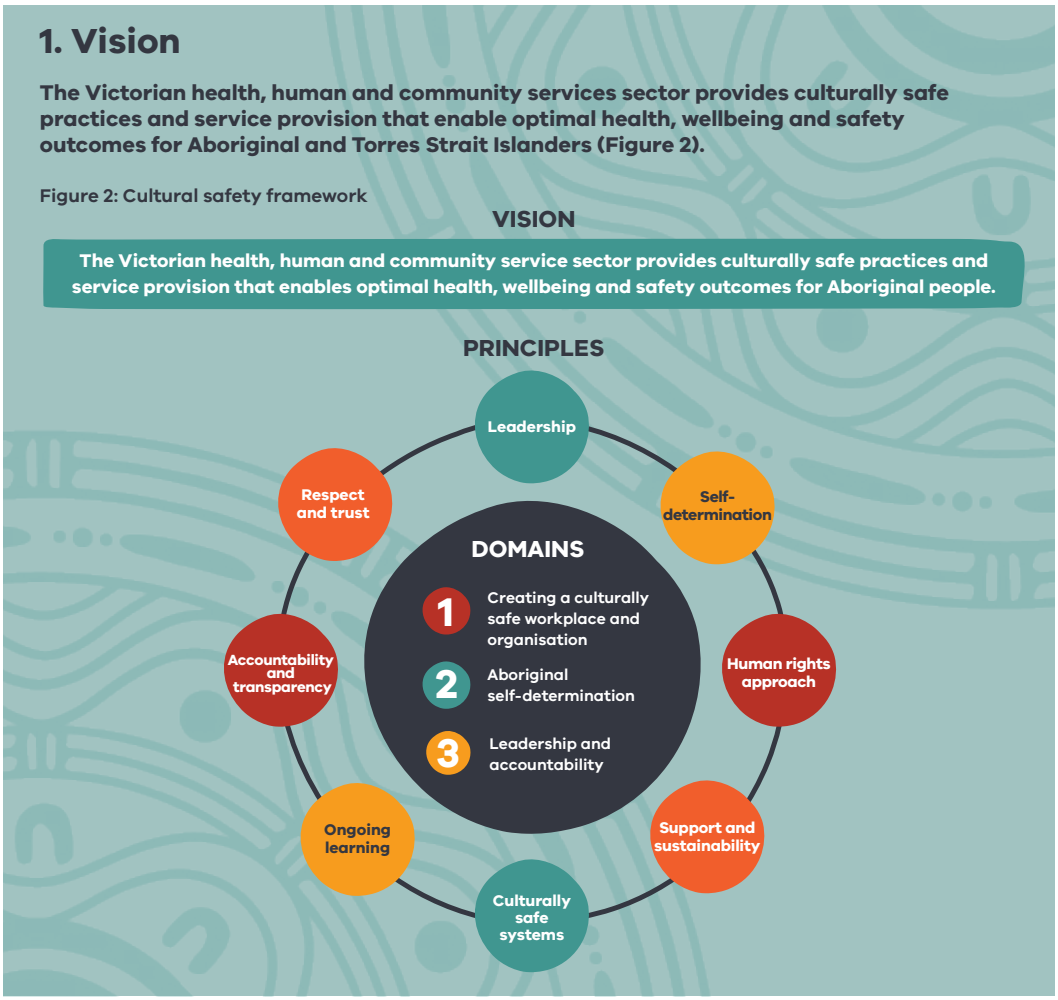
50 For period 2014–2019. Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, p. 73.

51 Ibid., pp. 73–74.

52 Ibid., p. 190.

53 Department of Health, *Aboriginal and Torres Strait Islander cultural safety framework: For the Victorian health, human and community services sector*, 2019, p. 7.

Figure 7.6 Aboriginal and Torres Strait Islander cultural safety framework



Source: Department of Health, *Aboriginal and Torres Strait Islander cultural safety framework: For the Victorian health, human and community services sector*, 2019, p. 8.

Numerous stakeholders told the Committee that a lack of culturally safe support for Aboriginal Victorian victims of crime is a significant impediment to their recovery and can act as a deterrent for them to seek help at all. Stakeholders believed if there was more culturally safe support available, it would reduce the overrepresentation of Aboriginal Victorians in the criminal justice system and address victimisation as a risk factor for offending. This was discussed by several stakeholders. For example, the Aboriginal Justice Caucus noted:

> the importance of trauma informed victim supports, particularly for children, as a means to reduce the likelihood of overrepresentation. Access to these services ought to be provided to Aboriginal in the community, but also within custody, including youth justice facilities.[54]

54 Aboriginal Justice Caucus, *Submission 106*, p. 10.

The Centre for Innovative Justice contended that to avoid retraumatisation and social stigma, services need to understand how a victim of crime's identity may affect the impact of certain offences.[55] Understanding the shared experiences of individuals and their communities is an integral part of ensuring that appropriate support is offered to a victim of crime. A service's response must address the direct impact of victimisation within the context of a person's identity, culture and history, in particular where it may be compounded by intergenerational trauma as is the case for many Aboriginal Victorians.

In the context of supporting young Aboriginal Victorians who have been victims of crime, Indi Clarke, Executive Officer of the Koorie Youth Council, discussed that services must understand the cultural intricacies of a young person and how that may shape the support they need. At a public hearing, Indi Clarke said:

> it is making sure that dedicated services, whether it is the Victorian Aboriginal Legal Service or even … Balit Ngulu, which is a dedicated Aboriginal children and young people's legal service—it is around how we truly support services like that that understand children and young people's lives and the kind of impacts that would have led them to where they are today.[56]

The Committee has made recommendations to improve culturally safe practices for supporting victims of crime who are Aboriginal Victorians, as well as culturally and linguistically diverse. These are discussed further in Chapters 6 and 8.

FINDING 26: A significant proportion of crimes committed against Aboriginal Victorians go unreported. Despite this, Aboriginal Victorians are still overrepresented in victims of crime statistics.

FINDING 27: A lack of culturally safe support for Aboriginal Victorians is a key barrier to victims of crime from these communities accessing services.

7.3 Culturally and linguistically diverse communities

Victoria's culturally and linguistically diverse communities make up a large portion of Victoria's population. According to the 2016 Census, 28.4% of Victoria's population was born overseas from over 200 countries.[57] However, the rates of victimisation in these communities are not easily quantifiable, as there is limited data available. The lack of available data is most likely to be caused by underreporting, with many people from these communities not reporting crimes committed against them.

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55 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 223.

56 Indi Clarke, Executive Officer, Koorie Youth Council, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 15.

57 Victorian Government, *Discover Victoria's diverse population*, 2021, <https://www.vic.gov.au/discover-victorias-diverse-population> accessed 12 January 2022.

In its submission, Victoria Legal Aid noted that there is a lack of empirical information about the rates of victimisation in culturally and linguistically diverse communities. It stated:

> All parts of the criminal justice system should be culturally safe, and racism and other bias in decision-making should be identified and addressed. There is comparatively little acknowledgment of these issues for culturally and linguistically diverse communities: as a starting point there is limited data across the justice system about these communities. There is also relatively little engagement with the leaders of those communities in identifying the causes of this over-representation and addressing them.[58]

In its review of Victoria's victim services system, the Centre for Innovative Justice found there were several factors contributing to underreporting within culturally and linguistically diverse communities, which also impeded access to appropriate victim services. The factors identified were:

- language barriers
- limited knowledge of available support services
- lack of understanding of rights and legal protections
- social stigma and shame relating to some criminal offences, such as family violence
- mistrust of authorities.[59]

Language barriers were also recognised by the In Good Faith Foundation as an issue which affects some people from articulating their victimisation. This can often compound their trauma which also acts as a barrier to describing their experiences as well as processing information, such as information about the support available to them.[60]

Dr Adele Murdolo, Executive Director, Multicultural Centre for Women's Health, described the experience of a client who reported family violence to police. The client did not speak English and an interpreter was not made available when police responded to the incident, resulting in attending officers speaking to the woman's husband rather than her.

> **A case study that I heard about recently was where police attended an incident and did not get an interpreter, which I think is not uncommon, spoke only to the man in the situation and in the end arrested the woman, who had called the police in the first place—and because of language issues. He spoke English, she did not, and that is quite a common thing as well—that men will have better English fluency than women in a relationship.**
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> Dr Adele Murdolo, Executive Director, Multicultural Centre for Women's Health, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 52.

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58 Victoria Legal Aid, *Submission 159*, p. 15.

59 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 233; Centre for Innovative Justice, *Improving support for victims of crime: key practice insights*, p. 10.

60 In Good Faith Foundation (IGFF), *Submission 38, Attachment A*, p. 20.

From 2014 to 2019, victims of crime from culturally and linguistically diverse backgrounds only made up 5% of the Victim Services, Support and Reform client group.[61] According to data collected by the Crime Statistics Agency, between 2016–17 and 2020–21, 15.9% of Victim Assistance Program family violence case clients had a cultural background other than Australian.[62] These figures likely underestimate the number of victims of crime from culturally and linguistically diverse backgrounds. However, it does demonstrate that family violence is a prevalent issue facing these communities.

Stakeholders to the Inquiry confirmed that family violence is a pressing issue facing culturally and linguistically diverse communities. Dr Adele Murdolo from the Multicultural Centre for Women's Health submitted:

> In terms of victims of crime, I guess the biggest threat to migrant women's safety is family violence. Again, we do not really have good prevalence data for migrant women, but there are some indications that migrant women have lower levels of access to family violence services, tend to access them at a much later point and, therefore, tend to experience more sustained and sometimes escalating violence. So there is a sense that the violence can be much more severe and longer term and women need to get to that real crisis end where they feel like their lives are in danger or the lives of their children are in danger before they call police or approach someone in the system. So I think, in terms of being victims of crime, that is the one area that I know the most about; that is the biggest issue for migrant women.[63]

Other challenges faced by culturally and linguistically diverse communities—such as language barriers and/or experiences of discrimination or racial bias— can affect the ways they navigate the victim support system. Often culturally and linguistically diverse people experience the justice system differently compared to other populations. Some of the key factors which affect a victim of crime from a culturally and linguistically diverse background's interaction with victim services are:

- A victim of crime's relationships with family and community, for example financial or emotional dependence, can generate additional pressures to not report or access support.
  - However, it should be noted that victims of crime with strong external support systems are more likely to recover from the trauma of their experiences.
- A lack of culturally appropriate options undermines engagement with victim services. This can be exacerbated if a victim of crime is exposed to racism, bias or discrimination when seeking help from the criminal justice system.

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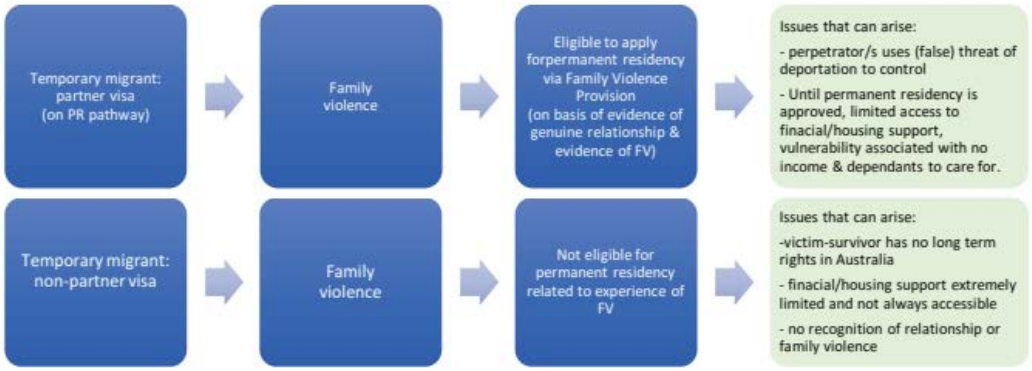
61 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 75.

62 Crime Statistics Agency, *Victims Services, Support and Reform - July 2016 to June 2021*, 2021, <https://www.crimestatistics.vic.gov.au/family-violence-data-portal/family-violence-data-dashboard/victims-services-support-and-reform> accessed 12 January 2022.

63 Dr Adele Murdolo, Executive Director, Multicultural Centre for Women's Health, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 53.

- Citizenship or visa status can impact a victim of crime's access to support services. Some services are not available to people on restricted visas, such as some income, housing or health supports. Figure 7.7 below from Monash Gender and Family Violence Prevention Centre and InTouch outlines the different issues that migrants who are victims of family violence may experience.[64]

Figure 7.7 Support options for migrants who are victims of family violence, partner versus non-partner visas



Source: Kate Thomas, Marie Segrave and InTouch Multicultural Centre Against Family Violence, *Support options for migrant women on temporary visas experiencing family violence in Australia*, Monash Gender and Family Violence Prevention Centre and InTouch Multicultural Centre Against Family Violence, 2018, p. 1.

Dr Murdolo told the Committee that people from culturally and linguistically diverse communities are interested in receiving information about supports available and dealing with victimisation. However, she suggested that mistrust in government systems was preventing them from seeking help. This was discussed in the context of women's engagement with health and family violence information who were from culturally and linguistically diverse backgrounds. Dr Murdolo explained:

> In a snapshot of some of the sessions we ran with a group of women last year, they told us that none of them—it was eight women that we spoke to over an eight-session period—had ever received women's health information in their language before, either in Australia or in their country of origin. So we knew that health literacy was fairly low. They were really interested in the information, but particularly on family violence, sexual and reproductive health, mental health and workplace health. In terms of the impact of the session, most of them said that they would speak with their family and friends after the session and that they would change some of their personal health behaviour. A lot of women usually tell us, 'Yes, I'm going to visit the doctor now', but this group tends to say, 'No, I'm actually not'. So that mistrust in the health system that I think is characteristic of groups that are kind of excluded from society in other ways, we were not able to kind of reduce that in any way through these sessions.[65]

64 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*; Centre for Innovative Justice, *Improving support for victims of crime: key practice insights*; Marie Segrave and InTouch Multicultural Centre Against Family Violence Kate Thomas, *Support options for migrant women on temporary visas experiencing family violence in Australia*, Monash Gender and Family Violence Prevention Centre and InTouch Multicultural Centre Against Family Violence, 2018.

65 Dr Adele Murdolo, *Transcript of evidence*, p. 51.

Victims of crime from culturally and linguistically diverse communities experience unique challenges as they navigate the criminal justice system. It is important that the system is equipped to deal with and respond to these challenges through the provision of culturally safe support. The Committee is concerned that there is not enough culturally safe support available commensurate to the victims of crime who need it. This issue, including the recommendations by the Committee, is addressed further in Chapter 8.

FINDING 28: Victims of crime from culturally and linguistically diverse communities face several barriers to reporting crimes committed against them. As a consequence, the rates of victimisation among culturally and linguistically diverse communities are not well known. Particular barriers to reporting include:

- language barriers
- limited awareness of:
  - available support services
  - rights and legal protections afforded to victims of crime
- mistrust of the criminal justice system and other support sectors
- social stigma and shame associated with certain offences.

FINDING 29: Victims of crime from culturally and linguistically diverse backgrounds may experience unique forms of disadvantage which adversely shape how they interact with victim services, such as:

- a lack of culturally appropriate or safe services
- facing familial or community pressure to not report crimes
- citizenship or visa status which may determine what services are or are not available to a victim of crime.

RECOMMENDATION 40: That the Victorian Government increase the number of multicultural community organisations contracted as participating agencies under the Victims Assistance Program.

7.4 People with disability

> **We do not have a decent system that assists those with visible or psychosocial disabilities, who may well be articulate and who present well yet struggle with comprehension due to the way we process information. Support is needed prior, during and after court, not just a possible witness assistance person on the actual day.**
>
> Hope, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 2.

People with disability are disproportionately victims of violent conduct or abuse.[66] The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in an issues paper on *Violence and abuse of people with disability at home*, noted that:

> People with disability are more likely to feel unsafe in their home than people without disability. Over a 12 month period, people with disability are almost twice as likely to experience violence and abuse as people without disability. Women with disability experience higher rates of intimate partner violence, emotional abuse, stalking and sexual violence than women without disability and men with disability. Men with disability are also more likely to experience all these forms of violence and abuse than men without disability, particularly physical violence.[67]

WWild Sexual Violence Prevention Association, in response to the issues paper on the criminal justice system prepared by the Royal Commission, submitted:

> It is well-established that women and men with intellectual, learning and cognitive disabilities suffer extremely high rates of sexual violence in the community. Depending on the research cited, it is estimated between 50% and 99% of women with intellectual disabilities will experience sexual assault in their lifetime. In spite of this only a small proportion of victims will choose to report to police and an even smaller percentage will proceed to trial.[68]

The Victorian Government acknowledged the high rates of victimisation experienced by people with disability, noting that they are overrepresented as victims of crime.[69] The Government also discussed victimisation experienced by people with disability in its *Absolutely Everyone: State disability plan 2017–2020*. The Plan noted that 'people with a disability and their families and carers are subjected to higher levels' of victimisation.[70] For example, women with a disability are 40% more likely to be victims of domestic violence compared to women without a disability.[71]

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66 Abuse Royal Commission into Violence, Neglect and Exploitation of People with Disability, *Criminal justice system*, Issues paper, January 2020, p. 1.

67 Abuse Royal Commission into Violence, Neglect and Exploitation of People with Disability, *Violence and abuse of people with disability at home*, Issues paper, December 2020, p. 3.

68 WWild Sexual Violence Prevention Association, *Response to Criminal Justice System Issues Paper (ISS.001.00065_0002)*, submission to Royal Commission into the Violence, Abuse, Neglect and Exploitation of People with Disability, 2020, p. 3.

69 Victorian Government, *Submission 93*, p. 18.

70 Victorian Government, *Absolutely Everyone: State disability plan 2017–2020*, 2017, p. 13.

71 Ibid.

In its report *Equal Before the Law: Towards Disability Justice Strategies*, the Australian Human Rights Commission stated:

> Violence is a personal cost to victims and perpetrators, their friends and families. It is an economic burden to the whole community. People with disabilities are exposed to violence at rates that exceed those for many others in the community.
>
> In our consultations the Commission heard many accounts of high levels of violence in the community at large and in institutional settings, including within the criminal justice system. Comprehensive statistics are difficult to obtain and it appears highly likely that violence affecting people with disabilities is under reported.[72]

People with disability often experience distinct forms of violence and victimisation. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability described some of the distinct forms of violence experienced:

> People with disability may be subject to distinct forms of violence and abuse in the home, including withholding of food, water, medication, or personal care such as toileting. They may be subject to restrictive practices, reproductive control, and seclusion.[73]

Like other vulnerable cohorts, people with disability are at greater risk of victimisation or trauma because of compounding disadvantages. People with disability 'experience multiple forms of hardship, such as unemployment, poverty, homelessness, health problems and social isolation'.[74] The effect of this is that people with disability are often marginalised, placing them at greater risk of becoming a victim of crime.[75]

In its submission to the Inquiry, the Law and Advocacy Centre for Women contended that people with disability, particularly women with disability, 'face increased social and economic marginalisation, as well as experiences of victimisation and trauma'.[76] However, like other vulnerable groups, available data on the rates of victimisation of people with disability is not clear due to underreporting. This was recognised by the Royal Commission into Institutional Responses to Child Sexual Abuse which also stated that research into victims of sexual abuse often excludes people with disability.[77]

When a person with disability does report a crime, they often have difficulty navigating the criminal justice system. The Royal Commission into the Violence, Abuse, Neglect and Exploitation of People with Disability submitted that there are significant barriers that people with disability face when accessing the justice system. These include:

- physical access barriers
- lack of or inaccessible communication and information

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72 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, 2014, p. 15.

73 Royal Commission into Violence, *Violence and abuse of people with disability at home*, p. 3.

74 Royal Commission into Violence, *Criminal justice system*, p. 6.

75 Ibid.

76 Law and Advocacy Centre for Women, *Submission 135*, p. 2.

77 Abuse Royal Commission into Violence, Neglect and Exploitation of People with Disability, *Volume 4: Identifying and disclosing child sexual abuse*, 2017, p. 19.

- fear of punishment from family or community if they report
- fear of losing support that the person who offended against them may provide
- requiring adjustment or supports to participate in criminal justice processes.[78]

Community attitudes and/or discrimination is another preventative factor for people with disability reporting crimes committed against them. The Royal Commission into Institutional Responses to Child Sexual Abuse found that a 'powerful barrier to disclosure' was the prevalence of problematic attitudes which made people with disability feel that they would not be believed. Examples of problematic attitudes which deter people with disability from reporting crimes include the beliefs that people with disability:

- are asexual or, conversely, promiscuous
- lie, exaggerate or are readily influenced by others
- are unable to give credible and reliable accounts of their experiences
- are not usually, and would not be, sexually abused.[79]

This was echoed by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability which stated that:

> The Royal Commission has been told that the authorities, such as the police and prosecutors, often do not consider violence and abuse directed at people with disability to be crimes or to be worthy of investigation or able to be prosecuted successfully.[80]

The Australian Human Rights Commission also found that negative attitudes in the criminal justice system towards people with disability impacted the way they were treated. The Commission stated that lack of appropriate support as well as negative attitudes meant people with disability are often seen as unideal victims or witnesses. This perception meant that criminal justice agencies and courts saw people with disability 'as not credible and their evidence as not reliable'. As a consequence, the Commission argued that 'this means police do not proceed with charges or the Director of Public Prosecutions (DPP) does not prosecute'.[81]

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability believed that there is a 'power imbalance between the agencies that make up the criminal justice system and people with disability who are brought into contact with them'.[82] This power imbalance is exacerbated where a person with disability has intersecting vulnerable identities, such as Aboriginal or Torres Strait Islander people with disability and culturally and linguistically diverse people with disability.[83]

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78 Royal Commission into Violence, *Criminal justice system*.

79 Royal Commission into Violence, *Volume 4: Identifying and disclosing child sexual abuse*, p. 81.

80 Royal Commission into Violence, *Criminal justice system*, p. 5.

81 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, p. 20.

82 Royal Commission into Violence, *Criminal justice system*, p. 5.

83 Ibid.

Some stakeholders suggested that this imbalance or disconnect could also extend to victim support services. The Office of the Public Advocate submitted there is a:

> lack of cohesion between victim support services for individuals with a disability. While the current victim support framework is complex, individuals with disability have unique needs and added difficulty in accessing the services vital to their continued inclusion in the trial process.[84]

It identified the lack of referral powers for Independent Third Persons as a gap which has inhibited cohesion in victim support services for people with disability.[85] Chapter 6 examines the Independent Third Person Program and other intermediary services available to victims of crime.

The Office of the Public Advocate recommended that Victoria develop a Disability Justice Strategy, as proposed by the Australian Human Rights Commission. In its view, a dedicated strategy for people with disability involved in the justice system—whether as a victim of crime, witness or person who has committed a criminal offence—would address the inequities people with disability experience within the criminal justice system. The Office of the Public Advocate encouraged the Victorian Government to consider the disability justice strategy proposed by the Australian Human Rights Commission.

The Australian Human Rights Commission's proposed strategy seeks to improve the experiences of all people with disability interacting with the criminal justice system, including victims of crime. It identifies five key outcomes for a Disability Justice Strategy, as described in Box 7.2.

BOX 7.2: Recommended outcomes of a Disability Justice Strategy, Australian Human Rights Commission

1. Safety of people with disabilities and freedom from violence.
2. Effective access to justice for people with disabilities.
3. Non-discrimination.
4. Respect for inherent dignity and individual autonomy including the freedom to make one's own decisions.
5. Full and effective participation and inclusion in the community.

Source: Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, 2014.

84 Office of the Public Advocate, *Submission 153*, p. 27.

85 Ibid.

The Commission also recommended the following core principles and actions which should be incorporated under any disability justice strategy:

- appropriate communications
- early intervention and diversion
- increased service capacity
- effective training
- enhanced accountability and monitoring
- better policies and frameworks.[86]

In 2019, the Australian Capital Territory (ACT) Government implemented a 10-year Disability Justice Strategy which aims to ensure people with disability in its jurisdiction 'have equal access to justice'. Box 7.3 below outlines the ACT Government's Strategy.

BOX 7.3: *Disability Justice Strategy 2019–2029*, ACT Government

The ACT Government's *Disability Justice Strategy* is a 10-year plan to ensure that people with disability have equal access to justice. The plan is underpinned by three key principles:

1. Equality before the law and access to justice are fundamental human rights which are expressed in art 12 and 13 of the *Convention on the Rights of Persons with Disability as well as s 8 of the Human Rights Act 2004* (ACT).
2. People with disability are significantly disadvantaged in accessing justice.
3. A justice system which provides equal access to justice for people with disability is a better system for all.

The Strategy has identified five focus areas which are critical to achieving the three goals of the strategy. The Strategy's focus areas are:

- Information and communication
- Education and guidance
- Identification, screening and assessment
- Better service delivery
- Data, research and review.

(Continued)

86 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*.

BOX 7.3: Continued

The Strategy has identified five focus areas which are critical to achieving the three goals of the strategy. The Strategy's focus areas are:

- Information and communication
- Education and guidance
- Identification, screening and assessment
- Better service delivery
- Data, research and review.

The three goals of the Strategy are:

1. **People with disability are safe and their rights are respected**, including:

- understanding their rights
- participating in decision-making and having their wishes and preferences respected
- protection from violence and neglect
- access to appropriate adjustments and supports enabling them to navigate the criminal justice system.

2. **The ACT has a disability responsive justice system**, including:

- the civil and criminal justice system is aware and responds appropriately to disability, including making reasonable adjustments
- people with disability have access to legal services and supports
- the support needs of people with disability are recognised and reasonable adjustments are made
- people with disability have supports to avoid contact with the criminal justice system as early as possible.

3. **Change is measured and achieved**, including:

- systems and services recognise the need for consistent data collection
- data is collected and used to monitor improvement
- goals, priorities and activities of the strategy are evaluated, tracked and measured for outcomes
- data and evaluation are used to measure cultural change.

Source: ACT Government, *Disability Justice Strategy 2019–2029*, 2019.

The Victorian Government has recognised the need to protect people with disability from becoming victims of crime and that tailored measures are needed to ensure their safety. Action 19 of the *State Disability Plan 2017–2020* focused on developing safeguards to prevent people with disability experiencing violence, abuse or other forms of victimisation.[87] A 2018 update of the State Plan outlined measures that had been implemented to support meeting Action 19, including:

- releasing the *Dignity, respect and safer services: Victoria's disability abuse prevention strategy* in April 2018
- passing the *Disability Service Safeguards Act 2018* (Vic)
- passing the *Disability Amendment Act 2017* (Vic).[88]

The focus of these new measures is to primarily prevent and address violence and abuse towards people with disability within disability services.

At the time of writing, the Victorian Government had not yet released its State Disability Plan for 2021–2025. Public consultation for the Plan concluded in May 2021.

The Victorian Government's Victim Support Update included some actions to enhance victims services for people with disability. To enhance the services for adults with a cognitive disability, the Government committed $9.9 million of the 2021–22 State Budget to continuing the Intermediary Program (see Chapter 6). The Government has also funded new remote witness rooms through the Virtual Court Support Program to give victims of crime flexible options to participate in criminal proceedings.[89] The Program is available more broadly but is particularly beneficial to victims of crime who have a disability.

The Committee supports these initiatives as important steps to improving the experiences of victims of crime with disability in the criminal justice system. However, it believes more could be done.

The Committee emphasises that people with disability are not just victimised in institutional settings or within disability services. It can occur anywhere. A strong criminal justice system is one that is equipped to support the needs of all people regardless of their circumstances. It is resourced and trained to understand and respond to the specific vulnerabilities of people interacting with the system. The trauma associated with being a victim of crime makes it even more crucial for the right support to be in place, which will allow all victims to engage with the criminal justice system equitably. A broader strategy for improving the experiences of victims of crime with disability would ensure that the criminal justice system is appropriately equipped to support victims. Improving the victim service delivery for victims of crime

87 Victorian Government, *Absolutely Everyone: State disability plan 2017–2020*, p. 46.

88 Victorian Government, *Absolutely Everyone: State disability plan annual report 2018*, 2018, p. 17.

89 Victorian Government, *Victim Support Update: Reforms we will deliver to support victims of crime - Enhancing services for adults with a cognitive disability and children and young people*, 2021, <https://www.vic.gov.au/victim-support-update/reforms-we-will-deliver-support-victims-crime#enhancing-services-for-adults-with-a-cognitive-disability-and-children-and-young-people> accessed 14 January 2022.

with disability is not just about improving infrastructure and service accessibility. It also requires addressing negative attitudes and biases within the criminal justice system. The Committee believes that the Victorian Government should commit to improving the delivery of victim support services for people with disability, including considering whether a dedicated Disability Justice Strategy is needed.

RECOMMENDATION 41: That the Victorian Government finalise and make public the *State Disability Plan 2021–2025* as a matter of urgency.

RECOMMENDATION 42: That the Victorian Government commit to improving the delivery of victim support services for people with disability. This commitment should involve:

- prioritising trauma recovery for victims of crime with disability
- improving the delivery of support services for victims of crime with disability, including addressing barriers experienced by victims, such as:
  - physical access and communication barriers
  - negative or biased attitudes expressed by authorities or agencies operating within the criminal justice system, including victim support agencies
  - the accessibility of adjustments or supports for people with disability participating in criminal justice proceedings
- undertaking research into whether a Disability Justice Strategy is necessary. If a dedicated strategy is deemed unnecessary, the Government should provide a report to the Parliament outlining the reasons for its decision.

7.5 LGBTIQ+ community

The Centre for Innovative Justice's victims services review provided some statistics on rates of victimisation amongst the LGBTIQ+ community.[90] These indicated that:

- 75% of people from the LGBTIQ+ community experienced verbal abuse
- 41% experienced threats of physical violence
- 23% experienced physical assault
- victimisation rates are higher for transgender people:
  - 92% of transgender women and 55% of transgender men experienced verbal abuse

90 There may be some variation in terminology in line with language used in evidence discussed by the Committee.

  - 46% of transgender women and 36% of transgender men experienced physical assault

- evidence also indicates that LGBTIQ+ victims of crime are seeking support at lower rates with only 25% seeking assistance.[91]

The review also noted that:

> An unknown percentage of these crimes could be characterised as homophobic or transphobic violence, or 'hate' crimes, i.e., arising in relation to the victim's sexual and gender identity. Hate crimes are most likely to be perpetrated against transgender people and younger LGBTI people. Of LGBTI people aged between 14 and 21 years surveyed in 2010, 61 per cent reported verbal abuse; 18 per cent reported physical abuse; and 69 per cent reported other types of abuse which they attributed to homophobia.[92]

Evidence also suggests that LGBTIQ+ people experience higher rates of family violence compared to people who do not identify themselves as part of those communities. Further, evidence indicates those with intersecting identities which also experience higher rates of victimisation are most at risk. A submission from Professor Felicity Gerry QC, Professor Andrew Roland, Dr Laura Connelly and Dr Jeanette Roddy stated that:

> A Western Sydney University study has found that transgender women from culturally and linguistically diverse backgrounds are more likely to be the victim of sexual harassment and violence than other women in Australia.[93]

Fiona McCormack, the Victims of Crime Commissioner, also acknowledged that systemic issues or challenges experienced by some cohorts (including LGBTIQ+ communities) can change the nature of the trauma experienced by members of those communities when they are victims of crime. The Commissioner argued this requires judicial officers to be well versed in how these issues interact with victimisation.[94]

The Victorian Law Reform Commission, in its report on *Improving the Justice System Response to Sexual Offences*, identified the LGBTIQ+ communities as a 'hidden group' of victim-survivors of sexual abuse. The Commission explained why these communities are hidden victims despite experiencing higher rates of sexual violence, stating:

> [LGBTIQA+ victims] remain hidden because sexual violence is usually understood as heterosexual violence. Broader social discrimination against LGBTIQA+ communities can also make it harder to seek assistance or report (for example, if services or the justice system are not responsive to people's experiences).[95]

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91 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 236.

92 Ibid.

93 Professor Andrew Roland Professor Felicity Gerry QC, Dr Laura Connelly and Dr Jeanette Roddy, *Submission 86*, p. 8. The study referred to in submission was: *Intersecting racism and transphobia put transgender women at risk*, 2020, <https://www.westernsydney.edu.au/newscentre/news_centre/more_news_stories/the_threat_of_sexual_violence_is_everywhere_study_reveals_intersecting_racism_and_transphobia_exacerbates_risks_for_transgender_women> accessed 16 January 2022.

94 Ms Fiona McCormack, *Transcript of evidence*, p. 5.

95 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, 2021, p. 24.

Like other communities facing systemic challenges, LGBTIQ+ victims of crime underreport crimes committed against them. The Victorian Law Reform Commission believed that LGBTIQ+ victims of crime underreport because 'they do not trust the justice system and do not see it as a source of support'. It noted that this perception is likely driven by the LGBTIQ+ community's broader interactions with the justice system and the fact that it has been criminalised in the past.[96]

This was echoed by the Centre for Innovative Justice and the Royal Commission into Family Violence, both of which noted that mistrust in the criminal justice system was a disincentive to access support or report crimes. The Centre for Innovative Justice summarised the issues identified by the Royal Commission, stating:

> The RCFV identified several issues relevant to the support needs of victims of crime from LGBTI communities generally, including: people may mistrust services such as the police, the courts, and health and community organisations; – services and programs that do not recognise the unique experiences of people in LGBTI communities can lead to services being inaccessible or inappropriate for this cohort.[97]

The Centre provided examples of situations which might prevent an LGBTIQ+ victim of crime from seeking help:

> the fear of discrimination by faith-based providers of family violence services might discourage victims of crime with diverse sexualities or gender identities from seeking help; and – people may not have support from their biological family to assist in recovery because of family estrangement in connection with the victim's gender identity or sexual orientation.[98]

In 2020, St Kilda Legal Service, with funding support from the Victoria Law Foundation, released the *LGBTIQ Legal Needs Analysis* report. The report reflected on the findings from the St Kilda Legal Service's two-year pilot program to provide specialist legal assistance to the LGBTIQ+ communities (the LGBTIQ+ Legal Service). From the LGBTIQ+ Legal Service pilot, St Kilda Legal Service found that:

- victims of crime assistance was in the top 10 issues experienced by clients[99]
- LGBTIQ+ people 'frequently feel anxiety in their interactions with police, due to their lived experience of homophobic and transphobic police responses'. This has reduced the likelihood of LGBTIQ+ people:
  - reporting incidents to police
  - seeking victims of crime assistance[100]

96 Ibid., p. 164.

97 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 236.

98 Ibid.

99 St Kilda Legal Service, *LGBTIQ Legal Needs Analysis: Reflections on legal need and future planning from our two-year pilot program*, report for Victoria Law Foundation, 2020, p. 25.

100 Ibid., p. 35.

- the LGBTIQ+ Legal Service legal needs survey found that, in response to the statement, 'If I had to report a crime where I was the victim, I feel confident the police at my local station would assist me.':
  - 35% either disagreed or strongly disagreed
  - 43% either agreed or strongly agreed.[101]

A November 2021 report by the Victorian Pride Lobby on *LGBTIQA+ attitudes towards and experiences with police* assessed the views of over 1,500 LGBTIQ+ Victorians on their attitudes and experiences with police. Overall, the Victorian Pride Lobby's Police Attitudes Survey found that the LGBTIQ+ community's attitude towards police is:

> one of distrust and even hostility, coupled with an overwhelming sense that police treat certain groups unfairly. For some, these sentiments have been informed by personal experiences or interactions with the police; for most, they have been informed by the experiences of others in the LGBTIQA+ community - whether partners, friends or from media reports.[102]

Table 7.2 from the Victorian Pride Lobby's study summarises some of its key findings.

Table 7.2 **Summary of selected statements from Victorian Pride Lobby's report into *LGBTIQA+ attitudes towards and experiences with police*, 2021**

Statement	Strongly agree (%)	Agree (%)	Neither agree nor disagree (%)	Disagree (%)	Strongly disagree (%)
Police are generally helpful and supportive	3.56	16.82	17.89	33.86	27.87
Police generally can be trusted to use their powers reasonably	2.21	10.76	8.91	26.80	51.32
Police treat certain groups unfairly	75.20	17.75	1.71	2.63	2.71
Police generally make an effort to understand issues of different groups they come into contact with	2.00	7.56	14.96	33.36	42.12
Police abuse their powers in their interactions with the public	41.34	37.13	12.54	6.63	2.35
Police harass or intimidate some groups without cause	59.80	26.80	6.06	5.06	2.28
Police treat LGBTIQA+ people with fairness when they have contact with them	2.00	9.47	22.47	35.50	30.29

101 Ibid.

102 Victorian Pride Lobby, *Upholding our rights: LGBTIQA+ attitudes towards and experiences of policing in Victoria*, 2021, p. 5.

Statement	Strongly agree (%)	Agree (%)	Neither agree nor disagree (%)	Disagree (%)	Strongly disagree (%)
Police are respectful of LGBTIQA+ people	2.42	11.55	22.95	37.49	25.59
I would be comfortable disclosing my sexual orientation, sex characteristics, or gender to a police officer	4.70	12.26	7.41	24.52	51.10

Source: Victorian Pride Lobby, *Upholding our rights: LGBTIQA+ attitudes towards and experiences of policing in Victoria*, 2021, pp. 8–9.

To address systemic barriers to reporting experienced by LGBTIQ+ victims of crime, the Centre for Innovative Justice recommended that, in redesigning the victims services sector, the Victorian Government should establish appropriate and specific referral pathways for LGBTIQ+ victims of crime.[103]

The Victorian Government also acknowledged that distrust of the system as well as lived experiences of discrimination has 'contributed to low levels of engagement with the justice system and access to legal support by LGBTIQ+ people'. As a result, the needs of LGBTIQ+ victims of crime are remaining unmet and furthering experiences of disadvantage and discrimination'.[104]

The Victorian Government outlined some of the measures it is taking to improve the experiences of LGBTIQ+ victims of crime navigating the criminal justice system and to build trust so that they report crimes committed against them. These measures include:

- allocating funding to St Kilda Legal Service to continue the LGBTIQ+ Legal Service, a free legal assistance service which can provide help with:
  - issues relating to discrimination, harassment or violence
  - gender identity issues experienced by transgender and gender diverse people
  - LGBTIQ+ people experiencing family violence[105]
- achieving Rainbow Tick Accreditation for Victim Services, Support and Reform services supporting victims of crime. The Rainbow Tick Accreditation is a national accreditation program recognising organisations 'who have committed to safe and inclusive practice and service delivery for LGBTIQA+ people'. Box 7.4 outlines the Rainbow Tick Accreditation in more detail.[106]

In addition to government measures, Victoria Police has established LGBTIQ+ Liaison Officers which act as intermediaries between police officers and the LGBTIQ+ community. Section 7.5.1 below discusses LGBTIQ+ Liaison Officers in more detail.

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103 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, pp. 105–106.

104 Victorian Government, *Submission 93*, p. 79.

105 Ibid.

106 Ibid., p. 80.

BOX 7.4: Rainbow Tick Accreditation

The Rainbow Tick is a national accreditation program which provides an assessment framework for organisations in the health and human services sector to show that they are safe, inclusive and affirming services for LGBTIQ+ communities.

The Rainbow Tick is owned and developed by Rainbow Health Australia. Accreditation is provided through independent assessment.

The Rainbow Tick has identified six standards which accredited organisations must demonstrate:

- **Organisational capability:** have embedded LGBTIQ+ inclusive practices across the organisation and continuously seek opportunity to improve.
- **Workforce development:** staff understand responsibilities to LGBTIQ+ clients and are trained to deliver LGBTIQ+ inclusive services.
- **Consumer participation:** LGBTIQ+ clients are consulted in planning, developing and reviewing organisation's services.
- **Welcoming and accessible:** LGBTIQ+ clients can confidently access services.
- **Disclosure and documentation:** LGBTIQ+ people—including clients and staff—feel safe providing information, including their sexual orientation, gender identity and/or intersex status, because they are confident that information will be treated respectfully and privacy is ensured.
- **Culturally safe and acceptable services:** services and program identify, assess and manage risks to ensure cultural safety for LGBTIQ+ clients.

Source: Rainbow Health Australia, *Rainbow Tick*, <https://rainbowhealthaustralia.org.au/rainbow-tick> accessed 16 January 2022.

In the 2021 Victim Support Update, the Minister for Victim Support explained why the Victorian Government was seeking Rainbow Tick Accreditation for services provided by Victim Services, Support and Reform:

> Members of the LGBTIQA+ community will not seek the support they need unless we can demonstrate our commitment to delivering a safe, inclusive and affirming victim support system. This is why we are working towards Rainbow Tick accreditation for all victim support programs and services. Achieving accreditation will help to ensure LGBTIQA+ people feel safe and supported to access the victim service system and receive a tailored response that meets their needs. It will also help to ensure our workforce feels safe, valued and supported in all of its diversity as well.[107]

The Victim Support Update indicated that the Victorian Government anticipated initial accreditation will be achieved by May 2022. Victim Services, Support and Reform's

107 Minister for Victim Support, *Victim Support Update*, Department of Justice and Community Safety, December 2021, p. 29.

accreditation, once achieved, will be subject to regular quality assurance reviews to ensure its programs and services remain consistent with Rainbow Tick standards.[108]

FINDING 30: LGBTIQ+ Victorians experience high rates of victimisation, including discrimination, physical violence and sexual violence. However, many LGBTIQ+ victims of crime do not report to police or seek out support from the criminal justice system. Barriers that are deterring LGBTIQ+ victims of crime from engaging the criminal justice system include:

- feelings of mistrust towards law enforcement and the broader criminal justice system, which has been compounded by the historical criminalisation of the LGBTIQ+ community
- lived experience of discrimination or stereotyping from police or other practitioners in the criminal justice system
- lack of LGBTIQ+-inclusive services and programs.

7.5.1 Victoria Police LGBTIQ+ Liaison Officers

Victoria Police has recognised a need to build mutual trust between police and LGBTIQ+ communities, by increasing the confidence of these communities that they can access fair and equitable police services.

At a public hearing, Chief Commissioner Shane Patton from Victoria Police acknowledged the importance of building trust with the LGBTIQ+ community:

> The LGBTI community is an absolutely important community partner for [Victoria Police]. I know there were issues as a result of a couple of incidents that occurred, and certainly we do not take our relationship with them for granted. We know that we have got work to do, and we have been working with them. Just recently I have asked one of my deputy commissioners to hold a meeting, and we will be holding a town hall meeting very soon with them, or representatives of that cohort, down in St Kilda so that we can continue to answer any questions and/or criticisms of us—because in the past there has clearly been some discriminatory practice or bias that has occurred. So you do not build this trust up overnight.
>
> But we are very mindful of the importance of it, and so that is why we do have representatives working with the community—so that we understand what the concerns are.[109]

In 2000, Victoria Police introduced LGBTIQ+ Liaison Officers (often called LLOs or GLLOs) to act as intermediaries between police and the LGBTIQ+ community. At the time of writing, Victoria Police had appointed one full-time and 230 portfolio LGBTIQ+

108 Ibid.

109 Chief Commissioner Shane Patton, *Transcript of evidence*, p. 32.

Liaison Officers to provide a contact point for LGBTIQ+ community members. Liaison Officers provide assistance, advice and recommendations to Victoria Police on the policing and community safety needs of LGBTIQ+ people.[110]

LGBTIQ+ Liaison Officers also support LGBTIQ+ victims of crime by:

- providing discrete and non-judgemental advice
- assistance with reporting crimes, including discussing the incident with a victim of crime and working out the best process for reporting the matter.[111]

The Victorian Pride Lobby's report into the LGBTIQ+ community's attitudes and experiences with police examined LGBTIQ+ Victorians' perceptions of Liaison Officers. The Victorian Pride Lobby found:

- 75.84% of survey respondents were unaware of LGBTIQ+ Liaison Officers
- 17.29% were aware but were unsure what the role of a Liaison Officer entailed
- some respondents recalled experiences where they were denied access to LGBTIQ+ Liaison Officers or experienced poor treatment from Liaison Officers.[112]

7.6 Victim-perpetrators

> **Criminalisation of victim-survivors replicates the trauma and abuse they have already suffered.**
>
> Victorian Aboriginal Legal Service, *Submission 139*, p. 72.

As discussed throughout this report, there are numerous factors which may increase the likelihood of criminal behaviour. One of these factors is being a victim of crime. Several studies have demonstrated there is a clear link between victimisation and offending. Vulnerable cohorts such as women and Aboriginal Victorians are even more likely to encounter the criminal justice system as a person who has committed criminal offences if they have been a victim of crime.

In 2015, Corrections Victoria conducted a *Family Violence Prisoner Survey* which examined prisoners' experiences, understanding and attitudes towards family violence. The survey included questions of people in prison about their experiences of being a victim of family violence. The study found that 65% of females and 52% of males surveyed experienced family violence. Over 50% of women surveyed experienced family violence as both a child and adult, compared to only 26% of men. Men were more likely to experience family violence during childhood (55%) than adulthood (18%).

Figure 7.8 below summarises some of the findings of the survey in relation to prisoners' experiences of family violence victimisation.

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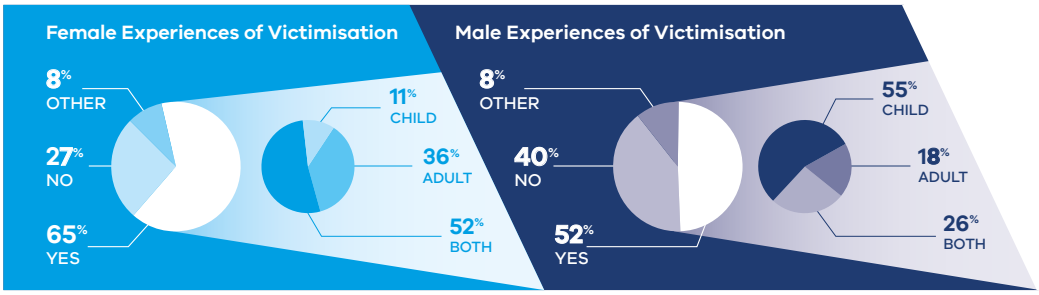
110 Victoria Police, *LGBTIQ+ liaison officers*, 2021, <https://www.police.vic.gov.au/LGBTIQ-liaison-officers> accessed 16 January 2022.

111 Ibid.

112 Victorian Pride Lobby, *Upholding our rights: LGBTIQA+ attitudes towards and experiences of policing in Victoria*, p. 16.

Figure 7.8 Female and male prisoners' experiences of family violence victimisation



Source: Corrections Victoria, *Family Violence Prisoner Survey 2015: Summary Report*, 2016, p. 2.

In 2019, the Crime Statistics Agency released a report on the *Characteristics and offending of women in prison in Victoria, 2012–2018* which showed that 51% of female prisoners had been a victim of at least one recorded criminal offence in the two years preceding their own offending. Table 7.3 below from the Crime Statistics Agency's report shows the proportion of female prisoners recorded as a victim of crime of specific offences.

Table 7.3 Female prisoners recorded as victim of select offence types in two years prior to reception, by legal status and year

Recorded as victim of offence type	2012		2015		2018	
	Number	%	Number	%	Number	%
Unsentenced receptions						
Any crimes against the person	83	34.9	159	34.9	277	38.6
• Assault and related offences	64	26.9	127	27.9	225	31.2
• Sexual offences	19	8	29	6.4	56	7.8
Any property and deception offences	66	27.7	151	33.2	224	31.2
• Property damage	25	10.5	54	11.9	117	16.3
• Burglary/ break and enter	25	10.5	45	9.9	67	9.3
• Theft	38	16.0	81	17.8	104	14.5
Sentenced receptions						
Any crimes against the person	34	37.8	34	41.0	32	30.8
• Assault and related offences	28	31.1	31	37.3	28	26.9
• Sexual offences	4	4.4	<3	2.4	8	7.7
Any property and deception offences	34	37.8	31	37.3	29	27.9
• Property damage	17	18.9	17	20.5	13	12.5
• Burglary/ break and enter	16	17.8	10	12.0	8	7.7
• Theft	14	15.6	12	14.5	16	15.4

Source: Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012–2018*, November 2019, p. 20.

Several stakeholders discussed the relationship between victimisation and offending, with some contending that current figures likely underreport the extent of the issue.[113]

The Prison Network argued that the trauma stemming from being a victim of crime can set a person on a trajectory towards criminal offending. It identified victimisation, as well as other forms of disadvantage, as a frequent precursor to addiction and addiction-related offending. In its submission, it stated that 90% of women in prison have been victims of violence or abuse which can often lead to addiction, noting that 'drug abuse is one of the primary reasons women enter prison'.[114] Fitzroy Legal Service also noted research which suggested up to 90% of women in prison have been victims of sexual abuse or other forms of violence in childhood.[115] The Royal Commission into Family Violence cited studies which found that 70–78% of females who had committed criminal offences had previously been a victim of crime.[116]

At a public hearing, Dr Mindy Sotiri, Executive Director of the Justice Reform Initiative, argued the importance of not seeing victims and those who commit criminal offences as binary parties within the criminal justice system. Instead, it is important to acknowledge that experiencing crime can sometimes be a precursor to criminal behaviour. Dr Sotiri said:

> the way that we think about the rights of both of those groups is often as if they exist in opposition. I guess that a really important frame for thinking about this is that of course victims rights have to be part of this conversation, but that does not mean that we want to mess around with anybody else's rights. Our rights do not exist in opposition.[117]

Young victims of crime may be at more acute risk of committing crimes later in life, particularly if they do not receive the appropriate support at the time of victimisation. Jesuit Social Services outlined the findings of a 2020 Crime Statistics Agency report into *Adolescent Family Violence in Victoria.* The report found that 52.5% of adolescent primary aggressors had been recorded by Victoria Police as a victim or witness of a family violence incident.[118] Of these adolescent primary aggressors:

- 31.8% were recorded as an affected family member of a family violence incident
- 24.8% were recorded as a protected person on a family violence intervention order or safety notice

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113 For example, see: Fitzroy Legal Service, *Submission 152*, p. 13; WEstjustice, *Submission 141*, p. 4.

114 Prison Network, *Submission 142*, p. 2.

115 Fitzroy Legal Service, *Submission 152*, p. 13.

116 Royal Commission into Family Violence, *Volume V: Report and recommendations*, 2016, p. 239; Caraniche, *Submission 456*, submission to Royal Commission into Family Violence, 2016, p. 2; Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders', *Research and Public Policy Series No. 63 (Australian Institute of Criminology)*, 2004, p. 77.

117 Dr Mindy Sotiri, Executive Director, Justice Reform Initiative, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 24.

118 Beverley Phillips and Connor McGuinness, *Police reported adolescent family violence in Victoria*, Crime Statistics Agency, 2020, p. 23.

- 37.9% were recorded as a victim of a criminal offence.[119]

Discussing these findings, Jesuit Social Services contended that:

> This supports existing literature linking exposure to family violence with later offending behaviour, but it also reveals that the justice system has direct contact with roughly half of adolescent primary aggressors before their behaviour escalates to a police reported family violence incident, representing an opportunity for early intervention.[120]

Chapters 3 and 4 considers early intervention and prevention of offending in the context of minimising the impact of family violence. In addition, Chapters 10 and 11 discusses incarcerated populations in relation to the nature of their intersections with the criminal justice system and the fact they are often victims of crime.

In relation to family violence, Springvale Monash Legal Service argued that there is an 'urgent need' to assess whether the criminal justice system has the capability to respond to people who commit criminal offences who have a history of being a victim of crime. It suggested that assessments should consider if any legislative reforms and/or sector training is needed.[121]

In the Committee's view, there is merit in undertaking further assessment on the relationship between being a victim of crime and committing criminal offences. Any support or rehabilitation services offered to people who have committed crimes should factor in any victimisation or trauma that those individuals have experienced. Addressing trauma is an essential component of preventing recidivism. Chapter 12 considers ways to prevent recidivism, including rehabilitation programs, for people in prison.

FINDING 31: Evidence suggests that being a victim of crime can be a risk factor for future criminal behaviour. Many people in contact with the criminal justice system who have committed an offence have previously been a victim of crime.

An issue related to the criminalisation of victims of crime, is perpetrator misidentification in family violence cases. Perpetrator misidentification occurs when a victim of family violence is incorrectly identified as the primary aggressor. Chapter 5 discusses perpetrator misidentification in detail in relation to police responses to family violence.

119 Ibid.

120 Jesuit Social Services, *Submission 119*, p. 22.

121 Springvale Monash Legal Service, *Submission 146*, p. 10.

7.7 Secondary trauma or revictimisation through justice processes

The Committee was repeatedly told by stakeholders that too often, victims of crime find the experience of navigating the criminal justice system traumatising in its own right. The lack of support, prioritisation of the rights of persons who have committed offences, and negative attitudes of some authorities and court officers (including judges and magistrates) towards victims of crime can harm their wellbeing. The secondary traumatisation or revictimisation of victims of crime through criminal justice processes has been discussed throughout this Chapter.

During this Inquiry, the Committee considered that it was crucial to engage directly with victims of crime, as well as advocates. The Committee has focused on reflecting on the experiences of victims of crime navigating the criminal justice system, and taking their views into consideration across a range of issues that both directly and indirectly face them. While not all victims of crime have had negative experiences within the criminal justice system, the Committee was alarmed to hear stories of victims finding the process harmful to their trauma recovery. This Section highlights the voices of victims of crime through the presentation of key statements from those who spoke to the Committee about their experiences.

Thomas

Thomas Wain, a victim of a violent home invasion whose perpetrators were never caught, described his interaction with police on the night of the incident:

> Some of the remarks the police said were just really highly inappropriate. You know, there was sort of a good cop and bad cop, and one of them said at one point to my mum, 'Well, Thomas obviously knows who has come and stabbed his brother, because people don't just go around doing that', and, 'We don't have a crystal ball. We are the police, but he could be walking down the street tomorrow and get stabbed in the back'. And Mum was just beside herself. But then the other cop came in and said, 'Look, New Year's Eve, you know. It is a high crime incidence. Robberies—people go away, people have just got Christmas presents. It's a big time for people to—so they were sort of obviously quite shocked that there was someone there'.

Thomas Wain, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 36.

Hope

Hope, a survivor of childhood sexual abuse, told the Committee:

> There was the re-traumatisation from retelling the sexual abuse situation to police, then the court experience, the cross examination and being refused the one thing that assisted my testifying safely—the witness protection screen, which would have at least afforded me the same conditions as other victims who wish to be protected from the visible trauma of seeing their childhood sexual abuser again.
>
> ...
>
> We do not have a legal or court system that can support those who have suffered trauma—in fact, it is quite the opposite, which is a huge advantage to a defence team. There needs to be support before, during and after court to ensure a safe duty of care. The usual system for trauma-informed care is based on the four Rs: recognising how trauma affects people, recognising the signs of trauma, having a system that can respond to trauma and resisting re-traumatisation.

Hope, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, pp. 1–2.

Tracie

Tracie Oldham, who also experienced childhood sexual abuse, spoke about the importance of officers of the criminal justice system building trust with a victim of crime:

> Trust is our biggest issue. Opening up to a stranger is another issue. So once you have made that first step and you have built up the rapport with one person, you do not want to be chopping and changing and continually having to go over the same story that you just told the last person. This is what always happens. It takes a lot to trust someone, but once you do trust someone, you want that person to stay there. There is nothing more soul-destroying than finally—finally, for once in your life—building up some faith that somebody is actually going to be there for you and then have them pull the rug out from under you at the last minute

Tracie Oldham, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 54.

Peter

Peter Brown, whose wife Roberta (Bobbie) was killed by a truck driver, explained that the 'pain of having [his] wife taken [was] slightly eased after being through the court process and the sentencing'. However, he stated that this was undone during an appeal:

> One month [after sentencing] I had a phone from the [Director of Public Prosecutions] informing me that Bobbie's killer had appealed and was let out that day after serving a pathetic 1 month in jail for being convicted of killing my wife.
>
> I had no avenue of appealing or having a say in why he was let out early … To try to describe how I felt was like reliving the entire court process again. The impact of having the life drained from you again, seeing your eldest daughter stand in front of you explaining how her mother has been there all through her life, helping and guiding her through her tears …
>
> I needed to see a sentence that fits the crime, for my own rehabilitation.

Peter Brown, *Submission 37*, pp. 1–2.

Jeynelle

Jeynelle Dean-Hayes, whose son was killed in a hit and run incident, submitted:

> Our issue is that we Victims don't get the right to appeal. There are all of these red flags in our case but because we got the worst Prosecutor on the planet we get left without our son, without justice, without appeal.
>
> If the driver was found Guilty then he could have appealed until the cows came home but the Victims don't get the same courtesy … We are having a bad life and that is all we got. Victims are the ones who should be getting the courtesy, the appeals, the care, so where did it all go so wrong. It needs to be changed right now. Victims first, always.

Jeynelle Dean-Hayes, *Submission 15*, pp. 1–2.

John

John Herron, whose daughter Courtney was murdered in 2019, believed that:

> To victims/survivors, the justice system appears to be heavily skewed to the offender once a crime has been committed. From my experience, this is universal amongst our cohort and is the most accurate testament of the current state of play.

John Herron, *Submission 42*, p. 3.

Cathy

Cathy Oddie, a victim-survivor of family violence, sexual assault and physical assault, explained the trauma she experienced navigating the criminal justice system and the impacts this has had on her wellbeing:

> The process of trying to navigate the Criminal Justice System has significantly contributed to my trauma burden and has caused me further harm. An example of this is when I attempted to get an intervention order in regard to my first perpetrator of domestic abuse, and what I experienced at Broadmeadows Magistrate Court during that legal process now means I am unable to enter a Magistrates Court building without experiencing a severe episode of PTSD being triggered.

At a public hearing, Cathy elaborated on the trauma she believed many victims of crime experience in the courts:

> Court environments are not therapeutic environments; they are inherently contributing to the harm that someone is actually experiencing. I think any victim of crime that I have spoken to has unanimously shared with me that there has been the crime perpetrated against them but their experience of going through the court system has almost felt like being violated yet again and they have had new trauma as a result of going through the court system. I know that has 100 per cent happened in my case.

Cathy's story is discussed further in the Section below.

Cathy Oddie, *Submission 166*, p. 2; Cathy Oddie, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 40.

Dianne

Dianne McDonald, who was a victim of domestic violence, stalking and coercive control, told the Committee that the person who offended against her used the court system against her by taking out retaliatory intervention orders. This was a traumatising experience for Dianne which was compounded by poor encounters with judicial officers:

> So my dealings with magistrates, for a lot of the time in the early days, were really not very good—not very good. The initial magistrate that I had—he was a lovely, lovely man, and he granted me the 10-year order. So he was great. Eventually I think he moved to Melbourne away from Broadmeadows. But, yes, this magistrate that we had at Broadmeadows repeatedly sided with the perpetrator. Sadly, he never, ever looked at anything that we had to offer in regard to counterclaiming anything. I am not the one with the record. Surely magistrates can see what has been going on. Look at both of our names, and, yes, maybe have a little bit more empathy for the victim. Or even when he can see that someone is being taken to court because they have already got an order on the person that is now trying to get an order on them, look at the history. Yes, empathy would be really, really nice, because I never, ever got that. Never got it.

Dianne McDonald, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 58.

Lee

Lee Little, whose daughter Alicia was killed by an ex-partner in 2017, described her experiences during the investigation and criminal proceedings surrounding her daughter's death:

> When Alicia died, we knew very little about the circumstances until the next day. The lack of information was enormously difficult to deal with under circumstances of enormous shock.
>
> Our family has Chinese heritage and part of our custom is to vigil with a deceased family member. Alicia was left for a long period of time before being picked up by the coroner and we were not able to have family with her until she was at the morgue. There was an absence of cultural understanding and I was told if I went to the property I would be charged. I understand that the investigation needed a clear scene to preserve evidence, but there was little sensitivity to the cultural needs for Alicia and our family.

Lee Little also discussed the distress that the lack of consultation from the Office of Public Prosecutions caused Alicia's family:

> We were never informed by the [Director of Public Prosecutions] what they were thinking in terms of the case. We recognise that the case is not the victim versus the offender, but we felt sidelined from the case. Part of our coping has been wanting to know every little detail, but instead we felt left in the wilderness – we had little knowledge of what would happen next and were never asked for out thoughts or view (though we tried repeatedly to give them) … Whenever we rang the [Director of Public Prosecutions] it was always 'we'll have to get back to you' or 'we have to check the file'. We never got an opportunity to say what we thought about the process. I think if someone takes a life, the family should have the opportunity to have a legal seat at the table.

Lee Little, *Submission 28*, pp. 1–2.

The Committee is grateful for the opportunity to hear from victims of crime and their families, and thanks them for their meaningful contribution to this Inquiry. The Committee acknowledges the emotional toll of presenting evidence as a victim of crime, and thanks them for their bravery. Understanding the lived experiences of victims of crime and their families has been an invaluable part of the Committee's process in recommending reforms to Victoria's criminal justice system.

7.7.1 Embedding trauma-informed practices in the criminal justice system

CASE STUDY 7.2: Cathy's story

Cathy is a victim-survivor of two long-term abusive relationships as well sexual abuse and physical assault. She has been the victim of multiple episodes of violence from previous partners and strangers.

As a consequence of the violence she has experienced, Cathy has significant and long-term physical injuries which she is still treating. Cathy also suffers from complex mental health conditions such as anxiety, post-traumatic stress disorder and depression.

In her submission to the Inquiry, Cathy described the physical and psychological impacts of being a victim of violent crimes as 'debilitating' and that she has 'only been able to overcome [her] suicidal ideation through the care and support of [her] treating psychologist, osteopath, friends and family members'.

In 2006, Cathy undertook legal proceedings to take out an intervention order against an ex-partner who had been abusive and was stalking her. She attended her local police station seeking help in applying for an intervention order but was informed that she would need to go the Magistrates' Court. According to Cathy, the officer she spoke to did not give her any referrals to support services or take any statements on the allegations she made against her perpetrator.

At the Magistrates' Court, Cathy attended without a support person because based on prior hearings she did not believe it was necessary. She was not aware that her ex-partner would be present at the hearing. Cathy represented herself at court meaning she was responsible for cross-examining him during the hearing. Seeing her ex-partner caused Cathy a lot of stress, which was compounded by the lack of support available to her.

In her statement to the Royal Commission into Family Violence, which she provided under the pseudonym Rebecca Smith, Cathy described her experience at the Magistrates' Court:

> In the break I called everyone I knew, but no one could get out of work to come down to help me. After lunch, the hearing was called back on and Dad still wasn't there. I had to stand up and represent myself. I didn't have any support people present. I wasn't prepared at all. Stupidly, I had deleted the text message which contained the threat to kill, just three days earlier. I didn't have any witnesses present. I then had to cross-examine my ex-partner. I don't even know what came out of my mouth. I was like jelly the whole time. It was horrible. At the end, the Magistrate was not convinced I had enough proof and said it was a case of 'He said, she said.' The final intervention order was not granted.

(Continued)

CASE STUDY 7.2: Continued

She went on to explain the immediate aftermath of this experience:

> I walked out. I was in a flood of tears at that point, I felt so numb. The applicant support worker then finally located me. As she was taking me into her office I saw my ex-partner, his lawyer and the ex-housemate coming out of the court high-fiving and laughing, and I could hear my ex-partner making comments about me.

Overall, Cathy described her experience at the Magistrates' Court as 'totally disempowering, traumatising'. As a result of her experience, she is 'unable to enter a Magistrates' Court building without experiencing a severe episode of PTSD'.

Cathy told the Committee that her experience navigating the criminal justice system as a victim-survivor has 'contributed to [her] trauma-burden and caused [her] further harm'. She believed that the realities of navigating the system as a victim-survivor did not meet the expectations she had. Cathy elaborated on this in her submission, stating:

> When someone has experienced the types of violence and abuse which I have, there is an expectation that the various agencies involved with the Criminal Justice System will support you into a situation of safety and that you will be able to receive justice for the harms which have been caused to you. Unfortunately, that has not been my experience or the experience of so many other victims of crime. Throughout the years, I have been consistently and repeatedly failed by the systems and services which are meant to protect individuals who have become victims of crime.

Along with other recommendations to improve the experiences of victims of crime accessing the criminal justice system, Cathy recommended that the Victorian Government introduce Peer Support Workers into Victorian courts to support victims of crime. Peer Support Workers are individuals with lived experience of navigating court processes as a victim of crime who would be able to support individuals currently navigating the process.

Source: Cathy Oddie, *Submission 166*; Rebecca Smith (pseudonym), *Witness statement of Rebecca Smith*, submission to Royal Commission into Family Violence, 2015.

Cathy's story and the above reflections from victims of crime make clear the importance of embedding trauma-informed practices into the criminal justice system. The Victims of Crime Commissioner provided the following definition of a trauma-informed justice system:

> A trauma-informed justice system does not aim to undermine notions of procedural fairness for the accused. Instead, a trauma-informed justice system accommodates, and makes space for, the ways in which trauma may manifest and impact on a person's ability to participate in processes.[122]

122 Victims of Crime Commissioner, *Submission 99*, p. 14.

The Commissioner further explained that a trauma-informed justice system:

- recognises the signs and impacts of trauma
- seeks to reduce retraumatisation
- emphasises the physical, psychological, and emotional safety of victims of crime
- provides different ways for victims of crime to engage in the justice system to minimise harm and promotes their voice in the system
- empowers victims of crimes and gives opportunities for them to rebuild a sense of control
- acknowledges that trauma can impact a victim of crime's engagement with justice processes
- promotes trust and transparency across the system, including in decision-making.[123]

The Victims of Crime Commissioner recommended that judicial officers undertake trauma-informed training to improve the experiences of victims of crime navigating the system. Some victims of crime and other stakeholders also recognised the need for trauma-informed training for practitioners in the criminal justice system, including:

- Merri Health[124]
- Centre for Innovative Justice[125]
- Professor Felicity Gerry QC, Professor Andrew Roland, Dr Laura Connelly and Dr Jeanette Roddy[126]
- Brimbank Melton Community Legal[127]
- Victorian Council of Social Services[128]
- Victorian Aboriginal Legal Service[129]
- Foundation for Alcohol Research and Education.[130]

Tracie Oldham argued that lawyers could be more empathetic towards victims of crime and have a better understanding of trauma:

> [lawyers] are not taught properly. Yes, they know the law, they are like magistrates, but they do not know what is going on psychologically with a person that is suffering … they lack empathy; they are very cold fish. I have sat there with lawyers that have just had dead eyes, just writing, no eye contact, and I might as well have been talking to

123 Ibid., pp. 14–15.

124 Merri Health, *Submission 72*.

125 Centre for Innovative Justice, *Submission 82*.

126 Professor Felicity Gerry QC, *Submission 86*.

127 Brimbank Melton Community Legal Centre, *Submission 131*.

128 Victorian Council of Social Service, *Submission 137*.

129 Victorian Aboriginal Legal Service, *Submission 139*.

130 Foundation for Alcohol Research and Education (FARE), *Submission 155*.

> the wall. It is a specialised thing, these historical charges, and you need lawyers that are specialised in, well, not only historical charges but they need to have some empathy training.[131]

Jane O'Neill from Merri Health Hume Region, a Victims Assistance Program service provider, told the Committee that victims involved in criminal justice proceedings are 'required to speak and relive their trauma from the time they first seek help and justice through making statements to police and again through the court process'. Therefore, courts should seek to 'limit further trauma to victims of crime' and court practices should be considered with this outcome in mind.[132]

Jane O'Neill emphasised the importance of practitioners in the criminal justice system having the appropriate knowledge and training in trauma-informed practices. At a public hearing, she reflected on the experiences of Merri Health support workers who have attended courts with victims of crime:

> Our support workers have on many occasions heard defence barristers and magistrates refer to crimes as not being a serious crime if the victims have no physical injuries. All practitioners working within the justice system need to be trained and knowledgeable about the serious psychologically and physically debilitating impacts that victims of coercive control, psychological, emotional, financial and social violence and intimidation can experience. In some matters clients who have lost loved ones to homicide have had to sit through a judge speaking directly to the offender on sentencing about their opportunities for a good life following release from prison. This minimises the victim's experiences and the impact of crime.[133]

The need for better trauma-informed practices was also recognised in relation to victims services. In its review of Victoria's victims services system, the Centre for Innovative Justice proposed a redesigned service system which embeds trauma-informed practices (Chapter 8 will consider the Centre's proposal in more detail). The review identified some practices which are trauma-informed that victim services should employ:

- asking questions to ascertain what the client needs to know at a point in time or providing examples of information available for a client who can't articulate their needs;
- providing information in a staggered way (i.e. critical information at first contact, with less critical information provided later);
- complementing verbal provision of information by sending written information, electronically or by post, including in Easy English and pictorial formats where relevant; and
- utilising web links when sending information so that clients can seek more information in a self-guided way.[134]

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131 Tracie Oldham, *Transcript of evidence*, p. 54.

132 Jane O'Neill, *Transcript of evidence*, p. 1.

133 Ibid., pp. 1–2.

134 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 94.

The review also noted that trauma-informed practices should occur across the entire victim service delivery spectrum:

> it can involve providing information in a way that is staged so that clients do not become overwhelmed; offering multiple opportunities to engage and help-seek; scaffolding and supporting clients to engage with referrals; and understanding that clients will not always be able to self-advocate, and that skilled assessment and case planning are important tools to assist clients to understand and articulate their experiences, needs and recovery goals.[135]

Increased peer support for victims of crime was identified as an opportunity to improve trauma awareness in the criminal justice system. Cathy Oddie recommended that Victorian courts employ Peer Support Workers to support victims of crime attending court. A Peer Support Worker is someone with lived experience of navigating court processes as a victim of crime. Cathy Oddie contended that:

> People who have lived experience of navigating court processes as victims of crime could play a critical role in bridging the massive gap which currently exists in the court environment which is not being addressed by legal representatives or the Court Network volunteers.[136]

The Committee heard stories from other victims of crime about the support that they or other victims had offered people in similar situations. For many, this form of support was incredibly useful because their peers had a unique understanding of the trauma they were experiencing. In his submission, John Herron stated:

> Being highly active in this space, I find myself (and other victims/survivors) being the front line of support. We have a saying, "in Victoria, the best victim support is other victims." Given the significant deployment of resources/funding, this should not be the case.[137]

At a public hearing, Hope told the Committee about the support she provided another victim of crime who wanted to testify remotely in court:

> I recently met a victim who has only just given her statement to police. She has got quite a few mental health issues and she said, 'I will have to say I've got mental health issues to remote testify. I've got childhood sexual abuse'. And I said, 'You don't need to say that. You can remote testify without saying that. Don't say that. Please don't say that. If you say that, a defence lawyer is going to use that'. And then I got the legislation for her where it says you can have a protection screen. I think that information should be available for all. It took me five years to get that information from an extremely helpful person who has given me a lot of help.[138]

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135 Ibid., p. 200.

136 Cathy Oddie, *Submission 166*, p. 9.

137 John Herron, *Submission 42*, p. 3.

138 Hope, *Transcript of evidence*, p. 7.

The Committee echoes the concerns of many stakeholders that too often victims of crime are being retraumatised during criminal justice processes. It believes that the criminal justice system can be improved by embedding better trauma-informed practices into its operations.

The Committee therefore recommends that the Victorian Government trial a Peer Support Worker program in the Magistrates' Court of Victoria. A person with lived experience can offer unique support to victims of crime as they navigate criminal justice proceedings.

The need for improved judicial education and training in relation to trauma-informed practice is discussed further in Chapters 8 and 15.

RECOMMENDATION 43: That the Victorian Government undertake a trial in the Magistrates' Court of Victoria on the use of Victim Peer Support Workers to assist victims of crime attending court proceedings, whether as a witness or otherwise. Following the conclusion of the trial, the Government should table a report in Parliament on the trial's outcomes, as well as its position on the continuation and/or expansion of the program.

8 Supporting victims of crime

At a glance

This Chapter examines Victoria's victims services sector. The victims services sector encompasses agencies and organisations which facilitate or provide support to victims of crime, both during criminal justice proceedings and afterwards. It sits adjacent to the agencies within the criminal justice system and forms part of Victoria's broader network of agencies which provide psychological, financial, housing and other supports.

A victim of crime can experience long-lasting and complex harm as a result of experiencing crime. It is essential that all victims of crime have access to support services which suit their needs. Victoria currently adopts a 'one-size-fits-all' approach to victims services which cannot meet the diverse ranges of needs of people who have experienced crime.

Key issues

- Victims of crime often have substantial and wide-ranging support needs. This requires them to have access to a range of support serves to give them the best chance of healing and recovering. For many, support is required over a long period of time, not just when they are actively engaged with the criminal justice system.
- Victoria's victims services sector needs to be reformed and shift away from a 'one-size-fits-all' approach.
- A redesigned victims services sector should be designed using trauma-informed and culturally safe practices.

Findings and recommendations

Finding 32: Victim impact statements give victims of crime a direct voice in criminal proceedings and ensure that the trauma and harm they have experienced as a result of a person's offending is heard by the courts.

Recommendation 44: That the Victorian Government expand the Victims' Legal Service to include legal support for victims of crime on procedural matters. Example matters which should be included in the remit of the Victims' Legal Service are advice on:

- the role of victims in criminal proceedings, including giving evidence and any entitlements for alternative arrangements or special protections
- making victim impact statements
- a victim of crime's right to be consulted during criminal proceedings.

Recommendation 45: That the Victorian Government:

- introduce a right to review scheme under the *Victims' Charter Act 2006* (Vic) which allows victims of sexual offences to request an internal review of decisions made by police or a prosecuting agency to not file charges or discontinue prosecution
- direct the Victorian Auditor-General's Office to evaluate existing internal review schemes open to victims of crime to determine if an external right to review scheme should be open to all victims of crime
  - the evaluation should assess the frequency of decisions being altered or revoked based on an internal review, including whether this impacts the number of cases going to or progressing through to a criminal trial.

Recommendation 46: That the Victorian Government provide funding to Victoria Legal Aid to conduct a pilot program which provides independent legal representation for victims of sexual offences up until the point of trial. The pilot should evaluate:

- demand for independent legal representation
- the impact independent legal representation has on a victim of a sexual offence's satisfaction with justice outcomes
- the impact of requisite changes to criminal procedure to accommodate independent legal representation for the victim.

Recommendation 47: That the Victorian Government develop a strategy to support agencies involved in the criminal justice system to implement effective methods for communicating with victims of crime. The strategy should be trauma-informed and provide guidance on how agencies can ensure victims of crime are aware of their entitlements consistent with obligations under the *Victims' Charter Act 2006* (Vic). The Government should conduct a review of the strategy 12–24 months after its implementation to ensure it is achieving its outcomes.

Finding 33: Restorative justice processes give a greater voice to victims of crime in criminal justice proceedings compared to traditional processes, such as court proceedings. This increased participation can lessen the trauma and dissatisfaction many victims of crime experience navigating the mainstream criminal justice system.

Finding 34: Victims services in Victoria are based on a 'one-size-fits-all' approach, which is incapable of meeting the diverse and complex needs of every victim of crime. The current model for supporting victims of crime has several limitations, including:

- inadequate referral pathways for victims of crime into services
  - lack of alternative referral pathways for victims of crime from communities with high rates of underreporting
- overreliance on victims of crime to identify and self-manage their support needs, including self-referring into victims services
- victims of crime receiving disjointed or disconnected support due to an absence of a single source of information approach to case managing through an entire support period
- service periods are generally broken up into before, during and after a victim of crime is involved directly in the criminal justice system, requiring victims to retell their stories when presenting at new services, which may dissuade them from seeking further support
- lack of culturally safe support options available to victims of crime who are Aboriginal Victorians or from culturally and linguistically diverse communities.

Recommendation 48: That the Victorian Government redesign Victoria's existing victim of crime services model in line with the model proposed in the *Strengthening Victoria's Victim Support System: Victim Services Review*, in conjunction with the Committee's additional recommendations around legal support and entitlements for victims of crime (Recommendation 44, Recommendation 45 and Recommendation 46).

Recommendation 49: That the Victorian Government establish a victims of crime strategy for culturally and linguistically diverse people to improve the delivery of culturally safe practices and support. The strategy should be informed by consultation undertaken with community leaders and organisations, as well as victims of crime who are from culturally and linguistically diverse communities.

Recommendation 50: That the Victorian Government make cultural safety a foundational requirement of the criminal justice system, including victims services. In doing so, the Government should:

- improve referral pathways for Aboriginal Victorians and culturally and linguistically diverse people who are victims of crime
- expand and diversify the network of services offering victim support services across Victoria, with an emphasis on recruiting more community-led organisations
- identify opportunities to support criminal justice practitioners and victim support services to undertake cultural safety awareness and training, including education on the impact intersecting disadvantages can have on victims of crime.

Finding 35: Experiencing major or critical incidents can cause significant and long-term trauma for people, whether they are victims, secondary victims (such as families) or witnesses. It is important that all people are immediately linked into support services to help them deal with trauma and prevent long-term psychosocial harm.

Recommendation 51: That the Victorian Government evaluate the surge capacity of Victim Services, Support and Reform services to attend critical incidents to provide on-the-ground support. This evaluation should assess:

- whether victim services deployed during critical incidents are meeting the critical enablers for surge capacity identified in the *Critical Incident Response: Framework for Victim Support*
- what impact deploying services to critical incidents has on the broader capacity of victims services, considering the short-, medium- and long-term demand of services regarding business-as-usual activities and needs arising specifically from critical incidents
- whether services which are deployed to critical incidents are suitably skilled and supported, and align with the aims of the *Critical Incident Response: Framework for Victim Support*
  - including whether there is a strong mix of multi-disciplinary agencies available for deployment, from sectors such as allied health, community services and specialist victim services
- ways victim services could be deployed to critical incidents where it has not resulted from criminal offending, such as natural disasters, accidental road trauma, or other incidents where acute trauma may be present.

This Chapter examines ways to improve the support available to victims of crime in Victoria. Victims of crime often require long-lasting support which promotes their recovery from the trauma and harm they have experienced. Support should not just occur when a victim of crime is involved in criminal justice processes. However, recognising the inherent interest of victims in criminal justice proceedings requires that the criminal justice system promote and support their involvement. Chapter 6 examined some of the key infrastructure in place for victims of crime within the criminal justice system. Chapter 7 outlined the unique and complex experiences faced by victims of crime who find themselves within the criminal justice system.

This Chapter expands on a victim of crime's involvement in the system, considering:

- a victim of crime's role in community safety and rehabilitation
- the use of victim impact statements
- whether victims of crime needed dedicated or enhanced legal services

- strategies for building victims of crime's knowledge and understanding the criminal justice system
- the purpose and impact of restorative justice processes which involve victims of crime.

The Chapter also discusses ways to improve support for victims of crime beyond the criminal justice system. It examines the existing victims services sectors and makes recommendations to improve its operations.

8.1 Involving victims of crime in criminal justice processes

> **the victim is voiceless in the courtroom.**
>
> Kerry Burns, Chief Executive Officer, Centre Against Violence, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*, p. 34.

8.1.1 Community safety and rehabilitation

Every victim of crime has differing needs from the criminal justice system. For many, they engage with the justice system because they want to prevent further offending and ensure accountability. They are focused on the interests of community safety. This suggests that victims of crime do not necessarily have an expectation of a punitive response from the justice system.

The Committee notes that victims of crime and advocate organisations emphasised that it was essential that the justice system's response to offending, particularly during sentencing, held a person to account. They considered that sentencing and other justice responses should acknowledge the harm caused to any victims of crime, balancing this against other outcomes such as reducing recidivism and promoting rehabilitation.

The Victims of Crime Commissioner submitted:

> Not all victims of crime want the same thing. For this reason, it is clear that the conventional criminal justice system, with its single pathway of prosecution through the courts, cannot meet the needs of all victims.[1]

In its submission, the Justice Reform Initiative stated that:

> Most victims do not want their own experience of crime to be experienced by anybody else and are keen for responses to crime that reduce the likelihood of the crime recurring.[2]

1 Victims of Crime Commissioner, *Submission 99*, p. 45.

2 Justice Reform Initiative, *Submission 103*, p. 7.

In relation to victims of crime engaging with the criminal justice system with the goal of protecting community safety, the Justice Reform Initiative also noted that:

- incarceration increases the likelihood of future offending which means it may fail victims of crime and the broader community by not properly promoting community safety
- victims and people who offend do not exist in two opposing categories, with many people currently incarcerated having previously been a victim of crime
- restorative or transformative justice processes can repair harm between a victim and the person who committed criminal offences against them in ways not possible within the adversarial court process.[3]

In its victims services review, the Centre for Innovative Justice discussed the views of some victims it had conducted interviews with, who said that their goal for criminal justice processes was 'harm prevention'. The Centre wrote:

> A common misconception about victims of crime is that their goals in relation to the criminal justice process are punitive. The reality, however, is far more complicated. Several of the victims of crime interviewed demonstrated empathy for the person who had harmed them, particularly where their offending occurred in the context of significant disadvantage, substance misuse or mental health needs. Victims of crime also described not wanting others to have the experience they had, framing their aims in terms of harm prevention, rather than retribution.[4]

This was echoed by the Federation of Community Legal Centres, which submitted:

> Another common misconception is the idea that punitive approaches to offending and harsher sentencing will lead to better outcomes for victims of crime. The needs of victims of crime vary significantly and depend on a range of factors. Victims of crime are also best served by reducing offending and recidivism, which requires less punitive approaches.[5]

At a public hearing for the Inquiry into a legislated spent convictions scheme, the former Victims of Crime Commissioner, Greg Davies, stated that victims of crime 'do not necessarily seek the throw-away-the-key outcome for offenders':

> In my experience victims of crime do not necessarily seek the throw-away-the-key outcome for offenders who have committed criminal offences against them. What the vast majority of victims of crime want is to prevent what happened to them from happening to anyone else. This altruistic response comes as a surprise to some, yet it is one that forms a recurring theme among victims of all manner of crimes. Sadly, it is one that is all too often frustrated by a system that continues to repeat its mistakes over and over while expecting the outcomes to suddenly improve.[6]

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3 Ibid.

4 Centre for Innovative Justice, *Improving support for victims of crime: key practice insights*, 2020, p. 13.

5 Federation of Community Legal Centres, *Submission 132*, p. 6.

6 Greg Davies, Former Victims of Crime Commissioner, Legislative Council Legal and Social Issues Committee, Inquiry into a legislated spent convictions scheme, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 23.

Rehabilitation and preventing further offending are other important goals for some victims of crime. To achieve these outcomes, stakeholders believed it was essential that both the criminal justice system and persons who had offended recognised the harm that had been caused. Dr Mindy Sotiri, Executive Director of the Justice Reform Initiative, told the Committee that:

> The voices of victims of crime have to be part of this conversation. I think there are a couple of things that we need to have as a starting point. First is that we already know that a lot of victims in the current system feel that their experiences are not properly legitimised, are not properly understood, and that with the adversarial system a lot of victims do not feel that the personal experience that they have had is kind of properly captured through those processes. A lot of victims also really note that what they want is for what happened to them to not happen to anybody else. So when we talk about jails failing victims of crime, that is really what we are talking about in terms of the failure of prisons actually to make the community a safer place. We know jailing is failing in terms of its rehabilitative capacities. It has always failed in terms of its capacity for rehabilitation.[7]

Kerry Burns, Chief Executive Officer of the Centre Against Violence, discussed the importance of a person who committed criminal offences recognising the harm they caused and acknowledging the impact on victims of crime:

> Some victim-survivors will say they felt better served by justice that the perpetrator was found guilty, but a heck of a lot of perpetrators are not found guilty, so they do not have that experience. I think sometimes the outcome of the system can feel like it minimises what the victim went through and their family. I think we have got to do better, but it might not be a longer sentence. One of the things that people look for is for the perpetrator to recognise to the victim what they did was wrong.[8]

Strategies for reducing recidivism and promoting the rehabilitation of people who have committed criminal offences is discussed further in Chapter 12.

8.1.2 Victim impact statements

> **The only voice we have in the whole justice system is to write a [Victim Impact Statement] and read it out to the court. This is the only vehicle to speak of our loss, grief and heartache of losing David … What if a victim did not have anyone speak of their loss would that make their death any less significant.**
>
> Caterina Politi, *Submission 143*, p. 1.

If a person is found guilty of an offence, any person considered a victim[9] of that crime can make a victim impact statement to assist a court to determine the appropriate

7 Dr Mindy Sotiri, Executive Director, Justice Reform Initiative, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 24.

8 Kerry Burns, Chief Executive Officer, Centre Against Violence, public hearing, Melbourne, 30 June 2021, *Transcript of evidence*, p. 33.

9 Under s 3(1) of the *Sentencing Act 1991* (Vic), a 'victim' means 'a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender'.

sentence. Victim impact statements are prescribed under div 1C of the *Sentencing Act 1991* (Vic) (Sentencing Act). These statements are made in writing and can also be read aloud in court. Victims of crime are not required to make an impact statement. However, the prosecuting agency should inform them of their right to provide a statement.

The Sentencing Act sets out what can be included in a victim impact statement, such as:

- particulars of the impact of the offence on the victim of crime, including any injury, loss or damage suffered[10]
- photographs, drawings or other materials relating to the impact of the offence on the victim[11]
- attached written statements on medical matters concerning the victim of crime.[12]

For a victim impact statement to be considered by a court in determining an appropriate sentence, it must be admissible. The court can rule a victim impact statement as inadmissible, either wholly or in part.[13] A victim impact statement cannot be made inadmissible because it contains subjective or emotive material.[14] The Sentencing Act only provides general guidance on what can be included in a victim impact statement and what is inadmissible. An example of material which could be deemed inadmissible is any discussion of a person's prior criminal history which is not relevant to the offences before the court.

If a victim impact statement is deemed admissible, it will be dealt with during a plea hearing, which occurs before the sentencing hearing. Figure 8.1 below shows the court proceedings process and where a victim impact statement will be considered.

10 *Sentencing Act 1991* (Vic) s 8L(1).

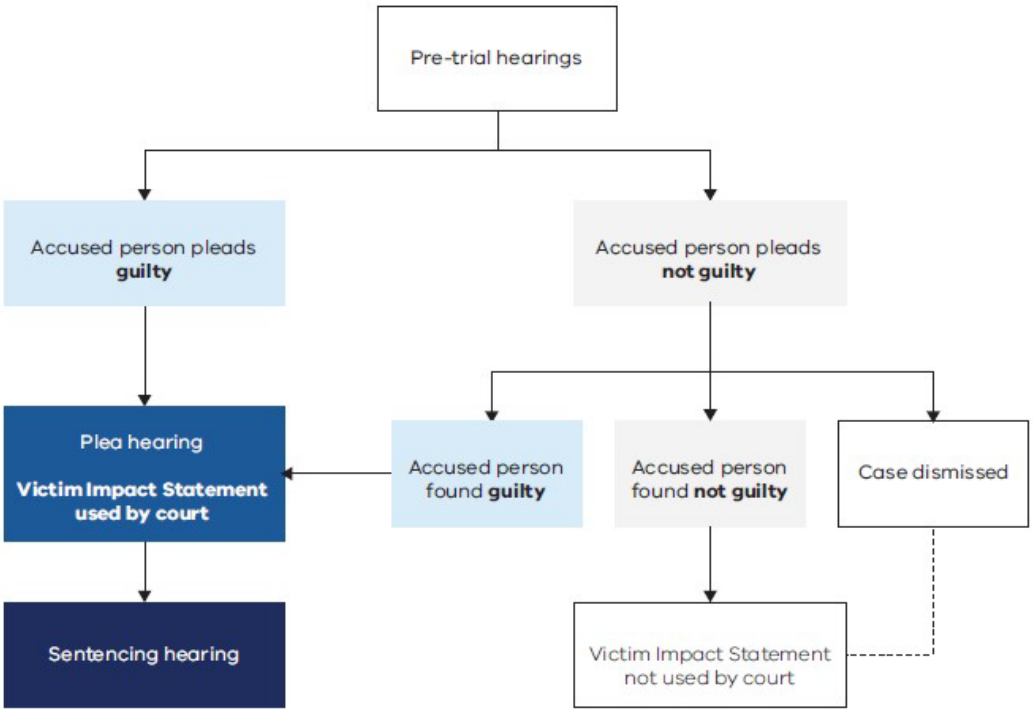
11 Ibid., s 8L(2).

12 Ibid., s 8M(1).

13 Ibid., s 8L(3).

14 Ibid., s 8L(4)(b).

Figure 8.1 Plea hearing and victim impact statement process



Source: Victorian Government, *How Victim Impact Statements are used at court*, <https://www.victimsofcrime.vic.gov.au/going-to-court/how-victim-impact-statements-are-used-at-court> accessed 22 December 2021.

Under the *Victims' Charter Act 2006* (Vic) (see Chapter 6), if a person wishes to make a victim impact statement, a prosecuting agency must refer them to a victims' services agency which can assist in preparing the statement. A prosecuting agency must also provide the person 'general information' about what material could be deemed inadmissible and, if material is deemed inadmissible, what happens next.[15]

Only the admissible parts of a victim impact statement can be read aloud or considered by the courts when sentencing. However, the court may receive the whole impact statement, including inadmissible parts, if the statement will not be read aloud in open court.[16]

Both prosecutors and defence counsel are responsible for determining if any of the material in a victim impact statement is admissible in advance of sentencing. This information is then presented to the judicial officer. For example, if an impact statement contains information outside the scope of charges, that information may be deemed inadmissible.[17] Practices and obligations of Victorian courts require the prosecution and defence counsels to raise any concerns or objections around the admissibility of material in a victim impact statement which they identify.[18] For example, in the Supreme

15 *Victims' Charter Act 2006* (Vic) s 13(12).

16 Judicial College of Victoria, *Victims of Crime in Courtroom: A Guide of Judicial Officers*, p. 14.

17 Ibid., p. 13.

18 *Profession Uniform Conduct (Barristers) Rules 2015* (Vic) s 83; Supreme Court of Victoria, *Practice Note SC CR 4 (Second Revision): Sentencing Hearings*, 2017, p. 2; County Court Victoria, *County Court Criminal Division Practice Note: PNCR 1–2015*, 2017, p. 18.

Court and County Court practice notes, defence counsel 'must inform the Prosecution of any objections to the admissibility of all or any part of it' as soon as reasonably practicable.[19]

Along with their defence counsel, the person who committed the criminal offence(s) is also entitled to receive a copy of any victim impact statement submitted in relation to offences where they were found guilty.[20] Victims of crime who provided evidence to the Inquiry expressed concern that the individual who offended against them was able to remove material from their victim impact statements. At a public hearing, Cathy Oddie argued that the person who committed the offence(s) should not be allowed to edit a victim impact statement:

> the fact that perpetrators are given the right to veto what parts of the victim impact statement are read out. I just think that is absolutely ridiculous. That should not be allowed. It takes a lot to write down the impacts that have occurred to you, and you are doing that for a purpose—for the offender to actually hear and recognise the harms that have been caused to you.[21]

Dianne McDonald, who was a victim of domestic violence as well as stalking, described the experience of having the person who offended against her read and edit her impact statement as 'distressing':

> to learn that he gets a copy of my Victim impact statement was distressing enough but then he was able to censor it. There were paragraphs that were highlighted that I wasn't allowed to say, how can that happen, I'm saying everything that he's done to me for 5 years and he can basically delete what he wants. Where are my rights to be heard in full. He also had a copy of my youngest daughter's victim impact statement. This is my child not his, why can he read how he is affecting her life by stalking her at work also. How she feels about her own safety, how he is impacting her life, she's a child.[22]

As stated already, defence counsel, and by extension the person they represent, can notify the prosecutor or the court of material they believe to be inadmissible. If a prosecutor accepts that the material is inadmissible they are required to advise the court, or the defence counsel can raise the matter themselves by raising an objection. If the court does not accept the defence's objection to the material, it can be used as a ground for appeal against the sentence.[23]

Section 8L of the Sentencing Act prescribes what can be included in a victim impact statement, however it is only broad advice. Further, a prosecuting agency does not have a duty to advise a victim of crime about the admissibility of their impact statement.[24]

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19 Supreme Court of Victoria, *Practice Note SC CR 4 (Second Revision): Sentencing Hearings*, p. 2; County Court Victoria, *County Court Criminal Division Practice Note: PNCR 1–2015*, p. 18.

20 Victorian Government, *Victims of Crime: How Victim Impact Statements are used at court*, 2021, <https://www.victimsofcrime.vic.gov.au/going-to-court/how-victim-impact-statements-are-used-at-court> accessed 23 December 2021.

21 Cathy Oddie, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 41.

22 Dianne McDonald, *Submission 20*, p. 1.

23 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 2016, p. 154.

24 *Victims' Charter Act 2006* (Vic) s 13(12)(b).

A lack of clarity around what can be included in a victim impact statement can make the process more difficult. In particular, a person may wish to include specific details about the nature and history of a person's offending behaviour but there is a risk this may be out of scope and deemed inadmissible. The Victorian Law Reform Commission explained that some people, especially those who experienced domestic and family violence, wish to make clear to the court the extent of the abuse but risk including inadmissible material where it relates to:

- offences before the court
- previous abusive behaviour
- prior criminal history.[25]

Further, the Commission stated that:

> where the prosecution has agreed to a guilty plea to lesser charges, victims are limited to describing the harm caused to them in terms of the lesser charges. However, victims will often include, or want to include, information in their victim impact statement that reflects the more serious offences that were originally charged.[26]

On the inadmissibility of a person's criminal history in victim impact statements, the Commission explained:

> Although the offender's past conduct is relevant—their criminal history is usually taken into account—it is a fundamental principle of sentencing that the court can only take into account harm caused by the offences for which the offender is being sentenced. Allowing victims to make representations about other charges contravenes this principle.[27]

The Committee acknowledges that the purpose of a victim impact statement is to give a person an opportunity to express to the courts the harm and trauma they have experienced, or are continuing to experience, because of a person's offending. The statement is a crucial tool to facilitate participation for victims of crime in the justice process. The Committee does, however, consider that the practice of keeping victim impact statements focused on the harm caused in relation to the offences for which a person is being sentenced should remain in place, in accordance with key principles of sentencing.

In recognition of the importance of victim impact statements in court processes, victims of crime should be supported to prepare the best possible statement they can. The Committee discusses this issue further in Chapter 6 in the context of the Victims Assistance Program, which provides support to people preparing victim impact statements.

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25 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, p. 150.

26 Ibid.

27 Ibid.

Victims of crime who provided evidence to the Inquiry described in their own words the value of victim impact statements in allowing them to have a direct voice in criminal proceedings. As outlined above, they described how the process allows victims to convey the impact the offending had on them and express the suffering and trauma caused.

Caterina Politi, whose son David Cassai was killed after a one-punch attack in 2012, emphasised the importance of victim impact statements and how they were considered in her son's case:

> The only voice we have in the whole justice system is to write a [Victim Impact Statement] and read it out to the court. This is the only vehicle to speak of our loss, grief and heartache of losing David. The impact it has had on our lives, the depression, anxiety, ill health and work. Whilst the judge acknowledged this the ensuing sentence did not result in a harsher sentence. We poured out our heart and tears in this traumatic experience for what? What would the sentence have been if the judge did not hear more than 20 [Victim Impact Statements]? What if a victim did not have anyone speak of their loss would that make their death any less significant.[28]

Jane O'Neill, Team Leader, Victims Assistance Program,[29] Merri Health Hume Region, discussed with the Committee that outside of victim impact statements, criminal proceedings are not really centred on the victim. She believed that this increased the importance of impact statements, noting they are 'required to be a high priority in all criminal court proceedings'. She advocated:

> for due weight to be given to the importance of victim impact statements by all types of criminal justice practitioners, including police, prosecutors, judges and magistrates, to ensure that victims of violent crime are afforded the opportunity to submit their statement to the court.[30]

Jane O'Neill also explained to the Committee the process Merri Health takes to support people preparing their victim impact statements:

> Every client that we work with has the opportunity to prepare their victim impact statement over a long period of time. At times we need to work together almost a little in secret, because if it becomes known that that victim impact statement is completed with the client prior to the plea hearing, that can actually be subpoenaed to be presented in court, and a client can be cross-examined on the basis of the information contained in their victim impact statement. So we like to work with our clients from a very early stage, to say, you know, 'What are the important things? Start to jot down what you want to say in your statement'. Also we inform them about what the statements are, and what is admissible and what is not admissible. We start that early on.[31]

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28 Caterina Politi, *Submission 143*, p. 1.

29 Merri Health's Victims Assistance Program includes support for people to write a victim impact statement.

30 Jane O'Neill, Team Leader, Victims Assistance Program, Merri Health Hume Region, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*, p. 2.

31 Ibid., p. 3.

In its submission, Merri Health discussed how some of their clients have lost opportunities for a court to hear their victim impact statement because of the speed of proceedings, or due to a statement not being submitted by prosecution counsel. It noted that this occurs mostly in the Magistrates' Court, where sentencing may take place on the same day as the contest hearing.[32] This leaves victims of crime no opportunity to submit a victim impact statement and have their experiences considered by the court in sentencing.[33]

Cathy Oddie, a victim-survivor of domestic violence, told the Committee that:

> despite having lodged and successfully received three [Victim of Crime Assistance Tribunal] compensation claims, for the first three I never was invited to write a victim impact statement.
>
> It is only in this most recent one that I lodged this year that I was given the opportunity to write one up … You do not know how much that means until you realise that you have not had that opportunity, so let us give victims that opportunity.[34]

It is of great concern to the Committee that victims of crime may not be afforded an opportunity to make a victim impact statement when it is their right to do so. Current legislation governing victim impact statements, such as the Sentencing Act and Victims' Charter, place the onus on the victim of crime to tell the prosecution they wish to make a statement. However, this can only occur once a person is found guilty of an offence. Section 13(2) of the Victims' Charter prescribes that a prosecuting agency is responsible for advising a person once they have indicated that they would like to make a victim impact statement.[35] Therefore, it is the responsibility of a person to know if they would like to make a victim impact statement and to be aware of their entitlement to do so. Further, s 8N(1) of the Sentencing Act requires that a victim of crime must provide a statement to the prosecutor in a 'reasonable time before sentencing'.[36] If the onus is on the victim of crime to express their wish to make a statement, then the speed of proceedings could be a potential prohibitive factor preventing reasonable time for a victim of crime to prepare and submit their statement to prosecution counsel.

Given the lack of other options for victims of crime to directly engage in court proceedings, especially where they are not a witness in the trial, this is an issue that should be addressed. The Committee believes that there should be an increased onus on prosecuting agencies to inform a person about their right to make a victim impact statement. Where the speed of proceedings may be a barrier to a person having reasonable time to submit a statement, the prosecutor should advocate to the court to allow appropriate time for an impact statement to be submitted. Accordingly, there

32 A contest hearing occurs where a person charged with a summary offence has pleaded not guilty. Contest hearings occur in the Magistrates' Court where a Magistrate will hear evidence from prosecution and defence before deciding whether the accused has been proven guilty.

33 Merri Health, *Submission 72*, p. 4.

34 Cathy Oddie, *Transcript of evidence*, p. 41.

35 *Victims' Charter Act 2006* (Vic) s 13(12).

36 *Sentencing Act 1991* (Vic) s 8N(1).

should be a balance between promoting a victim of crime's participation in criminal proceedings and not causing undue delays.

The Committee is pleased that the Victorian Government has acknowledged this issue and introduced legislation which requires a prosecuting agency to inform a victim of crime of their entitlement to make a victim impact statement. In February 2022, the Legislative Council passed amendments to the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021. The Bill amends s 363 of the *Criminal Procedure Act 2009* (Vic) requiring a prosecuting agency to inform a victim of crime 'as soon as reasonably practicable' to their entitlement to make a victim impact statement. It also amends the Criminal Procedure Act to require a prosecuting agency to inform a victim of crime about their entitlements to seek restitution or compensation orders under the Sentencing Act.

FINDING 32: Victim impact statements give victims of crime a direct voice in criminal proceedings and ensure that the trauma and harm they have experienced as a result of a person's offending is heard by the courts.

8.1.3 Dedicated legal services for victims of crime

As discussed in Chapter 6, the Victorian Government committed to establishing the Victims Legal Service by 2022–23. The Victims Legal Service is a dedicated legal service for victims of crime applying to the new financial assistance scheme. The service will be delivered by Victoria Legal Aid and community legal centres, who will provide 'timely, trauma-informed legal advice and support delivered by specialist staff'. The scope of the Victims Legal Service is supporting victims of crime navigate financial assistance and other compensation applications.[37]

Some stakeholders—including victims of crime and advocate organisations—argued that the Victims Legal Service does not go far enough to support victims of crime navigating the criminal justice system. These stakeholders advocated for specialist legal representation or support for victims of crime involved in criminal justice proceedings.

The Committee heard stories from victims of crime which showed a lack of support in criminal proceedings. For many, it made the process overwhelming and added to their trauma. Some suggested that dedicated legal support or representation would help victims of crime understand and participate in criminal proceedings and reduce the harm resulting from the experience. A common concern raised by victims of crime was the feeling of isolation they felt in these processes and that their voice or participation was secondary.[38]

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37 Victorian Government, *Victim Support Update: Reforms we will deliver to support victims of crime - Delivering a new Victims Legal Service*, 2021, <https://www.vic.gov.au/victim-support-update/reforms-we-will-deliver-support-victims-crime#delivering-a-new-victims-legal-service> accessed 17 January 2022.

38 For example, see: Dianne McDonald, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*; Lee Little, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*.

Dianne McDonald described her experience at court where she was unable to access any support to assist her to navigate the process of seeking an intervention order:

> I think as a victim there should be someone that is helping you through this. The clerk at the counter when I checked in said, 'Go upstairs and you will have a duty lawyer assigned to you'. Great! I had my aunt with me and went upstairs. We waited and waited and waited for the duty lawyer. She came out and she said, 'Really sorry, we can't help you. We're actually helping [the respondent] … So then they advised me to go downstairs to legal aid, and, you know, that is a minefield in itself. Then, when I eventually did go downstairs, they said that they too would not … be helping an applicant. So yes, they gave me no advice—no nothing.
>
> So as nervous and stressed and anxious and everything as I was—my first time ever in a courtroom—I had to do all this on my own … and that is pretty well how it played out for several years.[39]

Lee Little, whose daughter Alicia was killed in 2017, told the Committee she felt 'violated' during committal proceedings by the defence lawyer. She stated that she 'walked out of [the court], and they made Alicia's life feel like her life was worth nothing'.[40]

Experiences like Dianne and Lee's suggest that the interests of victims of crime could be better represented in criminal proceedings to prevent compounded trauma. One suggestion from stakeholders was creating a specialist victims' legal service (broader than the scope of the Victorian Government's intentions for the Victims Legal Service) which could provide legal advice and representation throughout criminal justice proceedings. Stakeholders suggested that dedicated legal support for victims of crime would ensure that their interests are directly advocated for in the court room, a role prosecuting agencies cannot fulfil.[41]

Ingrid Irwin, who provided a submission to the Inquiry, wrote:

> It is not defence lawyers who create the legal havoc for victim survivors, it's the fact that there is no lawyer for the victim that makes them legal fodder … Police are nothing more than an independent investigator. Police and OPP lawyers are not your legal reps, nor can they be.[42]

The Victims of Crime Commissioner advocated for an expanded specialist victims' legal service for all victims of crime. The Commissioner explained that a specialist legal service for victims of crime may not 'require any modification of current criminal trial processes'. Under the Commissioner's proposal:

> Victims [would be] better informed (by lawyers) of their rights and entitlements and be more aware when their entitlements have not been upheld. It would mitigate many issues that victims of crime generally experience with respect to specific legal issues

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39 Dianne McDonald, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 57.

40 Lee Little, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*.

41 For example, see: Victims of Crime Commissioner, *Submission 99*.

42 Ingrid Irwin, *Submission 68*, p. 3.

(for example, understand their entitlements in relation to information and participation, such as during plea negotiations). All victims of crime would benefit from such a victims' legal service, including victims of sexual assault.[43]

However, the Commissioner believed that for some offences, a specialist legal service would not be able to address all the needs of victims. On this basis, it suggested that Victoria introduce independent legal representation for victims of sexual assault.[44] This proposal is discussed in the Section below.

Victoria Legal Aid also supported the expansion of the Victims Legal Service, believing that it should provide legal assistance to victims of crime on a 'broader range of legal issues'.[45]

Dedicated legal services differ from independent legal representation. Specialist legal services for victims of crime are focused on providing advice and assistance to victims so that they understand:

- criminal processes, including giving evidence or making a victim impact statement
- their rights to be consulted throughout criminal proceedings, for example about decisions to discontinue prosecution or accepting a guilty plea to lesser charges
- options for financial orders, such as restitution, compensation or financial assistance claims.

A dedicated victims' legal service would provide legal support separate to that provided by prosecuting agencies or non-legal avenues. It focuses on the role and entitlements of victims of crime in criminal proceedings specifically, rather than as a part of the broader trial process.

Independent legal representation involves a lawyer separate to the prosecutor directly representing a victim of crime in court proceedings. This would require changes to existing criminal trial processes, as noted by the Victims of Crime Commissioner.[46]

The Victorian Law Reform Commission considered the need for independent legal assistance and/or representation for victims of crime in its report on the *Role of Victims of Crime in the Criminal Trial Process*. It concluded that 'it is not appropriate or necessary to fund another service to provide legal information, advice or assistance to victims about procedural matters' in criminal proceedings. The following reasons were listed by the Commission as to why dedicated legal services for victims of crime are unnecessary:

- Much of the perceived need relates to victims feeling included, informed and supported. The police, DPP, OPP and victims' services agencies already have obligations to address these issues. These obligations should be complied with rather than placing the burden on victims to obtain legal assistance.

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43 Victims of Crime Commissioner, *Submission 99*, p. 41.

44 Ibid.

45 Victoria Legal Aid, *Submission 159*, p. 14.

46 Victims of Crime Commissioner, *Submission 99*, p. 42.

- If obligations were consistently met, and victims linked with the support they need, they would rarely need access to an additional lawyer.
- Establishing another service could remove the incentive for prosecution lawyers to communicate regularly and effectively with victims.
- A range of agencies already provide general and tailored procedural information effectively. These services include the OPP Witness Assistance Service, Child Witness Service, Victims Assistance Program providers, Centres Against Sexual Assault and Victoria Police. It may be more effective to direct additional funding to these services.
- Many victims do not want another agency or lawyer to deal with. They want to be informed and supported, and they want the prosecution to communicate properly with them.
- It would be difficult to resource a service so that all victims who expect to access legal advice and assistance can do so. Resourcing equitable access is difficult to justify when victims are not a party to proceedings.
- A new legal service might inflate expectations about what independent lawyers can achieve for victims in circumstances where they have no substantive right.[47]

While the Committee acknowledges the merit in the Commission's conclusions, evidence provided by victims of crime and advocate organisations have shown that agencies responsible for supporting victims in criminal proceedings are not meeting expectations. Many victims of crime feel unsupported and isolated during criminal proceedings, and that their interests are not important to the justice system.

The Committee notes that the Victorian Law Reform Commission's report was published in 2016. Therefore, it is out-dated in some respects regarding the involvement of victims of crime in the criminal justice system. Following the report, the treatment and role of victims in the criminal justice system changed substantially. Furthermore, Victoria Legal Aid which is responsible for administering the new legal service advocated for the expansion of the service to include legal assistance on a broader range of legal issues faced by victims of crime.

The Committee supports the Victorian Government's commitment to establishing a Victims' Legal Service to support victims of crime to make applications under the new financial assistance scheme. However, it believes there is scope to expand the work of the new legal service to provide greater legal support to victims of crime. The Committee has not recommended changing criminal proceeding processes to include third-party legal representation for all victims of crime. However, it does advocate for the expansion of the Victims' Legal Service to include legal support to victims of crime on procedural matters such as:

- the role of victims in criminal proceedings, including giving evidence and any entitlements for alternative arrangements or special protections

47 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, p. 121.

- making victim impact statements
- a victim of crime's rights to be consulted during criminal proceedings.

In the Committee's view, expanding the Victims' Legal Service to support on procedural matters such as those listed above would not require substantial changes to processes within the court room. Rather, it would ensure that victims of crime have access to more legal support as they navigate through the criminal justice system. This means they do not need to solely rely on investigatory or prosecuting agencies but can get support tailored to their circumstances.

RECOMMENDATION 44: That the Victorian Government expand the Victims' Legal Service to include legal support for victims of crime on procedural matters. Example matters which should be included in the remit of the Victims' Legal Service are advice on:

- the role of victims in criminal proceedings, including giving evidence and any entitlements for alternative arrangements or special protections
- making victim impact statements
- a victim of crime's right to be consulted during criminal proceedings.

Enhanced legal entitlements for victims of specific offences

Some stakeholders believed that dedicated legal services in the form of legal support or advice would not meet all the needs of all victims of crime. The Committee received evidence which advocated for enhanced legal entitlements for victims of specific offences, particularly independent legal representation in criminal proceedings. Many of these stakeholders listed victims of sexual and/or family violence offences as ones who may require additional legal entitlements.

The Victims of Crime Commissioner argued that:

> a legal service alone will not resolve all issues for victims of crime, particularly for victims of sexual assault in the criminal trial process where aspects of the criminal trial process necessitate an independent legal representative which is not accommodated by current criminal trial procedure.[48]

The Commissioner acknowledged that changes to the existing systems would be required to incorporate independent legal representation for victims of sexual assault:

> Introducing independent legal representation for victims of sexual assault would involve modifications to some criminal trial processes to accommodate an independent legal representative for victims. For example, it would require criminal procedure changes to accommodate a third legal representative (in addition to the prosecution and defence)

48 Victims of Crime Commissioner, *Submission 99*, p. 41.

> to be present (and able to intervene) during aspects of some criminal trial processes. Models and approaches for this differ across jurisdictions.[49]

Tracie Oldham, a survivor of childhood sexual abuse, argued that victims of childhood sexual abuse often require their own lawyer but many cannot afford the expense:

> We cannot afford solicitors. We cannot afford advocates. The advocates, even though they are free, they are in such high demand and there are so few of them, and you really do need a solicitor. You need someone that knows law, not someone that has done a short course; you need a fully-fledged bona fide lawyer that specialises in historical law.[50]

While it did not advocate for dedicated legal services for all victims of crime, the Victorian Law Reform Commission has recommended that Victoria establish a legal service for victims of violent indictable offences. The Commission argued this service should be provided by Victoria Legal Aid with funding from the Victorian Government.[51] In its 2016 report, it contended that Legal Aid New South Wales' Sexual Assault Communications Privilege Service could be used as a model for a Victorian service (Box 8.1 outlines the Legal Aid New South Wales service).[52] The Commission expanded on its recommendation, stating that Victoria Legal Aid should:

> provide legal advice and assistance, in accordance with the *Legal Aid Act 1978* (Vic), in relation to:
>
> (a) substantive legal entitlements connected with the criminal trial process
>
> (b) asserting a human right, or protecting vulnerable individuals, in exceptional circumstances.
>
> The legal service should be independently evaluated not more than three years after commencement.[53]

The Victorian Law Reform Commission, in relation to recommending that New South Wales' Sexual Assault Communications Privilege Service be a model for a Victorian service, stated:

> Legal Aid NSW has established a service for victims of crime within its civil division, which provides legal assistance about the sexual assault communications privilege in New South Wales. It is known as the Sexual Assault Communications Privilege Service. The Commission heard that this service is essential to victims accessing legal representation to assert their legal entitlement during criminal proceedings. The Office of the Director of Public Prosecutions NSW described the ability to refer victims to a specialised legal service as positive.

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49 Ibid.

50 Tracie Oldham, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 53.

51 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, p. xxiv.

52 Ibid.

53 Ibid.

The Legal Aid NSW model was viewed positively by the Victims of Crime Commissioner, former victim representatives of the inaugural Victims of Crime Consultative Committee, Court Network and OPP lawyers. The model could be adapted to the Victorian context, and used to provide assistance in relation to a broader range of substantive entitlements connected to the criminal trial process.[54]

BOX 8.1: Sexual Assault Communications Privilege Service, Legal Aid New South Wales

The Sexual Assault Communications Privilege Service is a victims' legal service provided by Legal Aid New South Wales. The aim of the service is to protect counselling notes and other confidential therapeutic records in criminal proceedings involving sexual offences. Legal Aid New South Wales supports victims of sexual offences to claim privilege where confidential records are subpoenaed by legal counsel in criminal proceedings.

Lawyers involved in the service are specially trained in privilege matters and their role is to speak on behalf of the victim of crime against the use of confidential records. The Sexual Assault Communications Privilege Service assists both victims of crime wishing to prevent or restrict disclosure of sensitive sexual assault communications in court, and those that wish to consent to release sensitive communications in an informed way.

Source: Legal Aid New South Wales, *Sexual Assault Communications Privilege Service*, <https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service> accessed 17 January 2022.

New South Wales' Sexual Assault Communication Privilege Service is one of the only examples in Australia where victims of crime have access to independent legal representation. Whilst this only occurs in a limited circumstance, it did provide the Committee a case study to consider. The Committee also notes that the New South Wales model is supported by several stakeholders, including the Victims of Crime Commissioner.

The Victorian Law Reform Commission expanded on its recommendation for independent legal service for victims of violent offences in its 2021 report into *Improving the Justice System Response to Sex Offences*. The Commission recommended that the Victorian Government establish a pilot scheme trialling separate lawyers to support victims in sexual offence cases. However, the Commission limited separate legal representation for victims of sexual offences up until the point of trial.

54 Ibid., pp. 124–125.

Specifically, the Victorian Law Reform Commission recommended that:

> The Victorian Government should fund legal advice and, where necessary, representation until the point of trial and in related hearings, to ensure victim survivors can exercise their rights and protect their interests, including:
>
> a. their rights and privileges in relation to evidence (for example, the confidential communication privilege, alternative arrangements and special protections, access to intermediaries)
>
> b. their rights to privacy in relation to disclosures of personal information (for example, information about their sexual history, the nature of cross-examination, or suppression orders)
>
> c. their options for compensation, including under the *Sentencing Act 1991* (Vic), victims of crime compensation, and civil or other compensation schemes
>
> d. the implications of taking part in restorative justice and referrals to restorative justice when applying for compensation or restitution orders.[55]

The Victorian Law Reform Commission also discussed models for enhanced rights for victims of certain offences. One model it considered was the *Code of Practice for Victims of Crime in England and Wales* (Victim's Code), which prescribes enhanced rights for some victims, including victims of sexual offences. An example of an enhanced right under the Victim's Code is the right to review some prosecutorial decisions. Box 8.2 outlines key features of the Victim's Code in relation to enhanced rights.

BOX 8.2: *Code of Practice for Victims of Crime in England and Wales* (Victim's Code)

The Victim's Code established minimum standards that must be provided by service providers to victims of crime in England and Wales.

It sets out the rights of victims of crime in the criminal justice system, which are:

1. To be able to understand and to be understood
2. To have the details of the crime recorded without unjustified delay
3. To be provided with information when reporting the crime
4. To be referred to services that support victims and have services and support tailored to your needs
5. To be provided with information about compensation
6. To be provided with information about the investigation and prosecution

(Continued)

55 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, 2021, p. 268.

BOX 8.2: Continued

7. To make a Victim Personal Statement
8. To be given information about the trial, trial process and your role as a witness
9. To be given information about the outcome of the case and any appeals
10. To be paid expenses and have property returned
11. To be given information about the offender following a conviction
12. To make a complaint about your rights not being met

The Victim's Code also included enhanced rights for victims of certain offences, such as victims of sexual offences. Enhanced rights acknowledge that some victims of crime may require specialised assistance because they are:

- considered vulnerable or intimidated
- victims of the most serious crimes
- persistently targeted.

Examples of enhanced rights for some victims of crime include:

- having a police interview recorded and have that recording presented in court as evidence
- have cross-examination pre-recorded separate to the trial
- giving evidence remotely to minimise the risk of seeing the offender
- right to be provided information from criminal justice agencies–such as the decision not to investigate or prosecute an offender—in a timelier manner (the Victim's Code prescribed 5 working days for all victims, but reduces it to 1 working day victims of crime with enhanced rights.

Source: Ministry of Justice (UK), *Code of Practice for Victims of Crime in England and Wales (Victim's Code)*, 2021, <https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime/code-of-practice-for-victims-of-crime-in-england-and-wales-victims-code> accessed 17 January 2022.

As discussed, in Victoria, the rights of victims of crime are prescribed under the Victims' Charter. The Charter sets out the principles governing the criminal justice system's response to victims of crime (Chapter 6 discusses the Victims' Charter in more detail). The Victorian Law Reform Commission recommended strengthening the Victims' Charter to include rights for victims of sexual offences which:

- strengthened existing rights to be referred to support, by requiring an agency to refer a victim of a sexual offence to appropriate support services within a set timeframe
- created a new requirement for the gender of a police interviewer and forensic medical examiner to be specified as soon as practicable

- allowed for flexible arrangements for interviewing victims of sexual offences, where it is reasonably practicable to do so
- following an internal review, allowed victims of sexual offences to request an independent review of decisions by police or prosecuting agencies to discontinue or not file charges.[56]

The Victims of Crime Commissioner also recommended Victoria establish a victim right to review scheme which allowed victims of crime to review decisions made by the police and prosecution during the investigatory and prosecutorial stages.[57] The Commissioner noted that in other jurisdictions, victim right to review schemes have shown to:

- provide an additional check and balance for criminal justice agencies
- empower victims of crime to challenge decisions they are unhappy with
- increase the satisfaction of victims of crime with the criminal justice process, with evidence suggesting additional review mechanisms are considered an additional avenue for justice for victims.[58]

In the Committee's view, the legal entitlements for victims of crime should be expanded so that the criminal justice system is more accountable in meeting the needs of victims. This should begin with enhancing the legal entitlements for victims of sexual offences whose experiences and needs are often acute. The Committee has recommended that the Victorian Government introduce a right to review scheme for victims of sexual offences under the Victims' Charter Act. It has also recommended that internal review mechanisms open to victims of crime be reviewed by the Victorian Auditor-General's Office to see if the independent right to review scheme should be expanded to all victims of crime.

Regarding independent legal representation, the Committee believes introducing this to all victims of crime would be a huge resource challenge for the State, even if it is only available to victims of sexual offences. Therefore, the Committee recommends that the Victorian Government run a pilot program, in collaboration with Victoria Legal Aid, to provide independent legal representation for victims of sexual offences up until the point of trial. This pilot program would allow a better understanding of the resourcing needs that a wider program would require. The pilot should also evaluate the demand for independent legal representation and the impact independent representation has on a participating victim of crime's satisfaction with the outcome of justice processes and requisite criminal procedure changes.

56 Ibid., p. 83.

57 Victims of Crime Commissioner, *Submission 99*, p. 39.

58 Ibid., p. 38.

RECOMMENDATION 45: That the Victorian Government:

- introduce a right to review scheme under the *Victims' Charter Act 2006* (Vic) which allows victims of sexual offences to request an internal review of decisions made by police or a prosecuting agency to not file charges or discontinue prosecution
- direct the Victorian Auditor-General's Office to evaluate existing internal review schemes open to victims of crime to determine if an external right to review scheme should be open to all victims of crime
  - the evaluation should assess the frequency of decisions being altered or revoked based on an internal review, including whether this impacts the number of cases going to or progressing through to a criminal trial.

RECOMMENDATION 46: That the Victorian Government provide funding to Victoria Legal Aid to conduct a pilot program which provides independent legal representation for victims of sexual offences up until the point of trial. The pilot should evaluate:

- demand for independent legal representation
- the impact independent legal representation has on a victim of a sexual offence's satisfaction with justice outcomes
- the impact of requisite changes to criminal procedure to accommodate independent legal representation for the victim.

8.2 Building victims of crime's knowledge and understanding of the criminal justice system

> **because I was Alicia's mother … I believed that our family had to impact on everything that was going on … But the [Office of Public Prosecution]—they were not forthcoming with a lot of information. We never got the information we thought we would get. You are going in to a trial—a murder trial—blindfolded, and this is the best way I can put this. You do not know the process. You do not know the justice system. You get told very little.**
>
> Lee Little, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*, p. 25.

As noted throughout this Chapter, a key issue faced by many victims of crime is a lack of understanding about the criminal justice system. This lack of understanding can lead to unrealistic expectations for victims of crime on their role in criminal processes or what outcomes they can expect. This is despite Victoria prescribing obligations on investigatory and prosecuting agencies to inform victims of crime about key matters in criminal proceedings. Moreover, the trauma experienced by victims of crime mean it is important that agencies are providing information clearly to ensure that a person understands their entitlements and the justice process.

These issues were discussed by the Victims of Crime Commissioner, who argued that dedicated legal advice would better ensure victims of crime were aware of their entitlements in criminal proceedings. The Commissioner submitted that dedicated legal advice would improve victim's awareness of their rights regarding:

- making a Victim Impact Statement and /or reading it aloud in court
- in sexual offence cases, seeking leave to appear and make submissions in response to applications to access confidential medical or counselling records
- providing views before the DPP makes certain prosecutorial decisions, like modifying charges, discontinuing the prosecution or accepting a plea of guilty to a lesser charge.

> The trauma caused by victimisation, compounded by complex legal processes, means many victims may not be aware of their entitlements or are unable to meaningfully advocate for them to be upheld during the criminal trial process. In practice, this means that although victims may have rights 'on paper', they may not be meaningfully realised for many victims.[59]

The Committee heard from victims of crime who discussed the confusion they felt navigating criminal justice proceedings. Some of them also told the Committee that information provided by agencies was not clear and that better understanding of trauma would improve the justice system's communication practices.

Hope, a survivor of childhood sexual abuse, said victims of crime need to receive information in different ways to ensure it is sinking in. Hope told the Committee:

> tell people information in a couple of ways—sometimes we just get told very quickly, whether it is by police or solicitors, a piece of information and it looks like people are taking it in but they are not—perhaps if there is a way that we could email it, verbalise it and just make sure that people are taking these things in, because we are not. I struggle myself to take things in. I know certainly the SOCIT detective I had could tell that I was not taking things in. I do not know how many times she told me my accused was going to appeal. And I just thought, 'No, she's not going to appeal'. I just thought, 'It's going to be fine. She won't appeal. She'll get a guilty verdict because she did it. It'll be fine'.[60]

I needed things to be explained many times because I did not understand court.

Hope, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 6.

> Fiona McCormack, the Victims of Crime Commissioner, described the impact unrealistic expectations can have on a victim of crime's experience in the criminal justice system:
>
> These are huge events in a person's life, and I think they come to court believing—and I believe that this is absolutely justified—that what happened to them and their experience is going to be central to the court process. And I think it comes as a shock

59 Ibid., p. 37.

60 Hope, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 6.

> to many when they learn that prosecutions does not represent them, that it represents the state, and that they are fairly irrelevant to the process unless they are witnesses.[61]

The Victorian Law Reform Commission in its 2016 report contended that different perceptions of the criminal justice system can significantly impact the experiences of victims of crime. It wrote:

> Victims' expectations and perceptions of the criminal trial process differ and their needs are complex and variable. Many express satisfaction with their interaction with investigatory, prosecuting and victims' services agencies, and it appears that victims' confidence in the justice system has increased. Levels of satisfaction are highest when agencies have actively provided information and support.[62]

Navigating the criminal justice system can be a daunting and overwhelming experience for many victims of crime. Many victims of crime do not have prior knowledge of the criminal justice system and can sometimes have expectations of the process which are not met. To ensure that victims of crime understand the process and have clear expectations about what it can achieve, it is essential that agencies communicate with victims clearly. The Committee has found that this has not been the case. Poor communication has left too many victims of crime feeling retraumatised or dissatisfied with justice outcomes, in part because agencies did not properly explain how investigatory or prosecutory proceedings work. The Committee has recommended that the Victorian Government develop strategies to support investigatory and prosecutory agencies in the criminal justice system to implement trauma-informed methods for communication with victims of crime.

Strategies for trauma-informed communication should include, but are not limited to:

- communicating respectfully and acknowledging the impact communication-style can have on another person's perceptions or ability to process information
- being aware of other people's trauma and lived experiences, using that to inform ways of communicating with them
- actively listening and avoiding confrontational body language
- increasing self-awareness and acknowledging personal triggers.[63]

RECOMMENDATION 47: That the Victorian Government develop a strategy to support agencies involved in the criminal justice system to implement effective methods for communicating with victims of crime. The strategy should be trauma-informed and provide guidance on how agencies can ensure victims of crime are aware of their entitlements consistent with obligations under the *Victims' Charter Act 2006* (Vic). The Government should conduct a review of the strategy 12–24 months after its implementation to ensure it is achieving its outcomes.

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61 Ms Fiona McCormack, Commissioner, Victims of Crime Commission, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, pp. 5–6.

62 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, p. 22.

63 FEI Workforce Resilience, *How Trauma-Informed Communication Improves Workplace Culture*, 2020, pp. 5–6.

8.3 Restorative justice practices involving victims of crime

As discussed in Chapter 10, restorative justice is an alternative approach to the mainstream justice system which focuses on repairing the harm that arises from criminal wrongdoing. According to Australian Association of Restorative Justice, restorative justice involves 'facilitated, structured processes to help a group of people address social harm and reset relations'.[64] The principal ideas of restorative justice are:

- because crime causes harm, a core requirement of justice should be to repair that harm
- the people most immediately affected should be supported in their search for reparation
- members of a broader community (including professionals) may also participate in that search.[65]

The most common restorative justice practice is group conferencing, or victim-offender mediation. Examples of restorative justice programs in Victoria's criminal justice system are Victim Support for Youth Justice Group Conferencing and the Family Violence Restorative Justice Service.

Group conferencing allows a victim of crime to speak directly to the person who committed the offence about the harm they caused. Numerous stakeholders argued that restorative justice gives greater voice to victims of crime and increases satisfaction with justice processes and outcomes. These stakeholders also submitted that victims of crime often find restorative justice processes less traumatising than the mainstream justice system, and better suited to addressing the harm they have experienced more directly.[66]

In its submission, the Victims of Crime Commissioner stated:

> There is now a consistent body of work suggesting that some victims perceive restorative justice as fairer, more satisfying, more respectful, and more legitimate than what is offered by the traditional criminal justice system.
>
> Alternative forms of participation or alternative justice responses—such as restorative justice—can meet more of victims' most commonly articulated needs, including participation, voice, validation, vindication and offender accountability …
>
> Case studies reveal victims' strong desire to speak openly with the offender in a way that communicates the harm caused to them, and that provides the offender with an opportunity to acknowledge or, in some cases, apologise for the harm. This kind of open dialogue is incompatible with the adversarial trial process.[67]

64 Australian Association for Restorative Justice, *Restorative Justice*, <https://www.aarj.org.au/restorative-justice> accessed 14 January 2022.

65 Ibid.

66 For example, see: Victoria Legal Aid, *Submission 159*; Victims of Crime Commissioner, *Submission 99*; The Justice Map, *Submission 157*; Foundation for Alcohol Research and Education (FARE), *Submission 155*.

67 Victims of Crime Commissioner, *Submission 99*, pp. 44–45.

This was echoed by Victoria Legal Aid which said that 'well prepared and facilitated restorative justice can result in lessening the level of trauma experienced by a victim in comparison to those who only experience the formal criminal justice system'.[68] It also pointed to evidence which suggested that along with improving a victim of crime's experience, restorative justice has been shown to reduce reoffending.[69] Victoria Legal Aid recommended that the Victorian Government legislate restorative justice processes for youth and adult offending in order to improve the experience of victims of crime with the justice system and to reduce reoffending. It further recommended that restorative justice processes should be available for all suitable individuals who have committed criminal offences so long as both parties agree to participate, and at different stages of the criminal justice process.[70]

The Law Institute of Victoria also noted that restorative justice processes can 'greatly benefit the well-being of victims by ensuring that the harm that has been caused is acknowledged'.[71] The Law Institute cited processes for victim participation in the International Criminal Court as an example of an 'effective way for the needs and interests of the victim to be heard'.[72]

At a public hearing, Julie Edwards, Chief Executive Officer of Jesuit Social Services, described the benefits of restorative justice processes compared to mainstream proceedings:

> Victims do not really get a hearing in a court situation in the main and, for example, whenever you can have something like a restorative process—we have been doing that for about 15 years now—victims' experience of that is that it is much more healing and respectful of their experience, and for the young person who is part of that it is very demanding and very challenging and sometimes they are hearing for the first time the impact of their crime on another person.[73]

Whilst the Victims of Crime Commissioner did acknowledge that restorative justice processes can meet a broader range of victims of crime's needs, it recommended that an external review of existing programs should take place to 'determine victim's satisfaction with the existing pathways'. The Commissioner argued that any review of restorative justice programs should:

- ensure victims have a range of justice options and are given choice and control over what pathway best suits their needs
- ensure best practice in restorative justice is shared across the justice and service system

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68 Victoria Legal Aid, *Submission 159*, p. 13.

69 Ibid.

70 Ibid.

71 Law Institute of Victoria, *Submission 112*, p. 46.

72 Ibid. Source cited in submission: Victorian Law Reform Commission, *Alternative Criminal Justice Models*, 2020, <https://www.lawreform.vic.gov.au/content/3-alternative-criminal-justice-models>. Source no longer active.

73 Julie Edwards, Chief Executive Officer, Jesuit Social Services, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 20.

- ensure victims' voices and experiences of restorative justice are at the centre of learnings and evaluations of existing programs
- ensure programs respond to victim diversity, including diversity in language, culture, gender and sexual identity
- explore whether these programs should continue to exist as stand-alone programs, or whether a more consolidated, centralised and streamlined approach should be developed providing victims with a central contact point and a clearer sense of pathways to various programs.[74]

In 2021, the Victorian Government announced it was establishing a Victim-Centred Restorative Justice Program. The new program will expand on the existing restorative justice schemes, the Family Violence Restorative Justice Services and Youth Justice Group Conferencing. The Victim-Centred Restorative Justice Program is expected to commence in March 2022.[75]

In the 2021 Victim Support Update, the Victorian Government explained that:

> In victim-centred restorative justice, all elements of the process revolve around the victim and are informed by their needs and preferences. The restorative process gives the victim a safe and supported opportunity to tell their story to people that are important to them to reach a shared understanding about what has happened, its impact on them, and what might make the situation better. For some people, this might involve talking with the person who has harmed them. While more traditional restorative justice outcomes related to the offender such as reducing future offending may occur, this is not the core focus of victim-centred restorative justice programs.[76]

The Victim Support Update also outlined some of the key features of the Victim-Centred Restorative Justice Program, which will:

- establish new restorative justice streams for:
  - families of adolescents using violence in the home
  - victims of crime seeking a restorative process where a person has been sentenced
  - applicants to the new victims of crime financial assistance scheme
- create a Restorative Justice Knowledge Hub.[77]

The Victorian Government also indicated that in 2022, it will consult with victims of crime and other stakeholders on creating a restorative justice pathway for victims of sexual offences.[78]

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74 Victims of Crime Commissioner, *Submission 99*, p. 46.

75 Victorian Government, *Victim Support Update: Reforms we will deliver to support victims of crime - Establishing a new Victim-Centred Restorative Justice Program*, 2021, <https://www.vic.gov.au/victim-support-update/reforms-we-will-deliver-support-victims-crime#establishing-a-new-victim-centred-restorative-justice-program> accessed 14 January 2022.

76 Ibid.

77 Ibid.

78 Ibid.

The use of restorative justice in Victoria's justice system is addressed further in Chapter 10.

FINDING 33: Restorative justice processes give a greater voice to victims of crime in criminal justice proceedings compared to traditional processes, such as court proceedings. This increased participation can lessen the trauma and dissatisfaction many victims of crime experience navigating the mainstream criminal justice system.

8.4 Improving support for victims of crime

The Committee recognises that the existing approach to supporting victims of crime is not working. While not all victims of crime have poor experiences, many do. This can compound the harm a victim of crime is experiencing, with some victims of crime telling the Committee they found their interactions within the justice system traumatising (see Chapter 7). Parts of this Chapter have addressed key challenges victims of crime face when engaging with the criminal justice system, particularly where they are participants in proceedings. This Section examines the experiences of victims of crime accessing available support services in the victims services sector.

8.4.1 Accessing victim support services

> **That was probably the most frustrating bit, understanding that process for someone that never had to be in that situation before. And understanding who to call and who was responsible for what. The police were good in terms of pointing us in the right direction, but there wasn't a one stop shop. So yes, information, I think, was the biggest thing.**
>
> Victim of Crime Interviewee, Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, p. 34.

Victim support services refers to the broad range of government and non-government programs and organisations which offer support services to victims of crime. Services available to victims of crime are comprised of both specialist victims of crime services and generalist services offered by agencies which do not focus specifically on victims of crime. Chapter 6 provided several examples of specialist services available to victims of crime. Additional examples include:

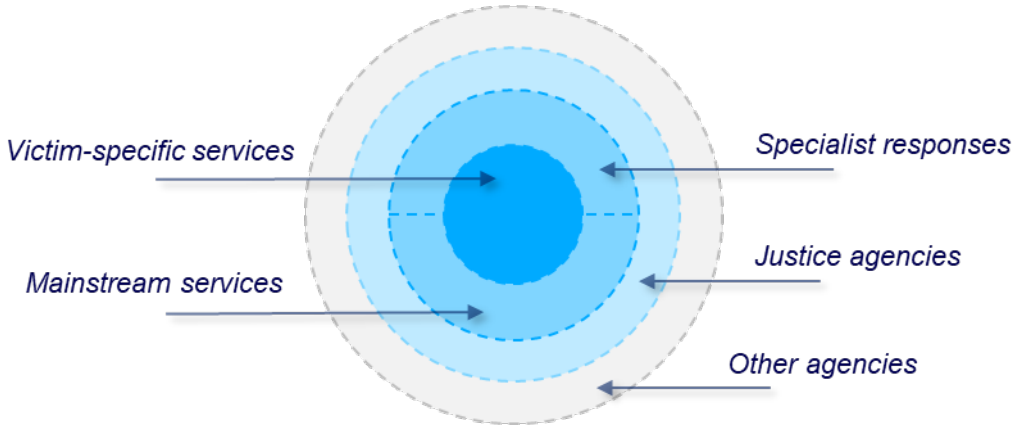
- sexual assault and family violence services, such as Centres Against Sexual Assault
- phone-based services, such as the Victims of Crime Helpline
- services which provide state-wide coverage, such as Orange Door
- cohort-specific services, such as the Child Witness Service.[79]

79 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, p. 28.

The broad range of services available demonstrates the complexities and varying needs of victims of crime. In its Victims Service Review, the Centre for Innovative Justice grouped victims services into five categories (shown in Figure 8.2 below). The Centre noted:

> These five groups of services can be conceptualised as concentric circles, with the inner circle representing services for whom victims of crime and vulnerable witnesses are their core business and therefore provide a highly specialised and trauma-informed response. The level of specialisation and understanding of victims' needs and experiences decreases as the circles move outward, so that the outermost circle represents those services that have limited capacity to recognise and respond to victims of crime because it is not a specific focus of their service design.[80]

Figure 8.2 Overview of the victims' services ecosystem



Source: Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, p. 29.

The Committee would like to acknowledge the substantial reforms that have been introduced to the way victims of crime are treated and supported within the criminal justice system. This acknowledgement was also expressed by Fiona McCormack—the Victims of Crime Commissioner—who stated:

> I also want to acknowledge the unprecedented reform that has been undertaken over the past 20 years to improve the experiences of people who are victims of crime … I am old enough to remember what it was like before the introduction of things like remote witness facilities or victim impact statements, dedicated police units … while these things do not always operate as they should for all victims of crime, it is important to acknowledge that they have been introduced because of the efforts of and the commitment by those working both within and outside of the justice system to improve victims' experiences … these interventions have certainly made a difference and are important features of our system.[81]

80 Ibid., p. 29.

81 Ms Fiona McCormack, *Transcript of evidence*, p. 2.

These important reforms, as well as the additional government commitments discussed in this Chapter, are positive steps to ensuring that the criminal justice system is meeting the needs of victims of crime. However, the Committee believes further changes are required to meet the unique challenges that victims of crime experience.

Stakeholders to the Inquiry contended that the current approach to victims services is flawed. Areas of concern that were identified include:

- that the existing victim services sector is based on a 'one-size-fits-all' approach to victim support rather than being responsive or holistic[82]
- inadequate referral pathways for victims of crime into victims services and/or overreliance on self-referrals and police referrals[83]
  - a lack of alternative referral pathways for victims of crime from communities who historically underreport to police[84]
- disjointed or disconnected support, with services periods generally broken up into before, during and after court/criminal proceedings[85]
  - lack of case management meaning victims of crime need to present to services and retell their story over and over again which can be a traumatising experience,[86] and may dissuade them from seeking further support
- overreliance on victims of crime to self-manage or identify support needs[87]
- lack of culturally safe support options available to victims of crime who are Aboriginal Victorians or from culturally and linguistically diverse communities (this issue is discussed in more detail in Section 8.4.2 below).

The experiences of victims of crime navigating the criminal justice system, including victims services, is discussed in more detail in Chapter 7.

> **[Victim support] was in touch with me within hours. The boys had theirs within 24 hours. But there was no follow-up. I think there should be a follow-up one week down the track, two weeks down the track, just a ring: 'Are you okay? Do you still need help?'. Because that was not there, and they did not get followed up. I am not talking about one person; I am talking about families. I am one of 15 children. I have a big family, and the rolling effect that this has done to every one of my family is unbelievable.**
>
> Lee Little, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*, p. 24.

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82 Victims of Crime Commissioner, *Submission 99*; Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*.

83 Kathleen Maltzahn, Chief Executive Officer, Sexual Assault Services Victoria, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*.

84 Centre for Innovative Justice, *Improving support for victims of crime: key practice insights*.

85 Lee Little, *Transcript of evidence*; Hope, *Transcript of evidence*.

86 Victims of Crime Commissioner, *Submission 99*; Tracie Oldham, *Transcript of evidence*.

87 Kerry Burns, *Transcript of evidence*.

The Victims of Crime Commissioner advocated for a strengthened victim support system. It noted that one of the objectives of the Victims' Charter is that victims of crime 'should be offered information to enable them to access appropriate services to help with the recovery process'.[88] However, the Commissioner contended that the 'one-size-fits-all' model of Victoria's current victims services sector means that not all victims of crime are accessing appropriate support services. The Commissioner also advocated for the victims services sector to be reconfigured so that victims of crime could have a single point of contact to help them navigate the system. The Commissioner noted that this issue has been raised as a concern by victims of crime who 'often have to repeat their story multiple times in the process of seeking support to recover from trauma'.[89]

Some stakeholders believed that the current approach to victims services lacked cohesion and could be better coordinated across the State.[90] The Office of the Public Advocate discussed this in relation to victims of crime living with disability, submitting:

> [The Office of the Public Advocate] notes with concern the lack of cohesion between victim support services for individuals with a disability. While the current victim support framework is complex, individuals with disability have unique needs and added difficulty in accessing the services vital to their continued inclusion in the trial process. One identified gap is that [Independent Third Persons] cannot refer victims (and alleged offenders and witness) to appropriate support services.[91]

The Committee has made recommendations on improving intermediary services for victims of crime, including the Independent Third Person program, in Chapter 6.

As noted by the Office of the Public Advocate, a lack of cohesion across the victim support sector can impede a victim of crime's referral pathways into services. As a result, many victims need to self-manage and self-refer to support, or rely on agencies such as police and the Office of Public Prosecutions. Figure 8.3 below shows the key referral pathways into Victim Services, Support and Reform services.

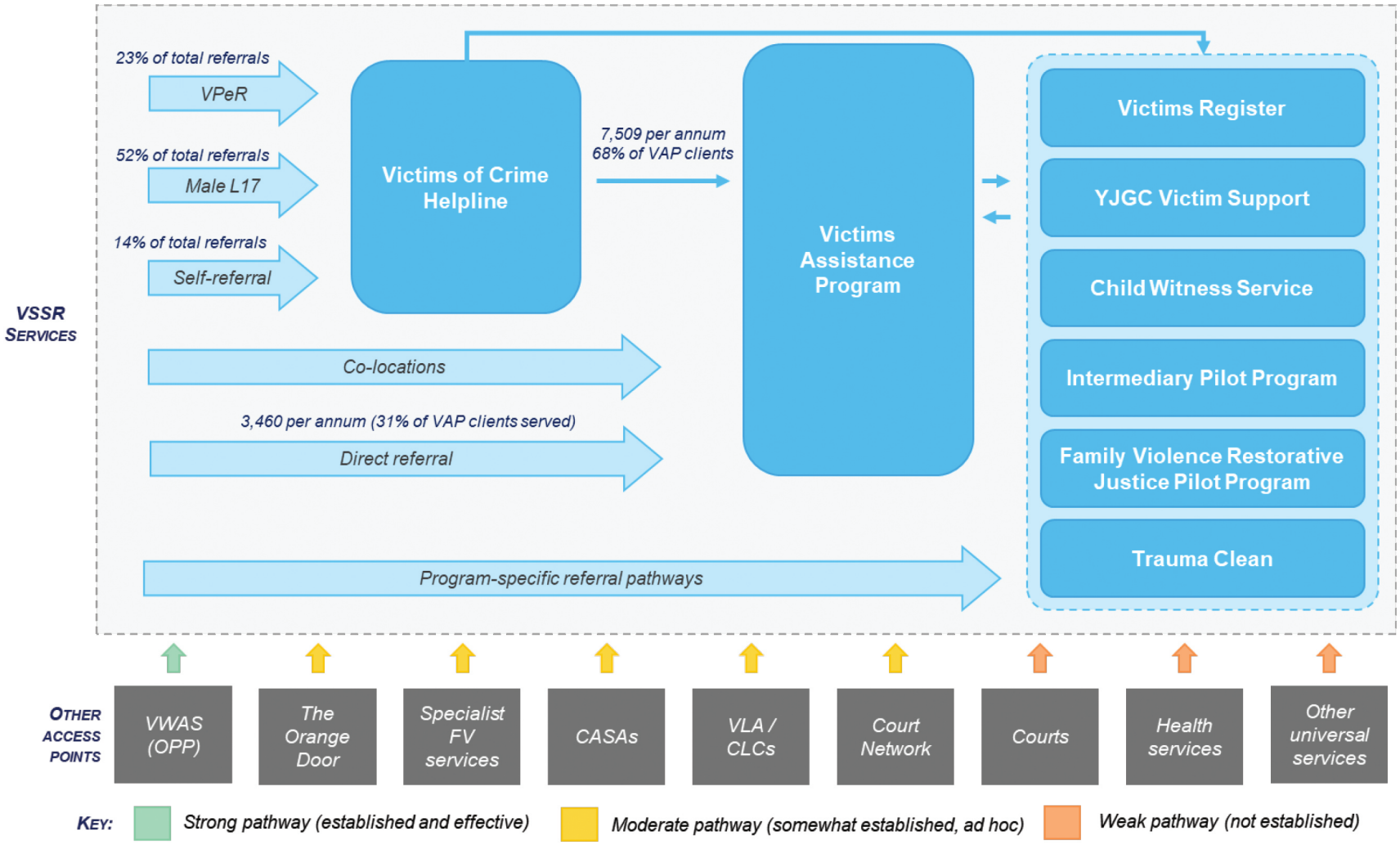
88 Victims of Crime Commissioner, *Submission 99*, p. 24.

89 Ibid.

90 Office of the Public Advocate, *Submission 153*, p. 27; Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*.

91 Office of the Public Advocate, *Submission 153*, p. 27.

Figure 8.3 Overview of key referral pathways into Victim Services, Support and Reform



Note: Male L17 refers to police referrals to support services for male victims of family violence; VPeR stands for Victoria Police e-Referral Program.

Source: Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, p. 72.

In the Committee's view, it is unreasonable to expect victims of crime—who may be experiencing acute trauma—to identify their needs and take responsibility for locating services to support them. Kerry Burns from the Centre Against Violence touched on the sector's reliance on victims of crime to self-manage their recovery and safety:

> … We are still relying a lot on victim-survivors to make moves. Last year when the police conducted White Ribbon, that was great. That is the first time I have ever seen it flip the other way, where they go and knock on the door of the household where they are concerned. I think we could keep that kind of approach—like police could be watching the perpetrator instead of us looking to hold the victim. If they had been visible in his life, would it have made a difference—if they had had the right to go out there and knock on his door? I think it would have.[92]

Kerry Burns also told the Committee that victims of crime who do not access support can experience further victimisation and poorer outcomes:

> One of the reasons I cannot be explicit is most of the victim-survivors we care for do not die, thankfully, and we can never claim that it is our intervention that has achieved that, but I watch every case reported, and there are a shocking number of deaths where the victim-survivors had no access to service. So, in other words, we are worried about people we do not know.[93]

Victims of crime needing to self-support as they navigate through the criminal justice system was also touched on by Tracie Oldham, a survivor of childhood sexual abuse. Tracie recalled her experience during a police interview:

> I was sitting there just reading off as in the third person, talking about it as if I was talking about somebody else, and it was not until I went and sat in the car that it just flooded me. Like, it was: 'Oh, my God'. Suddenly I heard myself speaking. But while I was in there, had an advocate been there, they would have slowed it down. They would have paused it. They would have said, 'Can we take a break now?'—because they are taught to read the signs; they would have seen—'I think she was just triggered. Maybe now is a good time to take a break for 5 minutes'. But no, they just keep hammering at you and hammering at you, and you are just trying to digest what you have just heard yourself say that you have never openly admitted. And before you have had a chance to digest that, they have asked you another question—'Hang on, hang on, hang on, I'm still trying to get over the fact'—so you are about 10 questions behind by that time.[94]

The significance and diversity of challenges faced by victims of crime which have been addressed in this Chapter demonstrate that there is a pressing need to re-examine Victoria's approach to victims services. As stated earlier, the Victims of Crime Commissioner advocated for a strengthened victim support. The Commissioner recommended that:

> The Victorian Government should commit to funding the enhanced victim support service model outlined in *Strengthening Victoria's Victim Support System: Victim*

92 Kerry Burns, *Transcript of evidence*, p. 31.

93 Ibid.

94 Tracie Oldham, *Transcript of evidence*, p. 52.

Services Review including the enhanced response for bereaved families and a new, dedicated legal service for victims of crime.[95]

The Victims Services Review, which was commissioned by the Victorian Government, proposed a redesign of Victoria's victims services sector so that the service model is 'based on tiered approach to support provision'. Under the redesign proposal, three core services would provide support to victims of crime. The Committee notes that a lot of the elements proposed by the Centre for Innovative Justice do exist, but the redesign would ensure that service delivery is cohesive, responsive and holistic.

Tier One: An integrated, phone-based Victim Support Centre

- primary intake function for victims of crime being referred into victim services
- core response to victims of crime against the person, including:
  - ongoing risk and needs assessment
  - information advice
  - psychological first aid
  - referrals to a range of services
  - case coordination
  - proactive, phone-based outreach to clients to ensure they remain in contact with the sector and to identify changes in support needs
- specialist team to respond to police referrals (L17s) for male victims of family violence
- managing the Victims Register
- coordination and oversight of critical incident responses (see Section 8.4.3 for a more detailed discussed of victim-centred critical incident responses).

Tier Two: Intensive, case management support for higher needs clients (Victim Support and Recovery Program)

- operates similarly to the existing Victims Assistance Program but with enhanced capacity to address a range of complex client needs; capacity will be improved to some victims of crime through Tier One
- services will be delivered through a network of community-based agencies which are also integrated into the Victim Support Centre
  - Victim Support and Recovery Program agencies will come from a wide range of sectors to ensure the diverse needs of clients can be met. Figure 8.4 below shows the service network of agencies which should be included in the Victim Support and Recovery Program

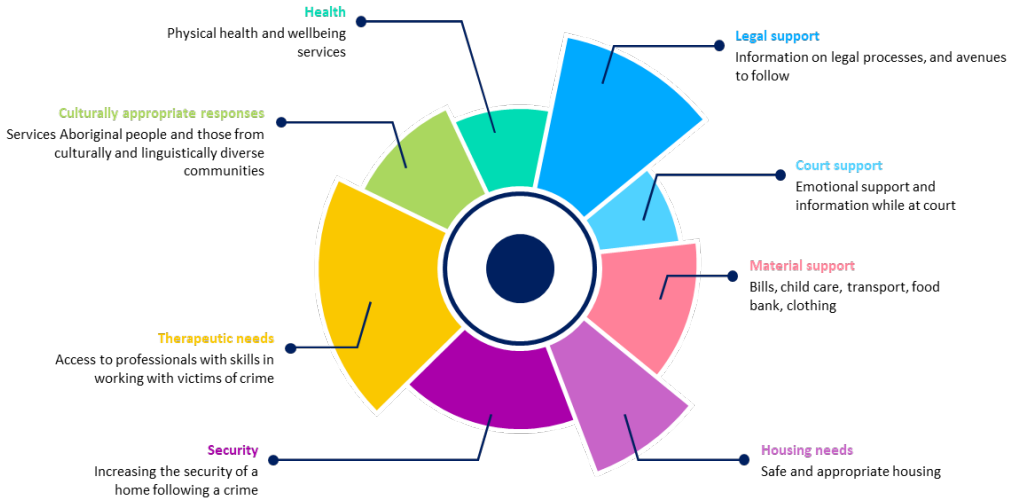
95 Victims of Crime Commissioner, *Submission 99*, p. 26.

- intended to operate as a step-up response for clients with multiple and complex needs, with the aim for clients to be supported to step down into less intensive support
- target client group for Victim Support and Recovery Program is victims of violent crime
  - broadly, Victim Support and Recovery Program clients will be victims of crime assessed as having medium-high needs.

Tier Three: Specialist Service for Bereaved Families

- replicates case management model of the Victim Support and Recovery Program but allows for higher intensity and duration of service provision
- recognises the significant needs of families of victims of homicide
- delivered jointly by the Victim Support Centre and Victim Support and Recovery Program
  - Victim Support and Recovery Program services located in the family's community will provide direct support and case management
  - Victim Support Centre provides back-end support and oversight (i.e. coordinating the team supporting a bereaved family)
  - Victim Support Centre will also liaise with key government agencies—for example, Victoria Police and the Coroners Court—to streamline processes ensuring families have a single source of information.

Figure 8.4 Victim Support and Recovery Program service network



Source: Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review,* 2020, p. 100.

The Centre for Innovative Justice's redesigned victims services sector also proposed a new Victims Legal Advice Service, which would be co-located with existing publicly-funded legal services. The purpose of the Victims Legal Advice Service would be to 'provide victims of crime with tailored legal information and advice, referrals and discrete task assistance'.[96] The Centre further explained that the legal service would ensure:

> victims of crime receive legal support from lawyers with an understanding of the needs and experiences of victims of crime, and the application of trauma-informed approaches to legal practice.[97]

The Committee acknowledges that specialist legal assistance for victims of crime was addressed by several stakeholders.[98] In 2021, the Victorian Government announced it would establish the Victims Legal Service for victims of crime making applications to the new financial assistance scheme (see Chapter 6). The Committee believes there are other opportunities to expand the provision of dedicated legal assistance for victims of crime. The Committee has made separate recommendations to enhance legal support and entitlements for victims of crime (see Chapter 6 and Section 8.1.3).

As part of the Victims Services Review, the Centre for Innovative Justice and the Victims Services, Support and Reform unit collaborated to identify overarching victim support service principles. The review noted that the principles were also informed by 'insights from interviews with victims of crime, practitioners and system reform experts'. Table 8.1 below outlines the victim support service principles recommended by the review.

8

Table 8.1 Victim support service principles

Principle	Explanation	What might this mean in practice?
Trauma-informed	Informed by a deep understanding of the impact of trauma and victimisation and works to reduce and prevent retraumatisation.	• Undertaking comprehensive and ongoing risk and needs assessments to understand the unique presentation of individuals and families. • Providing victims of crime with multiple opportunities to engage, including proactively offering support over time. • Ensuring that workers have an appropriate level of autonomy, within the scope of individual services and programs, to respond flexibly to the needs of clients. • Working with other services and agencies to build their awareness of the experience of trauma and victimisation, including advocating for clients where appropriate.

96 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 17.

97 Ibid.

98 For example, see: Victims of Crime Commissioner, *Submission 99*; Victoria Legal Aid, *Submission 159*; Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020.

Principle	Explanation	What might this mean in practice?
Victim-led	Recognises and scaffolds victim agency through the provision of needs-based, proactive and tailored support with a focus on resilience and recovery.	• Providing victims of crime with the right information at the right time so that they can determine the best course of action for them, based on their individual needs. • Offering step-up-step-down options so that victims of crime can self-manage based on their capacity to do so at a point in time, including actively supporting victims of crime to build that capacity. • Proactive check-ins to provide victims of crime with opportunities to help-seek and to identify changes in support needs, including ongoing risk and needs assessments. • Consistent and high-quality practices in relation to care planning, tracking progress against goals, and exit planning.
Equitable	Responds to the needs and experiences of victims of crime from diverse circumstances and backgrounds and actively addresses barriers to access.	• Multiple access pathways, including co-locations, which aim to increase access for cohorts that face barriers to reporting and service engagement. • A diverse Service Network that includes community groups and services that work with specific cohorts and communities, so that victims of crime can choose where they feel most safe and comfortable receiving support. • Requirement that all contracted providers achieve Rainbow Tick Accreditation and that all VSSR services (included those delivered by contracted community service organisations) meet clear expectations in relation to cultural competence and safety. • Education, training and clear practice guidance in relation to the support needs of diverse cohorts, including those experiencing multiple and intersecting forms of discrimination or disadvantage.
Timely	Works to minimise harm through early intervention, recognising that a lack of timely support can compound victims' needs and set them on trajectories of further harm.	• A comprehensive front-end, phone-based response that can address the immediate needs of victims of crime, with pathways to more intensive, community-based support where this is required. • Ongoing education and engagement with Victoria Police to ensure effective and consistent use of the VPeR system, including offering a referral at multiple points in time where there is an ongoing victim-informant relationship. • Development of new structured referral pathways to improve access for victims of crime who do not report to police, including protocols with family violence and sexual assault services to support handover of clients. • KPIs relating to response times supported by continuous improvement activities to improve timely access for all victims of crime, including specific cohorts.

Principle	Explanation	What might this mean in practice?
Holistic	Responds to the breadth of victims' needs, including psychological, practical, financial, legal and safety needs, as well as needs of the broader family.	• Standardised tools for risk and needs assessments and care planning that reflect the full breadth of victims' needs, including physical, psychological, practical, financial, legal and safety needs. • Development and maintenance of a range of effective, quality referral pathways which recognise the capacity of crime victimisation to impact multiple areas of a person's life. • Appropriate caseloads that reflect the breadth of needs with which victims of crime may present and enable practitioners to work holistically with clients. • Practice guidance and training to support practitioners to work with the broader family where appropriate, including identifying and responding to direct and indirect impacts of crime victimisation on family dynamics and other family members, particularly children and young people.
Coordinated	Supports a seamless and coordinated service experience for victims of crime as they move through the broader system, including through system navigation and advocacy.	• A comprehensive Service Network which core victim services can leverage to meet their clients' individual needs, using warm referrals, case coordination and advocacy (as required). • A fit-for-purpose CRM system that records all interactions with a client so that victims of crime do not need to re-tell their story and there is a clear record of services delivered. • Development of clear protocols between key victim services (including those not delivered by VSSR) to support shared care and seamless transitions between services. • Central and regional governance arrangements to ensure that relevant services and agencies have a shared understanding of their roles and responsibilities and are working together to develop, implement and monitor effective service responses for victims of crime.
Specialised	Delivered by a skilled, capable and well-supported specialist workforce based on evidence and leading practice.	• Development of a leading practice Workforce Capability Framework for victim services, supported by individualised professional development plans for all victim services staff. • Development and regular review of a Victim Support Practice Framework informed by contemporary evidence and leading practice. • A strong culture of reflective practice, supported by high-quality, organised supervision and routine opportunities for peer learning and discussion. • Engaging with and educating other services and agencies at the system-level and local-level to build their understanding of victims' needs and experiences, including appropriate referral pathways and strategies to mitigate the risk of re-traumatisation.

Principle	Explanation	What might this mean in practice?
Accountable	Uses data to understand, target and evaluate the effectiveness of interventions at the individual, program and system-level and to drive improvement and innovation.	• Minimum standards for all VSSR services that are informed by contemporary evidence and understandings of the needs of victims of crime and are supported by clear performance indicators, quarterly reporting and a regular cycle of service audits. • A comprehensive Monitoring & Evaluation Framework that is focussed on outcomes, rather than outputs, and which feeds directly into continuous improvement and service planning processes. • A fit-for-purpose CRM system to monitor the effectiveness, efficiency and appropriateness of service responses at the individual, program and system-level. • Aligning contract management practices with the best practice approach identified by VAGO in its 2018 report *Contract management capability in DHHS: Service agreements*.

Note: Table compiled from information in the Victim Services Review. Information is presented as written in original source material.

Source: Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, pp. 58–64.

In the Committee's view, the Victim Services Review's proposed model for a redesigned victim support sector is compelling. It has recommended that the Victorian Government redesign victims services in Victoria in line with the tiered approach proposed by the Victims Services Review. The Committee heard from stakeholders that there are serious issues with the current approach, leaving victims of crime with unmet support needs or not bringing them into the victims service sector at all (see Chapter 6). The Committee has made separate recommendations to enhance legal entitlements and support for victims of crime.

As noted, the Centre for Innovative Justice was commissioned by the Victorian Government to undertake this review. Some of the review's recommendations have been implemented (e.g. employing a Cultural Safety Practice Lead within the Koori Justice Unit of the Department of Justice and Community Safety (DJCS) and some are underway. However, the Committee is unsure to what extent the Victorian Government has committed to adopting the proposed model put forward by the Victim Services Review. In response to a questionnaire from the Public Accounts and Estimates Committee, DJCS indicated that under the Department's 'Supporting victims of crime' initiative, it has provided funding to 'start the transformation of the victim service system'.[99] The Department explained that the Victorian Government has committed $19.7 million of the 2021–22 State Budget to the initiative. Funding will be split to deliver several initiatives, including to:

- start the transformation of the victim service system
- establish a new financial assistance scheme for victims of crime

99 Department of Justice and Community Safety, *2021–22 Budget estimates general questionnaire*, Response to Inquiry into the 2021–22 budget estimates general questionnaire, Public Accounts and Estimates Committee (Parliament of Victoria), May 2021, p. 52.

- continue the intermediaries program
- provide a new victims' legal service.[100]

FINDING 34: Victims services in Victoria are based on a 'one-size-fits-all' approach, which is incapable of meeting the diverse and complex needs of every victim of crime. The current model for supporting victims of crime has several limitations, including:

- inadequate referral pathways for victims of crime into services
  - lack of alternative referral pathways for victims of crime from communities with high rates of underreporting
- overreliance on victims of crime to identify and self-manage their support needs, including self-referring into victims services
- victims of crime receiving disjointed or disconnected support due to an absence of a single source of information approach to case managing through an entire support period
- service periods are generally broken up into before, during and after a victim of crime is involved directly in the criminal justice system, requiring victims to retell their stories when presenting at new services, which may dissuade them from seeking further support
- lack of culturally safe support options available to victims of crime who are Aboriginal Victorians or from culturally and linguistically diverse communities.

RECOMMENDATION 48: That the Victorian Government redesign Victoria's existing victim of crime services model in line with the model proposed in the Government-commissioned *Strengthening Victoria's Victim Support System: Victim Services Review*. This should be done in conjunction with the Committee's additional recommendations around legal support and entitlements for victims of crime (Recommendation 44, Recommendation 45 and Recommendation 46).

8.4.2 Culturally safe practices in victim services

The need for the criminal justice system, including its support service sectors, to enhance its culturally safe practices has been identified several times in this report (for example, see Chapters 3, 4 and 11). Victoria's *Aboriginal and Torres Strait Islander Cultural Safety Framework* defines cultural safety as 'environments where people feel safe – where there's no challenge to their identity, and where their needs can be met'.[101] The Committee notes that a need for cultural safety not only exists for Aboriginal

100 Ibid.

101 Department of Health, *Aboriginal and Torres Strait Islander cultural safety framework: For the Victorian health, human and community services sector*, 2019, p. 3.

Victorians but also Victoria's culturally and linguistically diverse communities. Much of the literature and evidence presented in this Section focuses on the former, however, the Committee believes that the principles and strategies discussed would benefit the broader multicultural community across Victoria.

The Aboriginal and Torres Strait Islander Cultural Safety Framework outlined eight principles of cultural safety which are shown in Table 8.2 below.

Table 8.2 Cultural Safety Framework principles

Principle	Explanation
Leadership	Organisations provide meaningful leadership opportunities to design, deliver and evaluate culturally safe policies, programs, initiatives and services. Organisations have leadership at all levels that understand and champion the organisation's role in cultural safety.
Self-determination	Aboriginal staff, people and communities have meaningful leadership and decision-making roles, and are involved in designing, delivering and evaluating Aboriginal health, wellbeing and safety policies, programs and initiatives.
Human rights approach	The rights-based approach that drives this framework is an essential part of Victorian Aboriginal service delivery and sector development. The United Nations *Declaration on the Rights of Indigenous Peoples* recognises both the principle of self-determination (Article 3) and the right to culture (Articles 11 and 31). The *Victorian Charter of Human Rights and Responsibilities Act 2006* also recognises culture as a right.
Support and sustainability	Staff at all organisational levels are supported to undertake ongoing cultural safety professional and personal development. Workplaces have processes to build individual and organisational capacity, provide mentoring opportunities and establish culturally safe spaces for Aboriginal staff and clients.
Culturally safe systems	Embed culturally safe practice into recruitment and retention processes, as well as into existing policies, programs, procedures, procurement and services.
Ongoing learning	A continuous process of reflection and quality improvement to identify and reflect on individual and organisational practice, and implement the actions required for ongoing learning and self-reflection at all levels of the organisation.
Accountability and transparency	Individuals reflect on their own level of competency in cultural safety and identify required improvements. Organisations reflect on their current policies, practices and procedures and reflect on their organisational competency. Organisations demonstrate accountability by implementing key performance indicators.
Respect and trust	Individuals and organisations establish a relationship of trust and respect with Aboriginal staff, clients and local Aboriginal communities.

Source: Department of Health, *Aboriginal and Torres Strait Islander cultural safety framework: For the Victorian health, human and community services sector*, 2019, p. 9.

As noted in Chapters 5 and 6, the lack of culturally safe services available to culturally diverse victims of crime has resulted in many victims not seeking support. Given the higher rates of victimisation in Aboriginal and culturally and linguistically diverse communities, as well as the significant risk factor victimisation has on offending, it is essential that victims services provide a culturally safe environment for all Victorians.

It was suggested to the Committee that implementing culturally safe practices in the victims services sector could reduce the number of victims who go on to commit criminal offences.

Culturally safe practices can be achieved in two key ways:

- embedding cultural safety across the entire victims services sector through developing a cultural-safety framework to underpin service delivery. Options for frameworks include a sector wide framework or individual frameworks within service organisations. Regardless, a part of cultural safety frameworks should be dedicated to cultural-safety training and employment
- increasing the number of Aboriginal Community Controlled Organisations and culturally and linguistically diverse-driven organisations involved in the victims services sector (see Chapters 5 and 6).

The fourth phase of the Victorian Aboriginal Justice Agreement argued that building stronger and safer communities is important for improving positive outcomes for Aboriginal Victorians and preventing contact with the justice system. The Agreement noted:

> Safe communities are places in which people experience empowerment, security, pride, wellbeing and resilience.
>
> Stronger communities are more able to address local issues. Evidence from the evaluation of [Phase 3] tells us that strong local leadership, joined-up and collaborative approaches between justice agencies, service providers and the Aboriginal community delivering flexible services that are appropriate to the local context are critical to success.[102]

In its submission, the Centre for Innovative Justice summarised some of the key focuses of the Aboriginal Justice Agreement in relation to victims of crime who are Aboriginal Victorians. The victims of crime focus areas articulated in the Agreement include the need for:

- coordinating support for families to enhance trauma recovery and improving parent, relationship, communication and problem-solving capabilities
- meeting the specific needs of Aboriginal victims of crime and witnesses
- providing culturally informed support and enabling access to culturally safe services
- meeting the unique needs of children and young people in out of home care due to family violence and providing support which aims to avoid future involvement in the criminal justice system
- addressing the underlying causes of offending through healing and trauma-informed approaches. This should include exploring the impact of

102 *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement (Phase 4)*, 2018, <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-12-aboriginal-communities-are-safer> accessed 4 January 2022.

intergenerational experiences of violence, strengthening protective factors and increasing coping strategies

- enabling Aboriginal communities to self-determine services, including design, delivery, outcomes and evaluations
- building the capacity of justice services to provide wrap-around and holistic programs and services.[103]

To support the aims of the Aboriginal Justice Agreement, the Victorian Government has committed to establishing an Aboriginal Victims of Crime Strategy. In the Victim Support Update, the Minister for Victim Support explained the aims of the Strategy:

> Aboriginal and Torres Strait Islander people are overrepresented as victims of crime but are underrepresented in accessing victim support services. This is why the Victorian Government is developing a dedicated Aboriginal victims of crime strategy. This strategy will be informed by key principles of cultural safety and self -determination. We will work with the Aboriginal community, including the Aboriginal Justice Caucus, to identify how the victim support system can better respond to the needs of Aboriginal and Torres Strait Islander people.[104]

At a public hearing, Melanie Heenan, Executive Director, Victim Services Support and Reform, DJCS, updated the Committee on the Government's progress towards the Aboriginal Victims of Crime Strategy and why it was important, stating:

> [The Department of Justice and Community Safety] are also in the very early stages of finalising a consortium that will be undertaking some consultations across the Aboriginal communities but certainly directly with Aboriginal victims of crime … to develop an Aboriginal victims of crime strategy. … Aboriginal victims of crime are completely over-represented as victims. They have sometimes long histories of trauma and victimisation, but they are completely under-represented in the services that we provide. So it is absolutely a focus for us to make sure that this Aboriginal victims of crime strategy really helps us to understand how to do better in providing services to Aboriginal victims.[105]

The Victim Support Update indicated that the Victorian Government would consult Aboriginal victims of crime on the strategy in 2022. At the time of writing, the Committee was unaware of any available information concerning the release of the Strategy.

The Centre for Innovative Justice's Victims Services Review identified culturally-informed practices which should be embedded within the redesigned victims services sector to ensure it is meeting the needs of culturally diverse victims of crime. Table 8.3 below summarises the practices identified by the review.

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103 Centre for Innovative Justice, *Submission 82, Attachment 1*, p. 98.

104 Minister for Victim Support, *Victim Support Update*, Department of Justice and Community Safety, December 2021, p. 28.

105 Melanie Heenan, Executive Director, Victim Services Support and Reform, Department of Justice and Community Safety, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 10.

Table 8.3 Culturally safe service delivery for victims of crime

Cohort	Culturally safe service delivery examples
Aboriginal and Torres Strait Islander victims of crime	• embed dedicated Aboriginal Engagement Practitioners to support victims of crime (similar to Koori Engagement Officers under the existing Victims Assistance Program) – Aboriginal Engagement Practitioners should be recognised as a core role within victims services – Aboriginal Engagement Practitioners should not be required to support mainstream clients. Where client needs are low, practitioners should undertake community outreach and building relationships • service provision must recognise the impact of dispossession and trauma on victimisation amongst Aboriginal Victorians • service delivery must recognise the importance of Country and community, centering Aboriginal family and community structures • incorporate Aboriginal healing approaches into victim support practice framework • recognise barriers to reporting and ensure that a lack of police reporting does not impact the availability of support • develop referral pathways for Aboriginal victims of crime, including building a cultural safety network of services within service regions • victim service providers to undertake ongoing learning and development to support culturally safe practice • service providers should incorporate minimum standards in relation to cultural safety, including annual cultural safety audits. The Cultural Safety Practice Lead in the Koori Justice Unit should lead development of these standards – providers must demonstrate a culturally safe workplace, including values, behaviours, policies and structures
Culturally and linguistically diverse victims of crime	• develop referral pathways for culturally and linguistically diverse victims of crime, including building partnerships with multicultural organisations within a service region • victim service providers must undertake cultural awareness and safety training – service providers should have an understanding of the complexities of migration, stress of acculturation and identifying specific cultural and religious needs • recognise barriers to reporting and ensure that a lack of police reporting does not impact the availability of support • recognise the importance of family and the impact family and community connections can have on the identity and mental health of a victim of crime • interpreters employed as a required support service to allow culturally and linguistically diverse victims of crime to engage services in the language they are most comfortable with • victim service providers must demonstrate a culturally safe workplace, including values, behaviours, policies and structures

Note: Information has been summarised by the Legislative Council Legal and Social Issues Committee.

Source: Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, 2020, pp. 132–135.

Furthermore, the Centre for Innovative Justice's proposed redesign of Victoria's victims services system outlined several key principles which should underpin future service planning, design and delivery. The proposed redesign recommended 'Equitable' as one of these key principles. This principle recognises the need to respond to the diverse needs of victims of crime from diverse backgrounds and remove barriers to access.[106]

106 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, pp. 59–60.

The Centre for Innovative Justice's proposal advocated that cultural safety should be a 'foundational requirement of all victim-focused services'.[107] To achieve this, the proposal outlined several practices which should be embedded within the victims service sector. The report stated that cultural safety in practice should include:

- Multiple access pathways, including co-locations, which aim to increase access for cohorts that face barriers to reporting and service engagement.
- A diverse Service Network that includes community groups and services that work with specific cohorts and communities, so that victims of crime can choose where they feel most safe and comfortable receiving support.
- Requirement that all contracted providers achieve Rainbow Tick Accreditation and that all [Victim Services, Support and Reform] services (included those delivered by contracted community service organisations) meet clear expectations in relation to cultural competence and safety.
- Education, training and clear practice guidance in relation to the support needs of diverse cohorts, including those experiencing multiple and intersecting forms of discrimination or disadvantage.[108]

The Committee notes that the Victorian Government has committed to achieving Rainbow Tick Accreditation for all Victims Services, Support and Reform services. Chapter 6 discusses this in more detail.

The Committee agrees with the Centre for Innovative Justice's view that cultural safety should be a foundational requirement of victims services. It also believes it should be a foundational requirement of the criminal justice system more broadly. Culturally safe practices are essential to improving service engagement from victims of crime who are Aboriginal and/or culturally and linguistically diverse. The Committee has found that a lack of culturally safe support options is a significant barrier for some victims of crime to engage with not only the criminal justice system, but the victims services sector as well. The Committee believes that the Victorian Government can improve the experiences of Aboriginal and culturally and linguistically diverse victims of crime by embedding more culturally safe practices across the justice system. These practices should extend from the criminal justice system (i.e. police and the courts) through to victims services.

RECOMMENDATION 49: That the Victorian Government establish a victims of crime strategy for culturally and linguistically diverse people to improve the delivery of culturally safe practices and support. The strategy should be informed by consultation undertaken with community leaders and organisations, as well as victims of crime who are from culturally and linguistically diverse communities.

107 Ibid., p. 59.

108 Ibid., p. 60.

RECOMMENDATION 50: That the Victorian Government make cultural safety a foundational requirement of the criminal justice system, including victims services. In doing so, the Government should:

- improve referral pathways for Aboriginal Victorians and culturally and linguistically diverse people who are victims of crime
- expand and diversify the network of services offering victim support services across Victoria, with an emphasis on recruiting more community-led organisations
- identify opportunities to support criminal justice practitioners and victim support services to undertake cultural safety awareness and training, including education on the impact intersecting disadvantages can have on victims of crime.

8.4.3 Supporting secondary witnesses and victims to criminal offences

A specific issue raised with the Committee was how to best support secondary witnesses or victims, particularly in the immediate aftermath of major or critical incidents. Major or critical incidents can range from homicide or major trauma incidents, road fatalities to natural disasters.

Reverend Jim Pilmer, a retired police chaplain who worked with Victoria Police for over 20 years, recommended that Victoria run a pilot program of 'Rapid Response Units' to assist with major incidents. The role of the unit would be to provide:

- first-on-scene coordination services
- early intervention of ongoing distress
- specialised support services to the public and secondary victims.

Reverend Pilmer stated that being witness to an incident or crime can result in immediate support requirements and long-lasting psychological effects:

> Particularly at times of death, including road trauma, suicide or homicide, the attending emergency services members need to focus on their role and then move on. In the process the relate professionally (but fleetingly) to next of kin or secondary victims but are not in a position to support them beyond the specific task at hand. Police members have often expressed to me their frustration and embarrassment at having to literally walk away from distressed individuals or families with complex needs in tragic or dangerous circumstances.[109]

109 Reverend Jim Pilmer PSM OAM OStJ, *Submission 78*, p. 1.

He noted that during his time as a police chaplain, on some occasions he was called to the scene of a major incident to provide urgent support to secondary victims or families. However, he explained this was not the role of emergency service chaplains as they are employed to support police and other emergency service workers, not the general public. In his submission, Reverend Pilmer highlighted one particular incident:

> I had police call me from the scene of the suicide of a 13 year old late at night to say that the family needed urgent support at home to deal with a number of issues confronting them. These were not only about shock and grief but they were obviously factors. I attended, but this is not really the role of chaplains to Victoria Police, Ambulance Victoria, Fire Services Victoria or the SES whose role is to support emergency service workers, not the general public.[110]

Reverend Pilmer's submission provided several more examples of major incidents which would have benefitted from immediate onsite support in the form of a Rapid Response Unit focused on supporting secondary victims and witnesses. One example was the 2017 Bourke Street incident where James Gargasoulas drove through the crowded Bourke Street Mall precinct, killing six people. Reverend Pilmer stated:

> The Bourke Street, Melbourne (Gargasoulas) incident of 2017 highlighted the areas of community need which flow from tragedy. Hundreds of people sought counselling in due course but hundreds more could have had information provided rapidly in the immediate vicinity as to what their reactions might be. Literally hundreds more boarded public transport home or returned to their offices without contact points for future support. There are several ways to disseminate information at a major incident which a Rapid Response Unit could coordinate. Early 'intervention' is clinically more effective for individuals and more cost effective for the public purse.[111]

Reverend Pilmer outlined the key features of his proposed Rapid Response Units, which could be deployed to provide immediate on-call support to secondary victims and witnesses 'in the aftermath of the wide range of distressing or traumatic incidents which occur daily across [Victoria]'. The key features of the Rapid Response Unit proposal are:

- capability to respond to a wide range of incidents, either through self-deploying or working with other services, such as:
  - bushfires, floods or other natural disasters
  - major road trauma incidents
  - suicide incidents
  - on-scene support during early investigation into missing persons
  - drug overdoses
  - homicide or other traumatic incidents (e.g. workplace deaths or major injuries)

110 Ibid.

111 Ibid., pp. 2–3.

- units would be made up of a multi-disciplinary team:
- for metropolitan areas: the unit should include a General Manager, trauma counsellor, psychologist, multicultural worker, social worker and inter-/multi-faith chaplaincy services
- for regional and rural areas: the unit should include a Regional Coordinator based in major regional hubs allowing outreach to surrounding districts. Coordinators will be supported in the field by suitably qualified volunteers from existing support services in the area.[112]

At a public hearing, Reverend Pilmer emphasised why it is important that secondary victims or witnesses at major incidents are supported:

> It is really about practical support, comforting support, guidance, information for people who are impacted by crime or tragedy in different ways, and I thought I would just very quickly paint a little picture of what daily life can be like in Victoria … In Victoria on average each week there are five road fatalities—we are talking about on average here—two workplace deaths; 13 suicides, two-thirds of which are in the metropolitan area; and due to all causes we have 133 deaths a week in Victoria that are reportable to the coroner, so 19 a day. Behind those deaths there are all sorts of stories and stresses and griefs and often people just operating in a vacuum of hurt and bewilderment.[113]

Other jurisdictions have models in place which are similar to Reverend Pilmer's recommended Rapid Response Units. In the United Kingdom, Family Liaison Officers are dedicated police officers who are trained to work with families of victims of crimes or who are involved in major incidents. Along with being the single point of police contact with families, Family Liaison Officers also explain criminal justice procedures and provide information on additional support services available.[114] Box 8.3 below outlines the role of Family Liaison Officers in more detail.

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112 Ibid.; Reverend Jim Pilmer PSM OAM OStJ, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*.

113 Reverend Jim Pilmer PSM OAM OStJ, *Transcript of evidence*, p. 49.

114 College of Policing (UK), *Family Liaison Officer (FLO)*, 2022, <https://profdev.college.police.uk/professional-profile/family-liaison-officer-flo> accessed 17 January 2022.

BOX 8.3: Family Liaison Officers (United Kingdom)

Family Liaison Officers are police officers in the United Kingdom whose role is to work with the family involved in an incident. They also provide support and information to families of victims of crime, road fatalities, disasters/critical incidents, ensuring that families are given timely information in accordance with investigatory needs.

According to the College of Policing (United Kingdom), some of the key roles of a Family Liaison Officer are to:

- establish and maintain a supportive and ethical relationship with families
- act as a single point of contact between families and investigation teams
- provide information regarding additional services available for families, including signposting to support agencies, and explaining criminal justice procedures
- update families, in a timely manner, with all relevant information regarding a police investigation
- obtain victimology and family personal statements and any other material to enable the gathering of evidence
- document any requests and/or complaints made by the family
- liaise between families and the coroner and senior investigating officials.

In its Authorised Professional Practice resource on Critical Incident Management, the College of Policing identifies Family Liaison Officers as an appropriate resource where an additional level of victim care is required.

Source: College of Policing (UK), *Family Liaison Officer (FLO)*, 2022, <https://profdev.college.police.uk/professional-profile/family-liaison-officer-flo> accessed 17 January 2022; College of Policing (UK), *Critical incident management: Phase 3 - restoring public confidence*, 2013, <https://www.app.college.police.uk/app-content/critical-incident-management/phase-3-restoring-public-confidence/#victim-care> accessed 17 January 2022.

The Royal Commission into Victoria's Mental Health System made a similar recommendation for ensuring that during mental health incidents, there is on-site support from emergency services led by health professionals rather than police. Box 8.4 below is the recommendation from the Royal Commission.

BOX 8.4: Recommendation 10: Supporting responses from emergency services to mental health crises, *Royal Commission into Victoria's Mental Health System*

The Royal Commission recommends that the Victorian Government:

1. Ensure that, wherever possible, emergency services' responses to people experiencing time-critical mental health crises are led by health professionals rather than police.
2. Support Ambulance Victoria, Victoria Police and the Emergency Service Telecommunications Authority to work together to revise current protocols and practices such that, wherever possible and safe:
    a. Triple Zero (000) calls concerning mental health crises are diverted to Ambulance Victoria rather than Victoria Police; and
    b. responses to mental health crises requiring the attendance of both ambulance and police are led by paramedics (with support from mental health clinicians where required).
3. Ensure that mental health clinical assistance is available to ambulance and police via:
    a. 24-hours-a-day telehealth consultation systems for officers responding to mental health crises;
    b. in-person co-responders in high-volume areas and time periods; and
    c. diversion secondary triage and referral services for Triple Zero (000) callers who do not require a police or ambulance dispatch.

Source: Royal Commission into Victoria's Mental Health System, *Volume 1: A new approach to mental health and wellbeing in Victoria*, 2021, p. 507.

Chapter 5 examines policing responses to mental health crises in more detail.

Victim Services, Support and Reform services—such as the Victims of Crime Helpline and Victims Assistance Program agencies—can provide immediate support in the aftermath of critical incidents, including on-the-ground assistance. However, emergency service personnel on-site at critical incidents are still highly involved in victim support and needs assessment referrals. In the aftermath of the 2017 Bourke Street incident, Victoria Police made over 1,200 victim support referrals.[115]

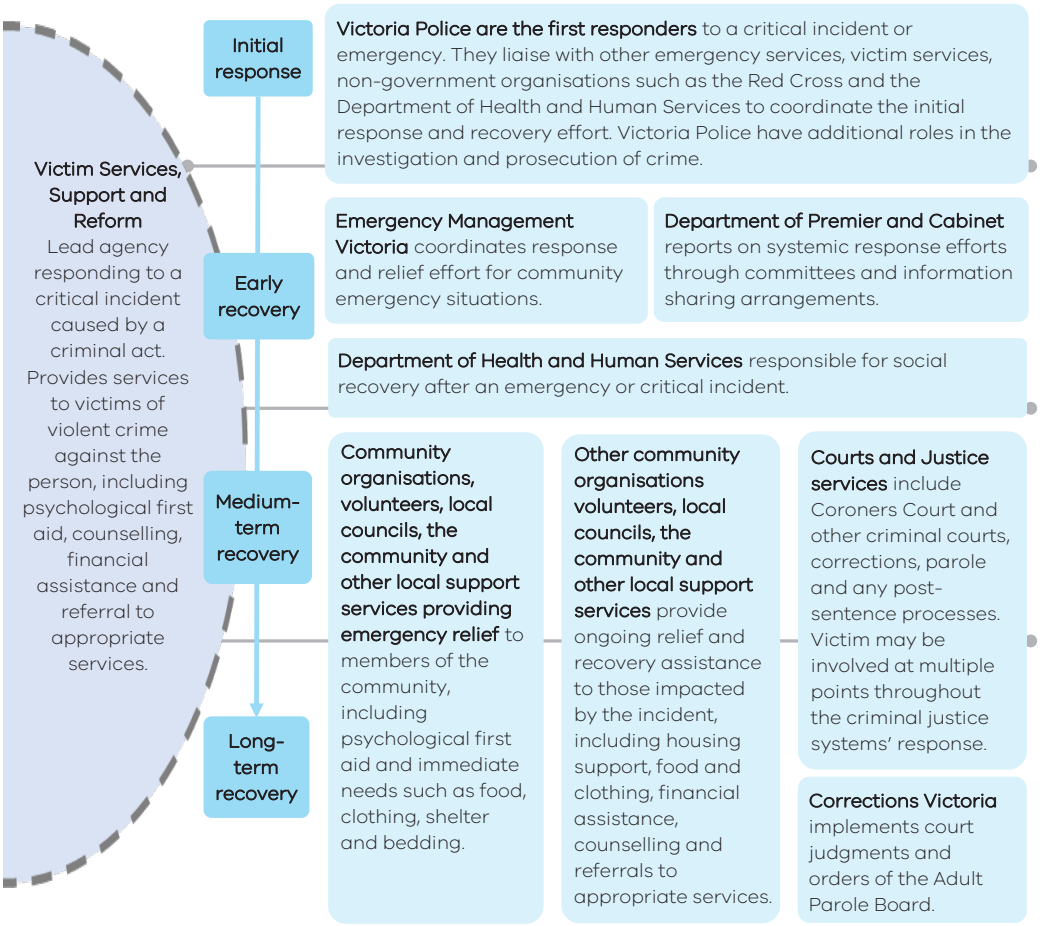
In 2019, the Victorian Government implemented the *Critical Incident Response: Framework for Victim Support* which outlines Victim Services, Support and Reform's response to victims affected by crime caused by critical incidents. The Framework defines a critical incident as any crime committed against a person where:

115 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 156.

- there are multiple victims or witnesses
- the broader community is impacted
- the nature, scale, intensity and profile of the incident warrants an immediate, coordinated victim support response
- broader Victorian Government emergency management arrangements are activated, and/or
- other exceptional circumstances.[116]

Under the Framework, Victim Services, Support and Reform are the lead agency responsible for victim support during a critical incident caused by a criminal act. However, if victims services are deployed to provide immediate support they must coordinate with Victoria Police. Figure 8.5 below shows the agency partners and their roles in victim service responses during critical incidents.

Figure 8.5 Key agency partners to the victim services response to critical incidents



Source: Victim Services, Support and Reform (Department of Justice and Community Safety), *Critical Incident Response: Framework for Victim Support*, 2020, p. 10.

116 Support and Reform (Department of Justice and Community Safety) Victim Services, *Critical Incident Response: Framework for Victim Support*, 2020, p. 3.

The Framework also recognises that an effective response to critical incidents requires 'a 'surge' workforce that can be mobilised swiftly'. It identified several critical enablers for surge capacity including:

- whole of organisation approach, leadership and enabling culture
- alignment with business continuity plans
- clear mandate and legislative obligations
- skilled, knowledgeable and supported staff
- rosters and registers that can be rapidly deployed
- regular drills, training and exercises
- established protocols, systems and procedures
- systemised learning practices and commitment to continuous improvement
- flexible funding arrangements and appropriate financial resourcing.[117]

Victims service practitioners deployed to provide on-the-ground support at critical incidents caused by a criminal act undertake initial recovery services such as:

- psychological first aid (see Box 8.5 below)
- information and referral services
- practical support, such as brokering funding for urgent assistance with transport, accommodation, etc.
- emotional support.[118]

117 Ibid., p. 12.

118 Ibid., pp. 15–16.

BOX 8.5: Psychological First Aid

According to the Australian Red Cross and Australian Psychological Society's guide on *Psychological First Aid: Supporting people affected by disaster in Australia*, psychological first aid is a 'psychosocial support activity that helps people affected by an emergency, disaster or traumatic event'.[119] The guide explains the core aim of psychological first aid is:

> to build people's capacity to recover. Psychological first aid supports recovery by helping people to identify their immediate needs and their strengths and abilities to meet these needs.

Some of the goals of psychological first aid are:

- reduce distress
- identify and assist with the current needs of individuals and families affected by incidents
- facilitate social support
- assist with early screening for further or specialised support
- reduce risks factors of mental illness, such as post-traumatic stress disorder.

Source: Australian Red Cross and Australian Psychological Society, *Psychological First Aid: Supporting people affected by disaster in Australia*, 2020.

The Victim Services Review identified a need for better support to victims of crime related to critical incidents in Victoria. The review made the following findings on why improving victim-centred critical incident responses is important:

- Critical incidents are increasing and can have significant numbers of victims and witnesses who require support.
- Surge capacity is essential so that critical incidents do not impact negatively on 'business as usual' service provision.
- A specialist, victim-centred response to critical incidents alleviates pressure on other key responders, including Victoria Police, and allows them to focus on investigation.[120]

The review proposed establishing a structured response to supporting victims and witnesses in the immediate aftermath of a critical incident. It recommended that the Victorian Government:

- implement clear processes for responding to critical incidents, including identifying the role and requirements of different parts of the victims services sector

119 Australian Red Cross and Australian Psychological Society, *Psychological First Aid: Supporting people affected by disaster in Australia*, 2020, p. 15.

120 Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, pp. 156–157.

- maintain a pool of skilled critical incident responders who can be deployed to provide on-the-ground support
  - critical incident responders should be drawn from appropriately trained victims service practitioners.[121]

In the aftermath of a major incident—particularly one which is the result of criminal offending—victims, secondary victims and witnesses may have complex trauma needs. Identifying trauma and distress, particularly in the immediate aftermath of an incident, can ensure that people in need of support are linked to services at the earliest opportunity. At major incidents police and emergency services have myriad responsibilities and may not have the time or resources to support and assess secondary victims or witnesses. However, it is important that all people—whether victims, secondary victims or witnesses/bystanders—are immediately linked into support services to help them deal with trauma and prevent long-term psychosocial harm. Early intervention and support for people dealing with trauma can prevent the effects from becoming more acute. It will also increase the number of people involved in major incidents accessing appropriate supports, as it will reach people who would otherwise not have been identified as a person in need.

Trauma is complex and can be long-term. The Committee believes that the Victorian Government should evaluate its current approach to deploying victims services to critical incidents. The aim of the evaluation should be to ensure that people involved in critical incidents—whether they are primary victims, secondary victims or witnesses—are referred as early as possible to support services if required. Expanding critical incident responses to such incidents acknowledges that witnesses to these events can become secondary victims because of the profound trauma which may result from their involvement.

FINDING 35: Experiencing major or critical incidents can cause significant and long-term trauma for people, whether they are victims, secondary victims (such as families) or witnesses. It is important that all people are immediately linked into support services to help them deal with trauma and prevent long-term psychosocial harm.

121 Ibid., pp. 158–159.

RECOMMENDATION 51: That the Victorian Government evaluate the surge capacity of Victim Services, Support and Reform services to attend critical incidents to provide on-the-ground support. This evaluation should assess:

- whether victim services deployed during critical incidents are meeting the critical enablers for surge capacity identified in the *Critical Incident Response: Framework for Victim Support*
- what impact deploying services to critical incident has on the broader capacity of victims services, considering the short-, medium- and long-term demand of services regarding business-as-usual activities and needs arising specifically from critical incidents
- whether services which are deployed to critical incidents are suitably skilled and supported, and align with the aims of the *Critical Incident Response: Framework for Victim Support*
  - including whether there is a strong mix of multi-disciplinary agencies available for deployment, from sectors such as allied health, community services and specialist victim services
- ways victim services could be deployed to critical incidents where it has not resulted from criminal offending, such as natural disasters, accidental road trauma, or other incidents where acute trauma may be present.

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LEGISLATIVE COUNCIL
Legal and Social Issues Committee

Inquiry into Victoria's criminal justice system

Volume 2

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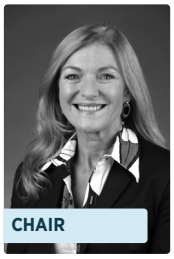
Committee membership



Ms Fiona Patten
Northern Metropolitan

Dr Tien Kieu
South Eastern Metropolitan

Dr Matthew Bach
Eastern Metropolitan
(*Substitute for Mr Craig Ondarchie)*

Ms Cathrine Burnett-Wake
Eastern Victoria
(*Member from 2 December 2021*)

Mr Enver Erdogan
Southern Metropolitan
(*Substitute for Ms Kaushaliya Vaghela)*

Hon Jane Garrett
Eastern Victoria

Ms Tania Maxwell
Northern Victoria

Hon Edward O'Donohue
Eastern Victoria
(*Substitute for Hon Wendy Lovell. Member until 1 December 2021)*

Mr Craig Ondarchie
Northern Metropolitan

Mr Lee Tarlamis OAM
South Eastern Metropolitan
(*Substitute for Ms Kaushaliya Vaghela)*

Ms Kaushaliya Vaghela
Western Metropolitan

Ms Sheena Watt
Northern Metropolitan
(*Substitute for Hon Jane Garrett)*

Participating members

Dr Matthew Bach, Eastern Metropolitan
Mr Rodney Barton, Eastern Metropolitan
Ms Melina Bath, Eastern Victoria
Ms Georgie Crozier, Southern Metropolitan
Dr Catherine Cumming, Western Metropolitan
Mr Enver Erdogan, Southern Metropolitan
Mr Stuart Grimley, Western Victoria
Mr David Limbrick, South Eastern Metropolitan
Hon Wendy Lovell, Northern Victoria (*Full member until 2 December 2021*)
Hon Edward O'Donohue, Eastern Victoria
Mr Tim Quilty, Northern Victoria
Dr Samantha Ratnam, Northern Metropolitan
Ms Harriet Shing, Eastern Victoria
Mr Lee Tarlamis OAM, South Eastern Metropolitan
Ms Sheena Watt, Northern Metropolitan

About the Committee

Functions

The functions of the Legal and Social Issues Committee are to inquire into and report on any proposal, matter or thing concerned with community services, education, gaming, health, and law and justice.

The Legal and Social Issues Committee may inquire into, hold public hearings, consider and report on any matter, including on any Bills or draft Bills, annual reports, estimates of expenditure or other documents laid before the Legislative Council in accordance with an Act, provided these are relevant to its functions.

Government Departments allocated for oversight:

- Department of Families, Fairness and Housing
- Department of Health
- Department of Justice and Community Safety.

Secretariat

Lilian Topic, Senior Committee Manager
Matt Newington, Committee Manager (from 19 April to 19 November 2021)
Alice Petrie, Inquiry Officer (until 25 January 2022)
Caitlin Connally, Research Assistant
Samantha Leahy, Research Assistant
Jessica Wescott, Research Assistant (from 18 October 2021)
Meagan Murphy, Research Assistant (from 17 January 2022)
Cat Smith, Administrative Officer
Sylvette Bassy, Administrative Officer

Contact details

Address Legislative Council Legal and Social Issues Committee
Parliament of Victoria
Spring Street
EAST MELBOURNE VIC 3002

Phone 61 3 8682 2869

Email lsic.council@parliament.vic.gov.au

Web www.parliament.vic.gov.au/lsic-lc

This report is available on the Committee's website.

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Preliminaries

PART A: INTRODUCTION

Terms of reference

Inquiry into Victoria's criminal justice system

On 3 June 2020 the Legislative Council agreed to the following motion:

That this House requires the Legal and Social Issues Committee to inquire into, consider and report, by no later than 28 February 2022, on various issues associated with the operation of Victoria's justice system, including, but not limited to —

(1) an analysis of factors influencing Victoria's growing remand and prison populations;

(2) strategies to reduce rates of criminal recidivism;

(3) an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime; and

(4) the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skillset necessary for judges and magistrates overseeing specialist courts.

PART D: CHARGES AND SENTENCING

9 Charges, bail and remand

At a glance

This Chapter canvasses issues relating to charges, bail and remand.

Key issues

- It discusses the operation of Victoria's bail system, including recent reforms to the system that were introduced in 2013 and 2017–18. These reforms have had an impact on the Victoria's prison population, with a significant increase in numbers of people being remanded in custody. Importantly, the current bail system has had varied negative effects on individuals charged with an offence, and has disproportionately impacted cohorts such as women, Aboriginal and Torres Strait Islander peoples, children and young people and persons with a disability.
- It outlines the importance of legal services to support individuals once they come into contact with the criminal justice system, and the need for these to be accessible, culturally safe and responsive.
- The Chapter considers areas of reform in relation to bail, with this being one of the key areas of advocacy for stakeholders to the Inquiry. Particular issues include the thresholds for granting bail as well as application processes in courts and after hours. Police powers to remand individuals in custody are also discussed, as well as the role and work of volunteer bail justices. In addition, the Chapter outlines specific areas for improvement in terms of how bail processes operate for Aboriginal and Torres Strait Islanders and children and young people, and looks at issues relating to bail and housing.
- In relation to charges, the Chapter highlights the need for further review of the classification of certain indictable and summary offences.

Findings and recommendations

Finding 36: Accessible, culturally safe and responsive legal services provide critical advocacy, referral and representation services for individuals in contact with the criminal justice system.

Finding 37: Women, particularly Aboriginal women and women experiencing poverty, are disproportionately remanded under current bail legislation.

Finding 38: Section 3a of the *Bail Act 1977* (Vic) requires decision makers to take into account any issues arising from an accused person's Aboriginality when determining whether to grant or deny bail. However, this section of the Act is poorly understood and underutilised.

Finding 39: Victoria's bail system must balance the maintenance of community safety with the presumption of innocence for people accused of an offence. Victoria's criminal justice system does not currently appropriately or fairly balance these objectives.

Recommendation 52: That the Victorian Government review the operation of the *Bail Act 1977* (Vic), drawing on previous reviews by the Victorian Law Reform Commission and former Supreme Court judge Paul Coghlan, with a view to amendments to simplify the bail tests, make presumptions against bail more targeted to serious offending and serious risk, and ensure that bail decision makers have discretion to consider a person's circumstances when deciding whether to grant bail. This review should ensure that the views of victims and law enforcement are taken into account.

Finding 40: The Bail and Remand Court, operating within the Magistrates' Court of Victoria, provides an important bail and remand hearing process for accused persons. An extension of court hours would enable it to provide timely support to individuals charged with an offence, and in particular, for children and other vulnerable cohorts.

Recommendation 53: That the Magistrates' Court of Victoria consider further extension of court hours to enable it to conduct timely and responsive bail hearings, and in particular, for children and other vulnerable cohorts.

Finding 41: Victoria Police can exercise discretion in deciding whether to grant bail, and there are limited mechanisms for oversight of these decisions. Stakeholders believed increased oversight over police decisions to grant or deny bail would ensure there is effective transparency and accountability.

Recommendation 54: That the Victorian Government investigate potential mechanisms for independent oversight of police decision-making with regard to bail.

Recommendation 55: That Victoria Police consider implementing measures to improve transparency and accountability with regard to bail decision-making. This should include consideration of the introduction of a requirement to record reasons for any refusal of bail, and for this to be provided to an accused person.

Recommendation 56: That the Victorian Government ensure that, in relation to bail hearings before a bail justice:

- bail hearings be undertaken in person, with remote hearings only to take place in circumstances where a bail justice cannot attend within a reasonable period of time
- additional funding is provided to recruit further bail justices and reduce current resourcing pressures.

Recommendation 57: That the Victorian Government consider amending the *Residential Tenancies Act 1997* (Vic) to explicitly provide that a person cannot be evicted from a rental property for 'illegal purposes' if that person has not yet been convicted or sentenced.

Recommendation 58: That the Victorian Government identify and remove barriers to culturally appropriate bail processes for Aboriginal and Torres Strait Islander peoples, and in particular:

- support the Victorian Aboriginal Legal Service to continue to facilitate the Custody Notification Service in conjunction with increases in demand, as required by ss 464AAB and 464FA of the *Crimes Act 1958* (Vic)
- amend s 464FA of the *Crimes Act 1958* (Vic) to provide that an investigating official must contact the Victorian Aboriginal Legal Service in all circumstances where a person taken into custody self-identifies as an Aboriginal person
- support the development of guidelines on the application of s 3A of the *Bail Act 1977* (Vic) in partnership with Aboriginal organisations and peak legal bodies, to ensure appropriate consideration of a person's Aboriginality during bail processes, in accordance with the recommendation of the Australian Law Reform Commission in its report, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.

Finding 42: Children and young people who are remanded in custody experience significant and varied negative impacts, including in terms of stigmatisation, increased risks of physical and psychological harm, and disruptions to family life, development, education and employment.

Recommendation 59: That the Victorian Government investigate the establishment of a state-wide, 24-hour bail system specifically for children, with accompanying support services including in relation to accommodation and the provision of independent support during any time in police custody.

Recommendation 60: That the Victorian Government undertake a review of relevant legislation, including the *Summary Offences Act 1966* (Vic), in relation to offences often linked to underlying forms of disadvantage. Such a review should assess which indictable offences could appropriately be reclassified as summary offences, and whether any summary offences are appropriate for decriminalisation.

9.1 Legal services and support

As outlined in Chapter 1, persons charged with a criminal offence have rights to a fair hearing and a fair trial. These are enshrined in Australia's international treaty obligations[1] and are provided by the *Charter of Human Rights and Responsibilities Act 2006* (Vic)[2] as well as at common law. Access to legal support is an important component of fair criminal justice processes.

1 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14.

2 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) forms part of a broader human rights framework which protects people's rights in Victoria (the framework includes international human rights law and laws such as the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic).

In its submission, the Victorian Government acknowledged and reinforced the importance of accessible legal assistance for people who come into contact with the criminal justice system:

> In a criminal matter, the prosecution is required to prove that an accused is guilty of an offence beyond reasonable doubt. The accused must have had the chance to test the evidence against them. This is referred to as 'equality of arms' meaning that each side has had a reasonable opportunity to present its case. While a hearing can sometimes be fair even when an accused is self-represented, legal representation can help prevent mistakes and support an accused to put forward their best case. In serious cases, which can often involve complex scientific evidence or a long list of witnesses, it is very challenging for an accused to properly test the evidence without legal assistance. In higher courts, trials will also generally run more fairly and effectively when lawyers are involved.[3]

As highlighted in Chapters 3 and 4, legal services can provide a crucial early intervention function by supporting individuals to prevent interaction with the criminal justice system, such as in relation to debt, health or housing issues. Once people have come into contact with the criminal justice system, legal services can advocate for them to receive cautions or diversions where appropriate, and referrals to other support services. They can also provide more intensive support in relation to serious criminal matters.

Victoria Legal Aid is the primary body offering free public legal assistance in Victoria. There are various other accessible legal services, many of which provided important contributions to this Inquiry. This includes the Victorian Aboriginal Legal Service and community legal centres across Victoria. The Federation of Community Legal Centres provided an overview of the multifaceted work of community legal centres in its submission to the Inquiry:

> Community Legal Centres (CLCs) take a holistic, community-based and multi-disciplinary approach to providing legal assistance and support to some of the most vulnerable Victorians to ensure that a range of their needs are met, to reduce inequality, and to ensure that their legal problems do not escalate. This is often done through an integrated service model that involves legal and community service professionals (such as, social workers, advocates, and financial counsellors) working in partnership to meet people's needs in a holistic way. This also enables legal professionals to work with community service professionals to upskill them in being able to identify legal problems and understand legal systems, rights and entitlements to better address client needs.[4]

An example of the ways in which community legal centres can achieve holistic outcomes for their clients, and reduce further interaction with the criminal justice system, is provided in Box 9.1.

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3 Victorian Government, *Submission 93*, p. 15.

4 Federation of Community Legal Centres Victoria Inc., *Submission 132*, p. 17.

BOX 9.1: Community legal centres

The Law and Advocacy Centre for Women (LACW) is a community legal centre specialising in criminal defence advocacy for women who are imprisoned, or at risk of entering the criminal legal system. LACW has an in-house case management team, including an in-house social worker, providing wrap-around support to clients. In many cases, women are at risk of criminalisation because of social, health and family challenges that they experience because of entrenched disadvantage and family violence.

In one matter, the lawyer and social worker assisted 'Jane' (a pseudonym) who had criminal charges against her. Among other factors, Jane was homeless, had an acquired brain injury and experienced mental ill health as a sexual assault survivor. The social worker put in place important supports for Jane which made her well enough to engage with the legal process and then proceeded to set up longer-term plans for ongoing support from services that the client had previously struggled to engage with. As the court could see that there was a detailed support plan in place for Jane, she was allowed to continue to engage with support services, rather than receiving a custodial sentence. The integrated approach not only led to a successful legal outcome, but also enabled Jane to address the underlying causes of her offending.

Source: Federation of Community Legal Centres, *Submission 132*, p. 18.

The 2021–22 Victorian Budget allocated funding to establish a Victims Legal Service. This service will be delivered by Victoria Legal Aid in conjunction with community legal centres and will provide legal advice and assistance to victims of crime who are accessing financial assistance or applying for restitution or compensation orders.[5] Legal and other supports for victims of crime are discussed in detail in Chapters 6 and 8.

The Victorian Aboriginal Legal Service provides a 24-hour criminal law service to Aboriginal peoples across areas such as bail applications, assistance with pleas and sentencing and representation for legal defence. In accordance with the Custody Notification Scheme established under ss 464AAB and 464FA of the *Crimes Act 1958* (Vic), the Victorian Aboriginal Legal Service must be notified within one hour of an Aboriginal person being taken into custody by police in Victoria. Upon receiving notification, the Legal Service initiates a welfare check and provides legal support to the individual if required.[6]

In its submission, the Aboriginal Justice Caucus—a self-determining body working in collaboration with the Victorian Government to improve Aboriginal justice outcomes—highlighted the importance of culturally safe legal assistance. It stated:

5 Victorian Government, *Submission 93*, p. 15.

6 Victorian Aboriginal Legal Service, *Submission 139*, pp. 5–6.

> Aboriginal people need culturally safe Aboriginal Community Controlled Organisation (ACCO) legal assistance when legal assistance is required. With more than half of Aboriginal people in Victoria living outside of Melbourne, this means readily accessible, culturally safe legal services where Aboriginal people live. Since 1973, VALS has provided culturally safe legal services to Aboriginal people in Victoria and demand has grown. There were 4,400+ matters that VALS dealt with across criminal, family and civil law practices in 2019/20, up 23 per cent on 2018/19, with 86 per cent of clients supported in legal matters also supported by VALS community justice workers (3,790 individual clients). This growth continued during the COVID-19 pandemic, with at least a 30 per cent increase in family law matters and more increases in criminal law matters outside of Melbourne. Despite its clients living across all of the state, VALS is chronically underfunded.[7]

Other stakeholders emphasised the importance of accessible and supportive legal services across the criminal justice system more broadly. Windana Drug and Alcohol Recovery stated in its submission that 'Legal support should be universal'.[8]

FINDING 36: Accessible, culturally safe and responsive legal services provide critical advocacy, referral and representation services for individuals in contact with the criminal justice system.

9.2 Bail and remand

Victoria's bail system operates to allow people charged with an offence to apply to be released from custody until their case is heard in court, in accordance with the presumption of innocence. If bail is refused, they are 'remanded' in custody for this period.

When bail is granted to an individual, conditions that are set by the court must be followed. These can include, for example:

- that the accused person will agree to come to court when their case is scheduled to be held
- not contacting witnesses
- reporting regularly to police.[9]

Where bail is not granted to an individual and they are incarcerated in the period up to their court date, this time may count towards any prison sentence imposed by the court. An accused person should be held in a separate area of detention from persons who have been convicted of an offence.[10]

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7 Aboriginal Justice Caucus, *Submission 106*, p. 8.

8 Windana, *Submission 117*, p. 5.

9 Victorian Government, *Bail and remand*, 2021, <https://www.victimsofcrime.vic.gov.au/charges-laid/bail-and-remand> accessed 22 December 2021.

10 Ibid.

The bail process differs depending on the type of offence a person is charged with. If police do not grant bail to an accused person at a police station, they must bring them before a court within a reasonable time period. If the court is closed, police may remand a person in custody until they are able to be brought before the court.[11]

Different requirements apply in relation to a person who identifies as Aboriginal, a vulnerable adult or a person under the age of 18. For these individuals, police will request a bail justice to attend a police station to make a decision on the bail application.[12] A bail justice is an independent person who conducts after-hours bail and remand hearings on a volunteer basis, in accordance with the *Honorary Justices Act 2014* (Vic).

An accused person may also make an application of bail when brought before the court or at a later period prior to their case being heard.

In being granted bail, an accused person may be required to provide to the court surety (another person who pays, or promises to pay, money to the court if the accused fails to comply with bail requirements) or a deposit (security given by the accused person that they will attend court).[13]

The *Bail Act 1977* (Vic) (Bail Act) establishes the administrative processes in relation to bail, including the relevant tests that must be used by decision-makers in different circumstances to decide whether to grant or refuse bail. A flowchart demonstrating how bail processes are carried out is shown in Figure 9.1. The bail tests and relevant offences are outlined in Table 9.1.

In addition to these tests, bail decision-makers must also consider any relevant family violence risks in relation to the accused person, such as if there is a family violence intervention order made against that person.[14] Although not a legislative requirement, other factors, such as whether or not an accused has stable housing, may also inform decisions to grant or deny bail.[15]

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11 Magistrates' Court of Victoria, *Bail and custody*, 2018, <https://www.mcv.vic.gov.au/criminal-matters/bail-and-custody> accessed 11 January 2022.

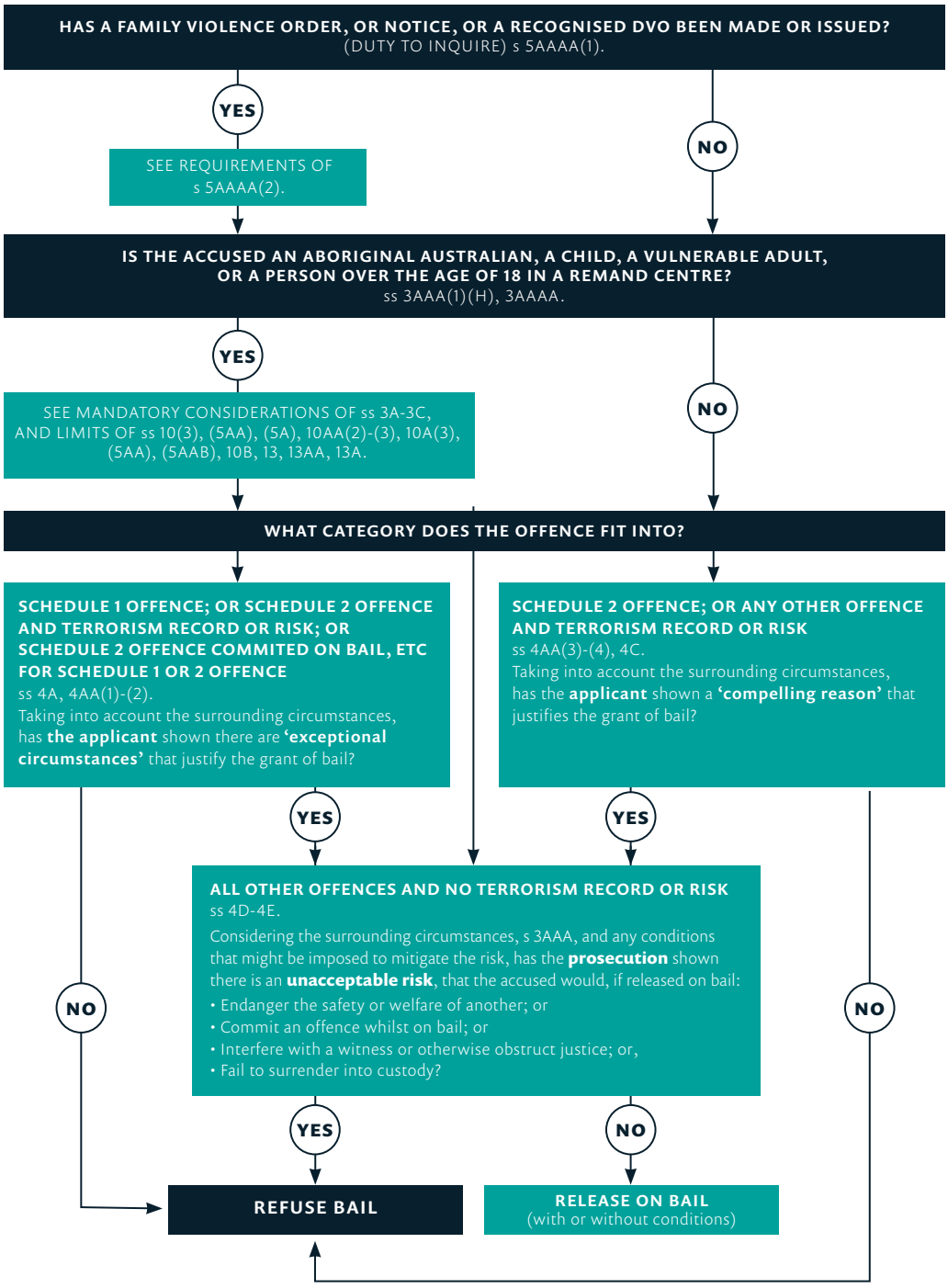
12 *Bail Act 1977* (Vic) s 10(6)(c).

13 Magistrates' Court of Victoria, *Bail and custody*.

14 *Bail Act 1977* (Vic) s 5AAAA.

15 Fitzroy Legal Service, *Submission 152*, p. 40.

Figure 9.1 Decision making flowchart for bail applications



Source: Judicial College of Victoria, *Decision making flowchart for bail applications*, https://www.judicialcollege.vic.edu.au/sites/default/files/2021-03/JCV_Decision_making_for_bail_applications_2021.pdf> accessed 10 February 2022.

Table 9.1 Bail tests and relevant offences

Tests	Description	Relevant offences
Exceptional circumstances and unacceptable risk tests	• **Step 1—**The bail decision maker must refuse bail unless satisfied that exceptional circumstances[a] exist that justify the grant of bail. The person accused of the offence bears the burden of proof as to the existence of exceptional circumstances. • If the decision maker determines that exceptional circumstances exist, they must then move to step 2. • **Step 2—**The bail decision maker must refuse bail if satisfied that there is an unacceptable risk that the accused, would, if released on bail: – endanger the safety or welfare of any person – commit an offence while on bail – interfere with a witness or otherwise obstruct the course of justice – fail to surrender into custody in – accordance with the conditions of bail. • The prosecutor bears the burden of proof as to the existence of an unacceptable risk in step 2.	Schedule 1 offences, including, among others: • treason • murder • aggravated home invasion • aggravated carjacking • drug trafficking (commercial quantities) • cultivation of narcotic plants (commercial quantities) • conspiracy, incitement or attempting to commit any Schedule 1 offence.
Show compelling reason and unacceptable risk tests	**Step 1—**The bail decision maker must refuse bail unless satisfied that *a compelling reason*[b] *exists* that justifies the grant of bail. The person accused of the offence bears the burden of proof as to the existence of a compelling reason. If the decision maker determines that a compelling reason exists, they must then move to step 2. **Step 2—**The bail decision maker must apply the unacceptable risk test outlined above.	Schedule 2 offences, including, among others: • manslaughter • child homicide • homicide by firearm • causing serious injury intentionally or recklessly in circumstances of gross violence • causing serious injury intentionally • threats to kill • rape • sexual penetration of a child • incest • kidnapping • home invasion • contravention of a family violence intervention order or safety notice in conjunction with use or threats of violence • an indictable offence alleged to have been committed by the accused person: – while on bail for another indictable offence – while subject to a summons to answer to a charge for another indictable offence (Continued)

Tests	Description	Relevant offences
Show compelling reason and unacceptable risk tests (Continued		– while at large awaiting trial for another indictable offence – during the period of a community correction order in relation to another indictable offence, or while serving a sentence for another indictable offence – while released under a parole order. • an indictable offence committed while subject to a supervision order or interim supervision order. This test also applies to a person charged with another offence who has a terrorism record, or is considered to be a terrorism risk.
Unacceptable risk test	**Step 1—**The bail decision maker must apply the unacceptable risk test outlined above.	Other offences or enforcement warrants.

a. The *Bail Act 1977* (Vic) does not define what constitutes 'exceptional circumstances'. However, key bail cases since the bail reforms were introduced have considered the applicants personal circumstances, such as their age, physical or cognitive problems, the availability of treatment, the hardship incarceration may impose on an applicant's family, and the likelihood of the period of remand being longer than any custodial sentence imposed. For further information of key bail cases see: Judicial College of Victoria, *Key Bail Act Cases – Post 2018 Reforms*, <https://www.judicialcollege.vic.edu.au/sites/default/files/2021-03/Key%20Bail%20Act%20Cases%20090321.pdf>.

b. Compelling reasons may arise from the circumstances surrounding the offending, such as: the strength of the prosecutor's case; the accused person's circumstances, including being a child or an Aboriginal person, having ill-health or a disability; the availability of forensic treatment; or the likely sentence to be imposed should the accused be found guilty.

Source: *Bail Act 1977* (Vic), Part 2, Schedules 1 and 2.

9

9.2.1 Recent bail reforms

In 2013, the Bail Act was amended to introduce new secondary offences of contravening a conduct condition of bail and committing an indictable offence while on bail.[16] Prior to this, only two secondary offences existed in relation to bail—failing to answer bail and failing to notify of a change of address.[17]

In 2017, following the Bourke Street tragedy—where six people were killed and approximately 30 people were injured—the Victorian Government commissioned a review of Victoria's bail laws to be undertaken by former Director of Public Prosecutions and Supreme Court Justice, the Hon Paul Coghlan QC. This review, known as the Coghlan Review, handed down its first report on 3 April 2017 and its second report on 1 May 2017.[18]

The Victorian Government responded to the first report, supporting in full, in part or in principle each of the report's recommendations. To date, a response to the second

16 *Bail Amendment Act 2013* (Vic) s 8.

17 Dr Marilyn McMahon, *No Bail, more jail?*: *Subtitle*, Victorian Parliament Library, Place published, 2019, p. 13.

18 Engage Victoria, *Bail Review*, (n.d), <https://engage.vic.gov.au/bailreview> accessed 23 December 2021.

report has not been provided, with the Victorian Government stating that it will conduct consultation on these longer-term recommendations.[19]

The *Bail (Stage One) Amendment Act 2017* (Vic) and *Bail (Stage Two) Amendment Act 2018* (Vic) subsequently made a number of changes to the Bail Act. This included extending the range of offences to which the 'reverse onus' tests apply, which place the burden of proof on the accused person to prove there are exceptional circumstances or compelling reasons, which justify the grant of bail. The test to 'show compelling reasons' for Schedule 2 offences replaced the previous 'show cause' test. In addition, community protection is now the primary consideration in bail applications.[20]

The presumption against bail now applies to over 100 offences, more than in any other Australian jurisdiction.[21]

A 2019 research paper on the changing nature of Victoria's bail laws by Parliamentary Library Fellow, Dr Marilyn McMahon, stated that in the first 20 years of the Bail Act's operation 'relatively few people' were refused bail. During this period, studies estimated that approximately 90% of bail applications were successful.[22] Dr McMahon asserted that refusal of bail on the basis of community protection is a relatively new phenomenon:

> traditionally the key concern when making a decision about bail was whether the person applying for bail would attend court for the hearing of their matter. Prior to the enactment of the Bail Act in Victoria in 1977, it appears that few persons on remand were detained specifically because of concerns about community safety.[23]

Dr McMahon indicated that the increase in numbers of people being held on remand is linked to escalating concerns regarding the need to protect the community from persons who are considered to present a risk of committing further offences if released on bail.[24]

In its submission to the Inquiry, the Victorian Government affirmed that governments have 'faced increasing pressure to act to ensure community safety and protect the community from violent and tragic events' such as those that have occurred in recent decades, including through 'strengthening bail requirements for some crimes'. However, it also acknowledged that 'more severe punishment for crime does not necessarily guarantee improved community protection or increase community confidence in the justice system'.[25]

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19 Ibid.

20 Dr Marilyn McMahon, *No Bail, more jail?*, p. 12.

21 Ibid.

22 Ibid., p. 11.

23 Ibid., p. 8.

24 Ibid., p. 1.

25 Victorian Government, *Submission 93*, p. 11.

9.2.2 Victoria's remand population

In its submission, the Victorian Government provided data in relation to the growing prison population. It highlighted that increases in recent years have been driven predominantly by people being held on remand. Between June 2010 and June 2020, the proportion of people in prison who had not been sentenced increased from 18% to 35%. By June 2021, this had increased to just under half the total prison population (44%).[26] Some groups are impacted more than others by these figures. For example, a larger proportion of women have been held on remand in recent years than men, with this figure even higher for Aboriginal women.[27]

In terms of those entering prison facilities, the number of people arriving on remand has increased from approximately 60% of all arrivals in 2009–10 to 89% in 2020–21.[28] Similar increases have been seen in the number of people leaving prison without serving an additional period of imprisonment (that is, being held on remand for the entirety of their time in the facility). This proportion increased from 27% of all individuals leaving prison in 2009–10 to 45% in 2019–20.[29]

A discussion of the operation of the bail system and its impacts for particular cohorts is included below. Where impacts are discussed, it is important to note that these are intersectional, and many individuals experience compounding effects.

Children and young people

> **Detention is incredibly damaging for children and young people with the criminogenic effects well-documented. Concerns about overuse of remand among children and young people have also been consistently raised, including particular concerns for refugee and migrant youth. In particular, reports have focused on the use of remand, with many noting that "remand periods are often relatively short but can be disruptive and of little rehabilitative value".**
>
> Centre for Multicultural Youth, *Submission 95*, p. 5.

The Sentencing Advisory Council's 2020 report, *Children Held on Remand in Victoria: A report on Sentencing Outcomes*, found that the number of unsentenced children being held on remand a day has, on average, doubled between 2010 to 2019 from 48 children to 99 children. The report stated that of this cohort, Aboriginal and Torres Strait Islander children and children from culturally and linguistically diverse backgrounds were overrepresented. Moreover, it noted that of the 660 cases for which children were remanded in 2017–18, two-thirds or 66% later resulted in non-custodial sentences and 5% in 'time served' sentences.[30] The report demonstrated a strong

26 Ibid., p. 31.

27 Ibid., pp. 31, 39.

28 Ibid., p. 33.

29 Ibid., p. 34.

30 Sentencing Advisory Council, *Children held on remand in Victoria: A report on sentencing outcomes*, Sentencing Advisory Council, Melbourne, 2020, pp. ix–x.

correlation between the amount of time children spent on remand and the likelihood of receiving a custodial sentence:

> Just 9% of children held on remand for a week or less received a custodial outcome, whereas 56% of children held on remand for six weeks or longer received a custodial outcome. This raises the question of whether some children held for short periods were remanded as an unacceptable risk not because of the seriousness of their alleged offending or their prior history but because they did not have access to the necessary support services at the time the decision was made to bail or remand them. This is an especial concern for children remanded outside business hours, when most remand decisions are made and when access to support services is more limited.[31]

The Council noted that in bail decision-making, bail is sometimes refused on the basis of a lack of adequate housing and other supports being available for an accused individual.[32] This practice is particularly concerning in relation to children and young people, as 'each contact with the justice system exacerbates the risk of further contact'.[33]

The Youth Affairs Council Victoria stated in its submission that the 'new complexity of bail applications means that fewer young people are granted bail or are even applying in the first place'. It advocated that bail should 'be the default for children and young people, rather than detention'.[34]

Being held in corrections facilities can be extremely damaging for children and young people. As noted by the Human Rights Law Centre, exposure to these facilities can increase the risk of stigmatisation and the likelihood of experiencing physical and psychological harm. Detention also results in disruptions to family life, development, education and employment.[35] The Youth Junction, a youth services organisation, described the impact of time spent in custody for its clients:

> The periods of time spent in custody had negatively impacted upon their ability to engage in therapeutic interventions on an ongoing basis, and [the] primary focus for a significant proportion was initially on issues of safety such as temporary accommodation. Time in custody also destabilised the stability achieved in the community within their individual circumstances prior to being remanded.[36]

While community safety was a key reason for strengthening the bail system, the Human Rights Law Centre asserted that this outcome had not been achieved following the recent reforms:

> The Victorian community is not safer for the application of reverse onus provisions to children. They instead result in children entering a cycle of imprisonment and

31 Ibid.

32 Ibid.

33 Ibid., p. xi.

34 Sentencing Advisory Council, *Submission 17*, p. 15.

35 Human Rights Law Centre, *Submission 58*, pp. 9–10.

36 The Youth Junction Inc., *Submission 51*, p. 4.

reoffending. Reoffending rates are higher where children have previously been sent to prison, and this escalates the more contact that children have with the system.[37]

The Youth Affairs Council Victoria submitted that time spent on remand contributes to recidivism rates among young people, in light of the criminogenic impacts of contact with the criminal justice system. It stated that 'each additional year a child or young person is kept out of criminal courts is associated with an 18 per cent decrease in the likelihood of reoffending'.[38]

The Youth Junction described in its submission how Victoria is facing a 'significant remand crisis'.[39] It provided information on its Youth, Community and Law Program, which is a pre-sentence program that provides tailored support to young adults between the ages of 18 and 25 who are involved in the criminal justice system. It stated that for the August to December 2020 quarter, there was 'a notable increase in remands to custody' for this cohort. Of its clients during this period, 56% were charged with a bail-related offence (such as committing an indictable offence while on bail or breaching a condition of bail). The Youth Junction attributed the increase in remanded young people to the recent changes to the Bail Act, which upgraded certain bail offences to Schedule 1 offences and resulted in young people being subject to the reverse onus provisions.[40] Similarly, Smart Justice for Young People noted that the treatment of breach of bail offences means that 'matters quickly escalate to far harder bail tests even though breaches are minor or technical in nature and result from young people's disadvantage'.[41]

The Youth Affairs Council Victoria noted that young people 'are less likely to understand and be able to comply with the conditions for bail' when it is granted. It provided findings from its consultations, that young people generally felt that 'bail conditions were arbitrary and poorly explained' and that this is exacerbated by 'the lack of a state-wide bail support program for children and young people which assists them to comply with bail'.[42]

The Committee also received evidence that young people in rural and regional areas of Victoria are even more likely to be remanded. The Youth Affairs Council Victoria explained that in these areas, housing services are more sparse and there are fewer options in terms of diversionary programs.[43]

37 Human Rights Law Centre, *Submission 58*, pp. 9–10.

38 Youth Affairs Council Victoria, *Submission 118*, p. 31.

39 The Youth Junction Inc., *Submission 51*, p. 8.

40 Ibid., p. 4.

41 Smart Justice for Young People, *Submission 88*, p. 3.

42 Youth Affairs Council Victoria, *Submission 118*, p. 16.

43 Ibid., pp. 17–18.

Women

> **I know I was remanded because of bail laws that removed the presumption of bail, and I know that these bail reforms were enacted in a kneejerk reaction to the gross acts of violence perpetrated by men—because the police failed to show that James Gargasoulas was a risk to the community. These law reforms are enacted in the name of community safety, when people like Adrian Bayley and Sean Price rape and murder women while on bail or parole, yet these reforms disproportionately affect women and their children. There are literally hundreds of women who have had their lives ripped apart by tough-on-crime policies that should not target them.**
>
> Amy, public hearing, via Zoom, 21 October 2021, *Transcript of evidence*, p. 5.

In her 2019 research paper on Victoria's changing bail laws, Dr McMahon stated that the 'increase in the remand population is gendered, with higher rates for women'.[44] Other stakeholders to the Inquiry similarly noted this disproportionate impact on women. For example, the Human Rights Law Centre argued that while the 2018 bail reforms were 'intended to target men', they instead primarily impact women experiencing poverty and Aboriginal and Torres Strait Islander women.[45] It stated:

> More 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. These 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.
>
> This results in the injustice of women typically spending short periods in prison on remand and often pleading guilty and receiving a 'time served' sentence. This raises concerns, as identified by the Sentencing Advisory Council, about whether the increasing likelihood of receiving a time served prison sentence might inappropriately encourage some people on remand to plead guilty in the hope of being released earlier than if they proceeded to trial.[46]

RMIT University's Centre for Innovative Justice noted in its submission to the Inquiry that 'the proportion of unsentenced women received into prison is increasing', with approximately 90% of women entering prison in 2019–20 on remand. This is up from 62% in 2009–10.[47] The Centre noted results of a recent study which indicated that women were becoming less likely to apply for bail in light of the difficulty in meeting the relevant tests:

> A recent Victorian study indicates that stringent bail criteria results in many women not applying for bail, particularly if they have no legal representation, or being refused bail when they do. Russell and colleagues found that 72 per cent of a sample of women appearing in the Bail and Remand Court during 2019 had made no application for bail,

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44 Dr Marilyn McMahon, *No Bail, more jail?*, p. 1.

45 Human Rights Law Centre, *Submission 58*, p. 7.

46 Ibid.

47 Centre for Innovative Justice, *Submission 82*, p. 5.

> and that high rates of homelessness and substance addiction amongst women increase the likelihood of being refused bail due to a perceived risk of reoffending.
>
> This has resulted in a growing proportion of women in prison being held on remand … The rise in 'breach bail' charges reflects a component of the reforms which have arguably had the most dramatic effect on women's prison numbers in Victoria. Unlike some states, breaching a condition of bail in Victoria is a criminal offence, even where bail is breached because a person misses their court date or is residing at another address. This means that women with mental ill health and substance dependence who struggle to comply with bail conditions can be subject to the highest legal test for bail – the same threshold that applies to people charged with murder and terrorism offences.
>
> By 2015, half of all unsentenced women in prison were charged with one of these new offences. Overall, there was a 630 per cent increase in the number of women facing breach of order charges, most commonly breach of bail and breach of Family Violence Intervention Order, as the most serious charge between 2012 and 2017.[48]

Carmel Benjamin, who has significant experience working within the criminal justice system, submitted that 'even when a woman's offending is relatively minor, her chance of being granted bail can be impossibly low'. She stated that many women are refused bail on the basis of not having an address or having insecure accommodation, or because they cannot return home due to the risk of family violence.[49] Similarly, Dr Karen Gelb, a consultant criminologist, stated that: 'Repeat, low-level offending such as theft from a shop can fall under these provisions', and that for women, 'this type of offending is often associated with financial need, homelessness and a history of trauma and/or family violence'.[50]

A 2020 report by Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society found that while on remand, women often do not have access to in-prison supports and programs. They also risk losing housing, employment or custody of their children. The report further stated that Aboriginal and Torres Strait Islander women experience significantly higher imprisonment rates than non-Indigenous women, and that in Victoria, they constitute 'the only prisoner cohort with more remandees than sentenced prisoners'.[51]

Other stakeholders also echoed the harmful impacts for women of being incarcerated on remand. For example, Smart Justice for Women told the Committee that time spent in custody on remand can interrupt 'important protective factors and opportunities for recovery and rehabilitation that may address underlying causes for offending behaviours'. This can include the loss of community supports, risk of losing employment, and having children removed from their care.[52]

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48 Ibid., p. 7.

49 Carmel Benjamin, *Submission 164*, p. 3.

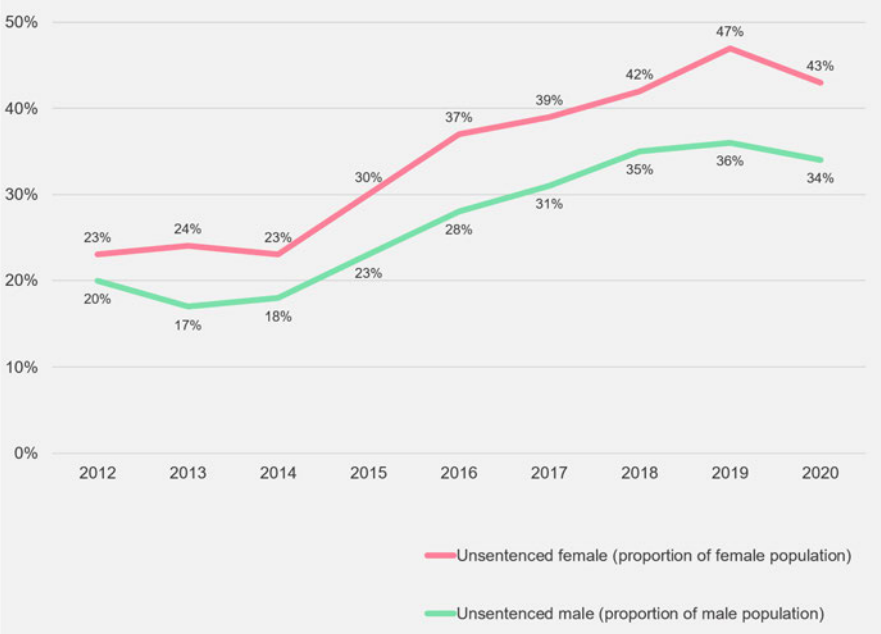
50 Dr Karen Gelb, Director, Karen Gelb Consulting, *Submission 70*, p. 4.

51 Emma Russell, et al., *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria*, Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society, Melbourne, 2020, p. 6.

52 Smart Justice for Women, *Submission 94*, p. 14.

The Centre for Innovative Justice provided a figure comparing the rate at which women and men are held on remand. This figure shows that the proportion of women on remand has been consistently higher than that of men over the period June 2012 to June 2020. The submission notes that this does not reflect more serious offending—rather, women are predominantly charged with less serious offences than men (such as property or low-level drug offences).[53]

Figure 9.2 Total unsentenced male and female prison population, June 2012 to June 2020



Source: Centre for Innovative Justice, RMIT University, *Submission 82*, p. 5.

The Committee is concerned by evidence that Victoria's 2018 bail reforms have increased the incarceration of vulnerable women.

FINDING 37: Women, particularly Aboriginal women and women experiencing poverty, are disproportionately remanded under current bail legislation.

In addition, as discussed in Chapter 5, the Committee received evidence regarding the ongoing misidentification of perpetrators of family violence. This has flow-on impacts in the context of bail, with contraventions of family violence intervention orders included in the list of Schedule 2 offences.[54] Where perpetrators of family violence utilise orders against victims as a form of control or manipulation, this can lead to victims being charged with contraventions and subject to the reverse onus provisions. The Human Rights Law Centre stated that this can lead to victims being 'quickly exposed to escalating bail thresholds'.[55]

53 Centre for Innovative Justice, *Submission 82*, pp. 4–5.

54 *Bail Act 1977* (Vic) sch 2

55 Human Rights Law Centre, *Submission 58*, p. 8.

Aboriginal Victorians

> **The immediate harm caused by detaining an Aboriginal person on remand is significant and far-reaching. Detention separates an individual from their family, community, country and culture, and jeopardises their health, wellbeing and safety.**
>
> Victorian Aboriginal Legal Service, *Submission 139*, p. 60.

Aboriginal Victorians are disproportionately represented among the remand population. In 2020, 44% of all Aboriginal people in prison were on remand—up from 20% in 2010—compared with 35% of the general prison population.[56] Aboriginal and Torres Strait Islander women are further overrepresented, with Corrections Victoria data showing that approximately 90% of this cohort entering prison are unsentenced on reception.[57]

The Human Rights Law Centre stated in its submission that 'current bail laws set up a system that makes it very hard for many Aboriginal and Torres Strait Islander women to succeed', with decision-makers failing to take into account cultural and practical considerations when imposing bail conditions. It noted examples of curfews, which can restrict people from making contact with networks and performing cultural responsibilities.[58] The Centre noted legislative provisions which were introduced to rectify these issues, but asserted that they have largely been unsuccessful to date:

> 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 being detained on remand. Since the introduction of the provision in 2010, the percentage and number of Aboriginal and Torres Strait Islander people – particularly women – on remand has continued to rise. According to the Australian Law Reform Commission, section 3A is not well understood and is underutilised.[59]

FINDING 38: Section 3a of the *Bail Act 1977* (Vic) requires decision makers to take into account any issues arising from an accused person's Aboriginality when determining whether to grant or deny bail. However, this section of the Act is poorly understood and underutilised.

The Victorian Aboriginal Legal Service highlighted that Aboriginal people experience higher rates of housing instability, making it more difficult to access bail. It noted that there is a lack of culturally safe bail support and accommodation for Aboriginal

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56 Corrections Victoria, *Profile of people in prison*, 2020, <https://files.corrections.vic.gov.au/2021-06/Infograpic_Profile_of_people_in_prison2020.pdf> accessed 14 January 2021; Corrections Victoria, *Profile of Aboriginal people in prison*, 2020, <https://files.corrections.vic.gov.au/2021-07/CV%20Prison%20Aboriginal%20Persons%202021%20Jul%20update.pdf> accessed 14 January 2021.

57 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.

58 Human Rights Law Centre, *Submission 58*, p. 9.

59 Ibid.

Victorians. In addition, it submitted that 'Aboriginal people are disproportionately impacted by the criminalisation of bail offences, introduced in 2013, which serve no purpose other than to further criminalise people who are already criminalised.'[60]

CASE STUDY 9.1: Edward's story

Edward is an Aboriginal man in his mid-40s. By 13, Edward was on the streets having escaped a violent family home and had also left school. Edwards's substance use issues with heroin started around this time and he reports being in and out of prisons from the age of 14. Edward spent much of his childhood in as a ward of the state and in youth detention. He was the victim of significant institutional abuse. The majority of Edward's adult life has involved imprisonment for low level offending linked to his drug use issues and homelessness.

Last year, Edward was placed on bail for further offending. He made the decision to break the cycle of use and prison. He began to address a 30-year habit through drug rehabilitation counselling, successfully finishing a voluntary program of rehabilitation and stabilising on opiate replacement therapy. He reconnected with family for the first time in many years and is looking at renting his own house. After nine months, Edward had a minor relapse and was found by police with a small portion of cannabis. Edward was remanded for committing an indictable offence on bail, and all the progress he made has been jeopardised.

Fitzroy Legal Services, *Submission 152*, pp. 51–52.

In its submission, the Victorian Aboriginal Legal Service told the Committee that detaining an Aboriginal person on remand 'separates an individual from their family, community, country and culture, and jeopardises their health, wellbeing and safety', as well as compromising education, employment and housing. In relation to the impacts of remand on parental responsibilities, the Service noted that this significantly impacts Aboriginal women, families and communities.[61]

The Aboriginal Justice Caucus similarly noted the overrepresentation of remanded Aboriginal women, noting that many are charged with 'low level, non-violence offences that do not carry a custodial sentence'. It highlighted that the 'majority of these women are the victim/survivors of family and domestic violence and the experience of incarceration cause immense trauma and distress'.[62]

60 Victorian Aboriginal Legal Service, *Submission 139*, pp. 59–60.

61 Ibid., pp. 60–61.

62 Aboriginal Justice Caucus, *Submission 106*, p. 12.

People with disability

CASE STUDY 9.2: Ari's story

Ari is a man in his mid-30s who arrived in Australia as a refugee in his teens. He has been using drugs since his late teens and has a range of mental health problems connected to his traumatic history, as well as severe pain connected to a bad car accident. Ari was on bail for drug-related offending and was regularly attending counselling and other court-directed supports. He had also recently been diagnosed with a disability and was about to access financial support through the National Disability Insurance Scheme. While on bail, Ari was charged with further minor drug offences and remanded in custody for about 2 weeks. All the progress Ari had made stopped in the two weeks he spent in custody before his Fitzroy Legal Service lawyer could get him bail. It took months for Ari to get back to the place of progress and hope he had been in before he went to prison.

Fitzroy Legal Service, *Submission 152*, p. 15.

Evidence received by the Inquiry also highlighted the particular experiences of the bail system for persons with disability. The Office of the Public Advocate noted the disproportionate impacts of the recent bail reforms on people experiencing disadvantage and persons with disability:

> While the imperative for the amendments concerned the high risk associated with violent offenders on bail, the changes have disproportionately affected women and low-level and non-violent offenders. Given their overrepresentation in the criminal justice system generally, it is likely that people with cognitive disability and mental illness are also overrepresented in this cohort.[63]

As with other cohorts, and as exemplified in Ari's story, time spent on remand can disconnect individuals with disability from their family and community supports and interrupt progress in therapeutic, rehabilitative and other programs.

The Youth Affairs Council Victoria submitted that Victoria's bail system 'fails young people with intellectual and psychosocial disabilities', and that this cohort should not be dealt with through the mainstream bail system where individuals are not able to give an undertaking that they will comply with their bail conditions. It highlighted that there may be language and terminology barriers throughout the legal process, and that terms such as 'legal practitioner' and 'bail' may not be understood. The submission stated that this confusion or complexity could heighten the risk of a young person being remanded:

> Where a disabled young person does not understand a term or a process that they are involved in (for example, a question during a police interview) they are susceptible to suggestive questions and could give incorrect or false information, increasing their time

63 Office of the Public Advocate, *Submission 153*, p. 21.

> spent on remand. Supports must be provided to disabled young people so that they are afforded their right to understand the process they are involved in.[64]

In addition, the Youth Affairs Council Victoria highlighted how persons with both diagnosed and undiagnosed intellectual disabilities or mental health issues may be remanded due to limited available alternative options. It provided:

> The Law Institute of Victoria considers that disabled young people are "set up to fail". This is evident where a young person with complex intellectual disabilities is refused bail because the decision maker believes the young person does not understand the conditions of bail. This choice is also made due to a lack of resources such as assisted living services. Where a young person with complex intellectual disabilities is best supported in assisted living, all effort should be focused on accessing these services. Instead, bail is often refused simply because it is the 'easier' solution, rather than using resources to locate and transition the young person to those services.[65]

The Royal Victorian Association of Honorary Justices submitted that there is limited support for people with disability during after-hours bail processes before a bail justice, which can often lead to an accused person being remanded. The Association stated:

> Apart from a possible assessment by Victoria Police Forensic Medical Officer concerning an accused's ability to participate in an interview, which is not always conveyed to the Bail Justice, there are virtually no after-hours services available to assist a Bail Justice with risk mitigation strategies which might lead to bail instead of remand.
>
> Independent Third Persons (ITPs) ensure that adults and young people with disability are not disadvantaged during police interviews but the ITP is not required by law to attend the bail hearing. Unfortunately there are no placements or other support services available to support accused with cognitive or mental health concerns after-hours.[66]

9.2.3 Thresholds for granting bail

> **I want the reality of the impact of the bail law reforms to be known. These laws, police and prisons are not keeping us safe. They are destroying women's lives and tearing families apart.**
>
> Amy, public hearing, via Zoom, 21 October 2021, *Transcript of evidence*, p. 5.

As outlined in the above sections and in Chapter 2, there has been a large increase in recent years of people being incarcerated on remand. This has had a significant impact on those individuals—particularly for overrepresented cohorts—as well as implications for the resourcing and management of the correctional system more broadly. Stakeholders to the Inquiry raised strong concerns regarding the overly punitive effects of Victoria's current bail system and the continuing rise in the rate of people remanded in custody.

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64 Youth Affairs Council Victoria, *Submission 118*, p. 18.

65 Ibid.

66 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 4.

At a public hearing, Mel Walker, Co-Chair of the Criminal Law Committee at the Law Institute of Victoria, told the Committee that:

> I think the elephant in the room really is that the changes in the bail laws as a result of Bourke Street in 2017 and 2018 are the single greatest contributor to the increase in our prison population at the moment.[67]

Mel Walker noted the importance of balancing protection of the community with the presumption of innocence while a person awaits their case being heard in court, and indicated that remanding in custody may in fact increase the risk of reoffending:

> How best to balance the protection of the community and the presumption of innocence really is the question. And it must be acknowledged that pre-trial detention increases the severity of the circumstances which underlie factors which lead to reoffending, such as a person may lose their income, they may lose their home, there is a breakdown of relationships and family support systems, there is a destabilising effect from somebody going into custody. It creates a toxic recipe for criminalising those who are in poverty, and the refusal of bail increases the criminogenic causes of offending in the first place. The lack of or the inability to provide proper and properly funded bail programs to reduce reoffending is crucial at the moment.[68]

Similarly, the Justice Reform Initiative argued in its submission that while the 'intent of tightening bail laws is to keep the community safe, the criminogenic impact of imprisonment itself must be factored in to any analysis of their utility', and that any experience of imprisonment increases the likelihood of a person reoffending and being reimprisoned. It stated that the 'more people we are sending to prison the less safe we are making the community'.[69]

This evidence reflects commentary in Dr McMahon's research regarding the impacts of detaining people pre-trial, including that it:

- challenges the foundational legal right to liberty and the presumption of innocence; [and]
- imposes significant adverse consequences on those detained: possible loss of employment; separation from families; and a reduced ability to prepare for legal proceedings and exposure to the dangers of a prison environment…[70]

Dr McMahon further found that 'many people who are detained in prison prior to their trial will 'subsequently be found not guilty or, if convicted, will be given a non-custodial sentence'. This means that those individuals will have been exposed to the damaging impacts and disadvantages of incarceration despite not receiving a sentence requiring their detention.[71]

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67 Mel Walker, Co-Chair of Criminal Law Committee, Law Institute of Victoria public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 12.

68 Ibid.

69 Justice Reform Initiative, *Submission 103*, p. 6.

70 Dr Marilyn McMahon, *No Bail, more jail?*, p. 7.

71 Ibid.

Dr Karen Gelb submitted that recent reforms to the bail system were aimed at preventing offending while on bail. She stated:

> Legislative and operational changes to bail laws in recent decades have led to a shift away from a primary concern with ensuring that the accused does not abscond to a focus on preventing offending while on bail. Views on the purposes and principles underlying the bail system have shifted in line with a preoccupation with minimising risk. The changes to bail laws also suggest governments have become less inclined to trust individuals to make difficult bail decisions – whether they be police decision-makers, bail justices, magistrates or judges. In the absence of trust, legislative changes have created increasingly stringent bail regimes. Under such regimes, long-held principles (such as the presumption of innocence) have fallen by the wayside or been countermanded by other imperatives.[72]

Dr McMahon's research found that while there is limited data regarding the proportion of people that commit offences while on bail in Victoria, interjurisdictional studies indicate that it usually constitutes a small proportion of individuals. Dr McMahon asserted that this challenges assumptions about offending while on bail, including that 'the focus on a small number of heinous crimes committed by persons on bail has led to a disregard of the large number of persons on bail who do not offend'. Further, 'most offences committed by persons on bail are non-violent offences'.[73]

While this does not negate the impact of serious offences committed by persons while on bail, Dr McMahon asserts that it shows that risk assessment should more specifically target the small cohort who do commit further serious offences, and that the current reverse onus provisions overestimate the potential level of risk.[74]

This issue was similarly raised in evidence to the Inquiry. At a public hearing, Emeritus Professor Arie Freiberg AM, Chair of the Sentencing Advisory Council, highlighted how the conception of risk in relation to bail has become one determined by preventing serious criminal offences. This is despite potentially causing harm to a much greater number of people. Professor Freiberg stated:

> This is the problem about the presumption against bail and the cultural factors. We have become a very risk-averse society, and we have been scarred by our experiences that we have had in the past … of people who commit offences on bail, people who commit offences on parole. That is seared into our conscience, because the argument … is if they were in custody, they would not be committing those offences. The problem is that we may get some of those wrong, but keeping a lot of people in, who would not otherwise offend, for longer than they need to be is similarly a problem. It is not one that appears in the newspapers. We would rather not take the risk. 'When in doubt, don't let them out'.[75]

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72 Dr Karen Gelb, *Submission 70*, p. 3.

73 Dr Marilyn McMahon, *No Bail, more jail?*, p. 21.

74 Ibid.

75 Sentencing Advisory Council transcript, pp. 26–27.

In a submission to the Inquiry, Dr Karen Gelb argued that the bail process has shifted to an approach that casts early judgment on an accused person:

> The bail process is not intended to assess whether the accused is guilty of committing a crime. Rather, it is an exercise in the management of risk – risk that the accused will fail to appear in court, or risk that the accused will reoffend. This purpose has been hijacked by politicians more afraid of the risk of public opinion. The result is a bail process that is accusation, judgment and punishment all rolled into one.[76]

Professor Bronwyn Naylor, a Professor of Law at RMIT University, highlighted how this new approach has not been shown to contribute to community safety outcomes. Professor Naylor submitted that it is 'not clear' that the bail reforms have improved community safety; however, they have 'resulted in over one third of the prison population now comprising unsentenced people and … caused significant hardship'.[77]

Further, evidence suggests that persons remanded in custody are more likely to subsequently be sentenced to a term of imprisonment—not necessarily because of the seriousness or nature of their offending. In its 2020 report into time served prison sentences, the Sentencing Advisory Council concluded that the growing remand population is 'having an indirect effect on sentencing outcomes'. It found that individuals who might have otherwise received a non-custodial sentence may instead receive a time served prison sentence, as they had 'in effect, already been punished for their offending'.[78]

As outlined in the above sections, the 2017–18 reforms have had disproportionate impacts for certain groups. Victoria Legal Aid stated that in its experience, the reforms have largely impacted people experiencing disadvantage:

> Our practice experience is that the reforms have had a disproportionate impact on more disadvantaged groups and people charged with lower level offending for which they are unlikely to receive a sentence of imprisonment … The starkest impact can be seen in the number of Aboriginal women on remand, which has increased five-fold over the past 10 years.[79]

The Human Rights Law Centre similarly highlighted how these laws predominantly affect those in difficult or disadvantaged circumstances, compounding their ability to address the causes of offending or seek therapeutic or other forms of support. It stated:

> 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. These are likely to be offences that are connected to housing insecurity and economic instability. The current bail system makes it very difficult for

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76 Dr Karen Gelb, *Submission 70*, p. 4.

77 Professor Bronwyn Naylor, *Submission 57*, p. 3.

78 Sentencing Advisory Council, *Time served prison sentences in Victoria*, Sentencing Advisory Council, Melbourne, 2020, pp. 5–10.

79 Victoria Legal Aid, *Submission 159*, p. 8.

people in these circumstances to be granted bail and so they are needlessly detained on remand, even though they are unlikely to ever receive a prison sentence if they are found guilty of the underlying offences.

When on remand, people in prison are often unable to access targeted programs that could address the underlying issues that may have contributed to their offending.

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.[80]

Stakeholders broadly advocated for wide-ranging reform of Victoria's bail system. The main recommendations for amendment of the Bail Act included:

- repeal of the reverse onus provisions, in particular, the 'show compelling reason' and 'exceptional circumstances' provisions (ss 4AA, 4A, 4C, 4D and Schedules 1 and 2)[81]
- introduction of a presumption in favour of bail for all offences except in circumstances where the prosecution can prove that there is a specific and immediate risk to the physical safety of another person or that they pose a demonstrable flight risk[82]
- inclusion of an explicit provision that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment[83]
- repeal of certain offences in conjunction with bail, including committing an indictable offence while on bail (s 30B), breaching bail conditions (s 30A) and failure to answer bail (s 30)[84]
- removal of any 'double uplift' provisions that propel persons accused of low-level offending into the highest threshold for bail.[85]

Various stakeholders asserted that if the reverse onus provisions were repealed, these could be replaced with a single test of 'unacceptable risk', either to the safety of another person or in terms of flight risk.[86]

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80 Human Rights Law Centre, *Submission 58*, pp. 7–8.

81 See, for example: Victorian Aboriginal Legal Service, *Submission 139*, p. 12; Human Rights Law Centre, *Submission 58*, p. 5; Smart Justice for Women, *Submission 94*, p. 14; Professor Bronwyn Naylor, *Submission 57*, p. 4; Centre for Innovative Justice, *Submission 82*, p. 9; WEstjustice, *Submission 141*, p. 8; ibid., p. 16; Smart Justice for Young People, *Submission 88*, p. 16; Office of the Public Advocate, *Submission 153*, p. 5; Fitzroy Legal Service, *Submission 152*, p. 8.

82 See, for example: Victorian Aboriginal Legal Service, *Submission 139*, p. 12; Human Rights Law Centre, *Submission 58*, p. 5; Smart Justice for Women, *Submission 94*, p. 14; Professor Bronwyn Naylor, *Submission 57*, p. 4; Centre for Innovative Justice, *Submission 82*, p. 9; Youth Affairs Council Victoria, *Submission 118*, p. 16; Smart Justice for Young People, *Submission 88*, p. 16; WEstjustice, *Submission 141*, p. 8; Office of the Public Advocate, *Submission 153*, p. 5.

83 See, for example: Victorian Aboriginal Legal Service, *Submission 139*, p. 12; Human Rights Law Centre, *Submission 58*, p. 5; Smart Justice for Women, *Submission 94*, p. 14; Centre for Innovative Justice, *Submission 82*, p. 9; WEstjustice, *Submission 141*, p. 8; Fitzroy Legal Service, *Submission 152*, p. 8.

84 See, for example: Victorian Aboriginal Legal Service, *Submission 139*, p. 13; Human Rights Law Centre, *Submission 58*, p. 5; Youth Affairs Council Victoria, *Submission 118*, p. 16; Smart Justice for Young People, *Submission 88*, p. 16; WEstjustice, *Submission 141*, p. 8; Office of the Public Advocate, *Submission 153*, p. 5; Fitzroy Legal Service, *Submission 152*, p. 8.

85 Smart Justice for Women, S94, p. 14; Centre for Innovative Justice, *Submission 82*, p. 9.

86 See, for example: Smart Justice for Women, *Submission 94*, p. 14; Professor Bronwyn Naylor, *Submission 57*, p. 4; Centre for Innovative Justice, *Submission 82*, p. 9; WEstjustice, *Submission 141*, p. 5; The Justice Map, *Submission 157*, p. 6.

In underscoring the need for reform of the Bail Act, the Human Rights Law Centre asserted that the State's bail system has 'become increasingly punitive and … arguably the most onerous in Australia'. This is primarily attributed to the reverse onus provisions under the Bail Act and the broad range of offences caught by these provisions.[87]

The Centre for Innovative Justice advocated for referral of the operation of the bail laws to the Victorian Law Reform Commission for review, suggesting that such a review could examine recent reform in other jurisdictions. It cited the example of New York City's focus on curtailing pre-trial detention as one that should be considered:

> The review could involve a more substantial rethink of Victoria's approach to bail, including consideration of recent changes to bail laws and practice implemented in New York City (NYC) to curtail pre-trial detention. Based on a presumption of release in all cases, the NYC laws extend earlier reforms in that jurisdiction by imposing a ban on pre-trial detention for the majority of people charged with a misdemeanour or non-violent felony. With twin imperatives of halving the city's prison population within six years of the 2020 changes while maintaining public safety, the reforms were based on evidence relating to flight risk; the likelihood of failure to attend court; the impact of refusal of bail on plea decisions; inconsistency in judge-made bail decisions; and the criminogenic effect of even short periods of detention.[88]

The Royal Victorian Association of Honorary Justices asserted that it 'is unreasonable' to require 'at risk' members of the community to be able to demonstrate exceptional circumstances or compelling reasons in accordance with the reverse onus provisions. It stated that: 'At 2am at a Police Station, without legal representation or in some cases no other supports, an accused in these circumstances is at a significant disadvantage.'[89]

The Centre for Forensic Behavioural Science agreed that remand should be reserved only for persons presenting an unacceptable risk of committing a serious violent or sexual offence, and suggested that another pathway forward may be to investigate potential risk assessment technologies for assessing bail eligibility.[90]

Stakeholders also highlighted the importance of increasing access to therapeutic and rehabilitative options for persons on bail, to reduce any potential risk of reoffending.[91] Therapeutic justice is discussed further in Chapter 10.

Finally, some organisations argued that policy and legislative reform should always be evidence-based and not responsive to particular high-profile events or incidents. For example, the Centre for Forensic Behavioural Science provided:

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87 Centre for Innovative Justice, *Submission 82*, p. 7.

88 Ibid., pp. 9–10.

89 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 2.

90 Centre for Forensic Behavioural Science, *Submission 36*, p. 8.

91 See, for example, Australian Psychological Society, *Submission 90*, p. 5.

> High profile criminal incidents can also lead to kneejerk reactions and solutions which deviate from the evidence base. Policy should always be informed by rigorous evidence and not gut-feeling, emotion or anecdote.[92]

The Committee is concerned that the current operation of Victoria's bail system has led to an increasing remand and prison population, with serious negative impacts for those individuals awaiting their charges being heard in court. Importantly, the Committee has not received evidence to demonstrate that the changes to the bail system implemented through recent reform of the Bail Act have led to greater community safety. Further, evidence suggests that individuals remanded in custody are more likely to be later sentenced to a term of imprisonment, often as 'time served', than they would have if they had been granted bail.

The operation of Victoria's bail system should ensure that an appropriate balance is struck between ensuring community safety and maintaining the presumption of innocence. However, on the basis of the evidence received by this Inquiry, the current system does not appear to appropriately or fairly strike this balance.

In addition, the Committee notes that Australia has voluntarily accepted obligations under the International Covenant on Civil and Political Rights, which include that accused persons should be separated from people convicted of an offence in incarceration facilities and receive separate treatment in accordance with their status as not yet convicted.[93] It is not clear in what ways this takes place within Victorian prisons.

The Committee notes that the Government has indicated that it will not seek to amend bail laws ahead of the 2022 Victorian election.[94] However, in light of the evidence received throughout this Inquiry, the Committee considers that urgent reform of the Bail Act is required. This will allow individuals to retain important connections to family, education, employment and housing, and explore therapeutic programs and supports, while awaiting their charges being heard in court. It will prevent further harm resulting from incarceration on individuals charged with an offence and reduce existing pressures on the Victorian prison system. With regard to the risk assessment process for bail, reform of the tests can continue to ensure community safety where a significant risk is presented while fairly balancing the presumption of innocence. The Committee urges the Victorian Government to consider these issues as a matter of priority.

FINDING 39: Victoria's bail system must balance the maintenance of community safety with the presumption of innocence for people accused of an offence. Victoria's criminal justice system does not currently appropriately or fairly balance these objectives.

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92 Centre for Forensic Behavioural Science, *Submission 36*, p. 9.

93 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10(2)(a).

94 Royce Millar and Chris Vedelago, 'Labor shelves plans to revamp justice laws until after state election', *The Age*, 15 November 2021, <https://www.theage.com.au/national/victoria/labor-shelves-plans-to-revamp-justice-laws-until-after-state-election-20211115-p598xn.html> accessed 14 January 2022.

RECOMMENDATION 52: That the Victorian Government review the operation of the *Bail Act 1977 (Vic),* drawing on previous reviews by the Victorian Law Reform Commission and former Supreme Court judge Paul Coghlan, with a view to amendments to simplify the bail tests, make presumptions against bail more targeted to serious offending and serious risk, and ensure that bail decision makers have discretion to consider a person's circumstances when deciding whether to grant bail. This review should ensure that the views of victims and law enforcement are taken into account.

9.2.4 Applications for bail

There are a number of ways in which a person's application for bail can be heard. As noted, if bail is not granted at a police station or by a bail justice, an individual must be brought before a court within a reasonable period of time. The Magistrates' Court of Victoria in Melbourne operates a Bail and Remand Court which is open from 10:00 am to 9:00 pm, seven days per week, including on public holidays.[95] Other courts have more restricted hours, including being closed on weekends.

Outside of the opening hours of a court, there are two mechanisms through which bail may be granted:

- for children, Aboriginal persons or vulnerable adults, a bail justice can be requested to attend a police station to undertake a bail hearing[96]
- for all other persons, a police officer may choose to grant or refuse bail. If bail is refused, the person may be remanded in custody to appear before a court within 48 hours. If it is not possible for a person to be brought within a court in that period, the person must instead be brought before a bail justice.[97]

In addition, the Central After Hours and Bail Placement Service provides a state-wide voluntary support service to young people between the ages of 10 and 18 who are charged with an offence after hours. It provides a single point of contact for police where either the police or a bail justice is considering remanding the young person in custody outside business hours. A worker from the Service can assess the suitability of a young person for bail placement (accommodation services) and provide them support and advice, or referral to other support services. This could include on the nature of the proceedings, their rights and responsibilities and expectations in relation to any bail placement. In metropolitan areas, a worker from the Service will attend a police station in person, and in rural areas a phone assessment will take place where a young person consents. The Central After Hours and Bail Placement Service is available after business hours up to 3.00 am on weekdays, and from 9.30 am to 3.00 am on weekends and public holidays.[98]

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95 Magistrates' Court of Victoria, *Bail and custody*.

96 *Bail Act 1977* (Vic) s 10(6)(c)

97 Ibid. s 10AA

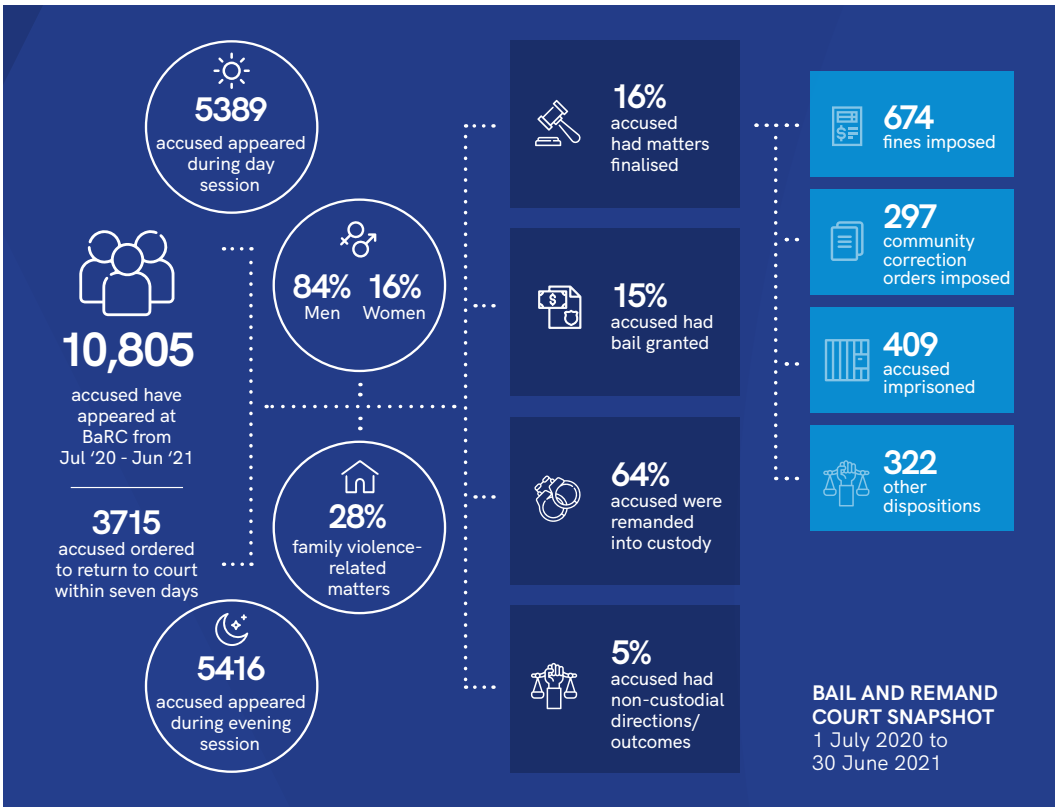
98 Department of Justice and Community Safety, *Central After Hours Assessment and Bail Placement Service (CAHABPS)*, <https://www.justice.vic.gov.au/justice-system/youth-justice/central-after-hours-assessment-and-bail-placement-service-cahabps> accessed 11 January 2022.

These mechanisms are discussed in the following sections.

Bail and Remand Court

Bail and Remand Court was established in 2018–19, following a merging of the Night Court (created in the aftermath of the Bourke Street incident) with the Weekend Bail and Remand Court.[99] It hears a significant number of bail matters, and in 2020–21 conducted bail hearings for 10,805 accused persons. The Court's operations during 2020–21 are outlined in Figure 9.3.

Figure 9.3 Snapshot of the Bail and Remand Court's work, 1 July 2020 to 30 June 2021



Source: Magistrates' Court of Victoria, *Annual Report 2020–2021*, Melbourne, 2021, p. 22.

In its submission to the Inquiry, the Royal Victorian Association of Honorary Justices—the peak body representing Victorian bail justices—welcomed the establishment of the Bail and Remand Court but noted limitations in terms of its hours of operation:

> The establishment of the Bail and Remand Court (BARC) is seen as a progressive improvement to the system. However, the apparent inability or reluctance of the BARC to hear Children's Court matters, on weekends or public holiday weekends needs to be addressed. This is especially important over long weekends and extended holiday periods (Easter and Christmas) where a child remanded on Easter Thursday is not able

99 Victorian Government, *Submission 93*, p. 101.

> to appear before a Children's Court until the following Tuesday. Our view is that the role of BARC would be enhanced if it were prepared and required to hear Children's Court matters on weekends and public holidays.[100]

Similarly, the Youth Affairs Council Victoria recommended the expansion of the Bail and Remand Court's hours, as it considered that bail justices are more risk-averse than courts and more likely to remand a young person:

> One mechanism which may also be contributing to the difficulty for young people of obtaining bail is the use of bail justices to grant after-hours bail. Eighty per cent of remanded children are admitted outside court hours, mostly by bail justice volunteers who may not be legally trained and tend to be more risk-averse than courts themselves. The bail justice system may improve access to bail after court hours for young people, but by comparison the Bail and Remand Court of the Magistrates' Court operates until 9:00 p.m. seven days a week. In the absence of bail reform, an expansion of court hours for young people will improve bail outcomes.[101]

The Committee acknowledges the important work undertaken by the Bail and Remand Court since its establishment, and hopes that the Magistrates' Court will continue to seek ways to expand its hours of operation in order to provide timely support for accused persons.

FINDING 40: The Bail and Remand Court, operating within the Magistrates' Court of Victoria, provides an important bail and remand hearing process for accused persons. An extension of court hours would enable it to provide timely support to individuals charged with an offence, and in particular, for children and other vulnerable cohorts.

RECOMMENDATION 53: That the Magistrates' Court of Victoria consider further extension of court hours to enable it to conduct timely and responsive bail hearings, and in particular, for children and other vulnerable cohorts.

Police remand

As noted, police have the authority to remand alleged offenders in custody, other than children, Aboriginal and Torres Strait Islanders and persons with mental health or cognitive difficulties. However, they must be brought before a court within 48 hours, or, if that is not practicable, before a bail justice as soon as possible.[102]

These remand powers were introduced in 2017 as part of broader reforms to the Bail Act. Kevin Mackin, Secretary of the Royal Victorian Association of Honorary Justices, asserted that this was a backwards step for oversight of bail processes:

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100 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 3.

101 Youth Affairs Council Victoria, *Submission 118*, p. 15.

102 *Bail Act 1977* (Vic) s 10AA.

> prior to the introduction of changes to the Bail Act in 2017 everybody in Victoria that was accused of a serious crime had the opportunity for an independent review of the police decision before their liberty was taken away. We strongly believe that removing this oversight of after-hours remand decisions by police was a retrograde step for justice in Victoria.[103]

Other stakeholders to the Inquiry also raised concerns regarding police powers to remand individuals. Smart Justice for Women noted the discretion afforded to police in deciding whether to grant or refuse bail, and the lack of transparency in these decisions. It advocated for greater transparency and independent oversight of police decision-making, including in relation to:

- the decision to initiate charges by way of bail rather than summons;
- the decision to not grant bail from the police station;
- considerations of an accused person's vulnerabilities as defined in the Bail Act and the consideration of section 3A; and
- bail conditions that are attached to police bail.[104]

Smart Justice for Women recommended that police be required to 'always provide reasons when refusing to grant bail' in order to improve transparency and accountability.[105]

The Victorian Aboriginal Legal Service similarly highlighted the need for effective oversight of police decision-making with regard to bail. It raised concerns around police inappropriately questioning or disputing a person's Aboriginality, which has ramifications for their treatment under the Bail Act. It also raised concerns around police imposing 'culturally inappropriate bail conditions', such as:

> non-association conditions which create challenges in community, especially if the requirement is for non-association with a relative; regular reporting to police stations, which can further stigmatise an individual and antagonise the relationship with police; conditions not to attend a specific place (e.g. a shopping centre) which is challenging in rural communities where attending that location may be the primary activity.[106]

The Legal Service recommended that:

- the Victorian Government establish a mechanism for oversight of police decision-making on bail matters
- Victoria Police provide mandatory guidance and oversight for police officers to ensure understanding of, and compliance with, the requirements of the Bail Act.[107]

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103 Kevin Mackin, Secretary, Royal Victorian Association of Honorary Justices, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 42.

104 Smart Justice for Women, *Submission 94*, p. 31.

105 Ibid., p. 11.

106 Victorian Aboriginal Legal Service, *Submission 139*, p. 67.

107 Ibid.

In its submission to the Inquiry, the Royal Victorian Association of Honorary Justices recommended that Victoria Police be required to record bail and remand considerations, noting that they do not conduct formal hearings.[108]

In a 2007 report, *Review of Bail Act*, the Victorian Law Reform Commission recommended that:

- written reasons for refusing or granting bail should be provided to the accused and prosecution
- victims of crimes against the person should be notified about bail hearing outcomes as soon as possible
- bail decision-makers should consider:
  - a victim of crime's safety and welfare
  - the cultural needs of an accused, particularly if they are Aboriginal or Torres Strait Islander or from a culturally and linguistically diverse community.

At a public hearing, Shane Patton APM, Chief Commissioner of Victoria Police, told the Committee that police officers use remand as a last resort:

> We do not have those statistics about who we remand, but I think importantly, from my perspective, it is certainly appropriate when we have those high-end offenders—those people who … are committing carjacking, who are committing home invasions, who are on recidivist rampages, for lack of a better word—we remand them. All in all, with the others we are very much focused on diversion, we are very much focused on not remanding and we are very much focused on trying to even give cautions where we can … We bail literally thousands and thousands of people from the police station. It is done regularly. Remand is pretty much a last resort to us, when it is a risk to the community, when there is a risk to public safety or where they are on multiple counts of bail and because, under the Bail Act, it puts them into … a breach of bail.[109]

The Committee notes that police aim to remand a person in custody only as a last resort. However, it considers that accountability and transparency are key tenets of the criminal justice system, including in relation to police decision-making on bail matters.

FINDING 41: Victoria Police can exercise discretion in deciding whether to grant bail, and there are limited mechanisms for oversight of these decisions. Stakeholders believed increased oversight over police decisions to grant or deny bail would ensure there is effective transparency and accountability.

RECOMMENDATION 54: That the Victorian Government investigate potential mechanisms for independent oversight of police decision-making with regard to bail.

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108 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 7.

109 Chief Commissioner Shane Patton, Victoria Police, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 30.

RECOMMENDATION 55: That Victoria Police consider implementing measures to improve transparency and accountability with regard to bail decision-making. This should include consideration of the introduction of a requirement to record reasons for any refusal of bail, and for this to be provided to an accused person.

Bail justices

A bail justice must hear and determine any application made for bail, or variations regarding the amount or conditions of bail. If they remand a person in custody, that person will appear before a court within two working days.[110] However, there are certain circumstances where a court must undertake the bail hearing, including where terrorism offences are involved.[111] Hearings involving a child must have a parent, guardian or independent person present.[112]

The Royal Victorian Association of Honorary Justices emphasised the importance of the role of bail justices within Victoria's bail system:

> Our position is that independent, community-based bail/remand decision-making by peers is a very appropriate model for all bail/remand decisions and provides an important and incredibly necessary oversight of Police powers before anyone's right to freedom is removed, even for a night or, in some regional areas and children's cases, for 4 or 5 days and nights. Such a model should engender community confidence in the justice system and ensure procedural fairness for anyone accused of a criminal offence.[113]

However, the Association asserted that the operation of the bail justice model 'has been modified, brutalised, mismanaged, under-resourced and poorly supported for many years'. It outlined a number of issues facing after hours bail processes:

- Bail Justices are far more likely to remand than they need to be
- The lack of support services and infrastructure after hours severely limits bail options
- The move towards remote hearings will only exacerbate the problem
- The personal risks on a Bail Justice tend to drive remand decisions rather than bail.[114]

At a public hearing, Kevin Mackin from the Royal Victorian Association of Honorary Justices outlined the particular challenges of after-hours bail processes and the risk assessment that takes place in these circumstances:

> Bail justices see these people at their absolute worst. They may be under the influence of drugs or alcohol. They may be in a state of mental distress. Not often but often

110 *Bail Act 1977* (Vic) s 10A(2), (6).

111 Ibid., ss 13, 13AA and 13A.

112 Ibid., s 10A(3).

113 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 2.

114 Ibid.

> enough they are raging at the world, yelling at anybody who approaches them. Sometimes they are so dangerous they need to be kept in the cell, and you are trying to talk to them through a little flap in a big steel door. Some of our hearings are done at hospitals and other facilities. In many, many cases it is almost impossible to have a sensible and reasonable discussion with them, let alone give them the opportunity to make a compelling case for bail.
>
> Other times, though, you see someone who has just messed up. They have done something stupid, perhaps something really stupid. Sometimes something in their history or some other action that they have done in the past puts them in a situation where they need to show exceptional circumstances to get bail. So when we make these sorts of risk assessments in these cases, bail justices need to find a way to mitigate the risks, maybe finding someone to commit a person with cognitive challenges to come to court on a particular day or finding alternative accommodation for a couple of days over the weekend or finding somebody in the community to take a First Nations child under their wing. That can be really, really challenging at 10 or 11 o'clock at night or 2 or 3 in the morning, because those resources just do not exist.[115]

A number of stakeholders to the Inquiry commented on the resourcing challenges facing bail justices, including the need for recruitment of additional volunteers. The Royal Victorian Association of Honorary Justices noted that the number of bail justices had nearly halved since the 2017 Bourke Street tragedy (in this case, a bail justice had granted James Gargasoulas bail prior to the incidents in Melbourne's CBD). It stated that approximately 120 bail justices now provide this service across Victoria, but estimate that around 500 are needed.[116]

These resourcing issues mean that bail justices are required to travel further, and more frequently, to attend a hearing:

> Consequently, as there are so few Bail Justices, those remaining are travelling huge distances to meet the demand for their services across the State. It is not unusual for a country Bail Justice to drive 100km in the middle of the night, without compensation even for mileage, to conduct a hearing and then drive back 100km to home. In the metropolitan area, Bail Justices often travel from Dandenong to Lilydale or from Footscray to Geelong. This leads to some lengthy delays for both Victoria Police and for the accused person before a hearing can even take place.[117]

The Victorian Aboriginal Legal Service stated in its submission that the Government 'must employ more bail justices, particularly in regional and rural areas' in order to 'ensure that individuals are not remanded unnecessarily because a bail justice is not available'. It noted that a lack of bail justices in regional areas is an ongoing issue, and where one is not available to attend a police station to conduct a bail hearing, an accused person must either make their application in an unfamiliar location or be remanded in custody until they can appear before a court.[118] Due to these issues, the

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115 Kevin Mackin, *Transcript of evidence*, p. 43; ibid.

116 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 3.

117 Ibid.

118 Victorian Aboriginal Legal Service, *Submission 139*, p. 64.

Legal Service indicated that the bail justice system is not fulfilling its goal of reducing wait times for accused persons to appear before a court:

> In theory, they operate as a mechanism to facilitate bail hearings without having to wait for the next court sitting date, thereby reducing short-term remand. In VALS' experience however, there are a number of challenges, including a significant shortage of bail justices, as well as a lack of diversity and cultural awareness amongst bail justices. Additionally, since the Bourke Street incident, VALS has seen less willingness on the part of bail justices to grant bail.[119]

The Victorian Association of Honorary Justices submitted that while funding was allocated in the 2020–21 State Budget for the recruitment of an additional 75 bail justices, this would 'not even replace those lost since 2017 and falls well short of providing a comprehensive solution'.[120]

During the COVID-19 pandemic, remote bail hearings with bail justices took place in accordance with the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic). While the trial of remote hearings enabled more flexible proceedings and reduced logistical constraints on bail justices (such as travel times), the Committee received evidence that these did not necessarily improve outcomes for accused persons.

The Royal Victorian Association of Honorary Justices noted that while remote hearings had been seen by the Victorian Government as 'a terrific solution to the problem of not having enough Bail Justices', in-person hearings remain the preferred option where possible as they provide for 'better justice outcomes'.[121] At a public hearing, Kevin Mackin stated:

> We recognise that any time spent in jail waiting around for a bail justice to attend to have a fair hearing has got to be kept to an absolute minimum, but we strongly believe that the fairest and best hearings, especially for this cohort of at-risk people [children, Aboriginal and Torres Strait Islanders and people with mental health or cognitive issues], are done in person and that remote hearings should be kept as a last resort and only used as a backup if there is no way to get an in-person hearing done.[122]

In addition, the Association stated that the 'collective wisdom' of bail justices suggests that remote hearings will 'undoubtedly and unintentionally lead to an increase in remand for those most at risk in our community'.[123] Kevin Mackin provided an example of the potential difference in outcome:

> For example, I live in South Gippsland. I do a lot of hearings towards Morwell, Traralgon and Sale. That is an hour drive for me to go there. I will more than happily get in the car and do that if there is an opportunity for me to release a child on bail—more than happy to do that. I do that at my own expense, I do that in my own time and I do that at 2 or 3

119 Ibid.

120 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 3.

121 Ibid., p. 5.

122 Kevin Mackin, *Transcript of evidence*, p. 43.

123 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 6.

> in the morning, through the rain, hail and sleet, over the mountains. That is fine; happy to do it. If that child is communicative and we could have that discussion face to face on the computer and I could get a sensible interaction with them, it might be a quicker, faster result. More often than not, though, I am dealing with a child that has already been held by police for a number of hours. They are stressed, they are tired, they have had enough. I tried to do a video hearing with a young girl—she was 14—huddled up in the corner of a concrete cell with a blanket over the top of her head. If you are trying to do that by video, it is impossible. If you are face to face, you can move around and get in her line of sight and start to try and break down the communication barrier and develop some rapport and some discussion so you can see where this kid is really coming from, not just get grunts from a bundle of blankets. In that particular case I said, 'No, this is not working. I'm getting in the car. I'll be there in about 45 minutes', and we did it in person. I was able to break down that barrier and have that discussion. So I think that is a better solution. My worry is that people will think, 'We don't have to have 500 bail justices. We can get away with 100 or 200 and we'll do the rest by video'. That would be a very, very poor outcome.[124]

Other stakeholders agreed that bail hearings should be in person where possible. The Victorian Aboriginal Legal Service submitted that in-person hearings 'should be the default position, with remote bail justice hearings only used in strictly limited circumstances'. The Service further said that remote hearings should be 'strictly regulated by a clear, legally enforceable, and reportable procedure'.[125] It advocated for an increase in the number of bail justices to provide for in-person hearings as much as possible:

> The decision about whether or not to grant bail is one of the most serious decisions taken by the state, as it is fundamentally a decision about the right to liberty. As set out above, being detained on remand (rather than being released on bail) has clear consequences for the outcome of the criminal process, including in relation to the sentence. Accordingly, a Practice Direction from the Magistrates Court provides that all first remand hearings should be in-person, unless the individual has access to a lawyer. The ability to properly assess and triage a person, likely at their most vulnerable, is best assisted by physically engaging with the individual.
>
> We are concerned that the COVID-19 pandemic is being used as a reason to bring in permanent changes. Whilst we recognise that the shortage of bail justices can lead to someone being remanded for longer than necessary, we do not believe that remote bail justice hearings are an appropriate solution. As has been recommended previously, there is a critical need to increase the number of bail justices to ensure so that bail justices are available when needed.[126]

The Office of the Public Advocate stated that it welcomed 'sector flexibility and innovative practice that may increase availability of bail justices', but that consideration should be given to 'the barriers audio-visual technology can create for people with cognitive impairment'. It raised concerns around remote hearings leading to an

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124 Kevin Mackin, *Transcript of evidence*, pp. 45–46.

125 Victorian Aboriginal Legal Service, *Submission 139*, p. 13.

126 Ibid., p. 65.

increase in time spent in custody for individuals with cognitive impairment, and the risk of an increase in new criminal offending as a result of breaches of bail conditions where people do not completely understand what has been imposed during a remote hearing.[127]

The Committee recognises that there are ongoing and significant resourcing challenges for Victoria's bail justices, which have flow-on effects for individuals charged with an offence. It also notes evidence received from various stakeholders that in-person bail proceedings are likely to provide better support and outcomes for people in police custody, particularly for vulnerable people. For this reason, it considers that in-person hearings should be maintained wherever possible, and that further resourcing be provided for the recruitment of additional bail justices.

RECOMMENDATION 56: That the Victorian Government ensure that, in relation to bail hearings before a bail justice:

- bail hearings be undertaken in person, with remote hearings only to take place in circumstances where a bail justice cannot attend within a reasonable period of time
- additional funding is provided to recruit further bail justices and reduce current resourcing pressures.

Housing

Throughout the Inquiry, the Committee received evidence around the need to ensure that a lack of secure housing is not a precursor to bail refusal. For example, Smart Justice for Women noted that lawyers working in the Bail and Remand Court have highlighted this issue as the 'biggest barrier women face when applying for bail'. It asserted that greater investment is required in 'safe, suitable and affordable housing options for women', and stated that 'No woman should be refused bail because she does not have access to a home'.[128]

The Victorian Aboriginal Community Services Association Ltd stated that Aboriginal people are often detained in custodial settings on the basis of being unable to demonstrate access to secure housing.[129] The Victorian Aboriginal Legal Service advocated for investment in 'culturally safe residential bail accommodation and bail support for Aboriginal people'.[130] This was similarly recommended by the Commission for Children and Young People in its report, *Our youth, our way: inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*.[131]

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127 Office of the Public Advocate, *Submission 153*, p. 28.

128 Smart Justice for Women, *Submission 94*, pp. 15–16.

129 Victorian Aboriginal Community Service Association, *Submission 81*, p. 11.

130 Victorian Aboriginal Legal Service, *Submission 139*, p. 13.

131 Recommendation 60, 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*, report for Victorian Government, Melbourne, June 2021.

This Committee previously considered issues relating to bail and housing in its Inquiry into homelessness in Victoria. In its final report for this Inquiry, which was tabled in the Parliament of Victoria on 4 March 2021, the Committee recommended that the Victorian Government 'investigate whether greater access to supported accommodation is required for people seeking bail and whether this would lead to a reduction of individuals on remand'. However, while a response from the Victorian Government in relation to the Report's recommendations was required by 4 September 2021, no response has yet been received by the Committee.

In its submission, Fitzroy Legal Service cited recent research by the Australian Housing and Urban Research Institute that reported circumstances of tenants being evicted from rental properties after charges had been laid, prior to their case being heard in court. The *Residential Tenancies Act 1997* (Vic) provides that a landlord may evict a tenant if the premises have been used for illegal purposes.[132] However, Fitzroy Legal Service indicated that this should only be permissible after a person has been convicted or sentenced to a term of imprisonment.[133]

In its submission, Fitzroy Legal Service provided a case study showing how an individual being charged with a criminal offence can result in their eviction.

> **Anne is a 60-year old woman with no criminal history. Anne's son, who has a drug addiction, was staying with her and selling drugs from Anne's home. Both Anne and her son were charged with trafficking, although there is no evidence Anne knew about this and her son admitted to the offences. As a result of these charges, the Office of Housing has applied to evict Anne for illegal use of the property. She has now spent 6 weeks in custody. If she loses her public housing, it will be even harder for Anne to get bail. If she is released, it will be into homelessness. This situation will exacerbate her chronic health issues and significantly impact her mental health.**
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> Fitzroy Legal Service, *Submission 152*, pp. 15–16.

The Committee considers it essential that people in contact with the criminal justice system are able to retain access to their housing wherever possible, including where charges against them have not yet been heard in court. Access to housing allows individuals the space and security to respond to their justice matters, undertake rehabilitative programs, and retain important connections to communities and employment.

RECOMMENDATION 57: That the Victorian Government consider amending the *Residential Tenancies Act 1997* (Vic) to explicitly provide that a person cannot be evicted from a rental property for 'illegal purposes' if that person has not yet been convicted or sentenced.

132 *Residential Tenancies Act 1997* (Vic) s 91ZQ.

133 Fitzroy Legal Service, *Submission 152*, pp. 15–16.

Aboriginal Victorians

As noted in Section 9.1, under the Custody Notification Service established by ss 464AAB and 464FA of the *Crimes Act 1958* (Vic), the Victorian Aboriginal Legal Service must be notified within an hour of an Aboriginal person being taken into custody. This scheme has been in operation since June 2020. In its submission, the Legal Service provided an overview of the recent operation of the service:

> Overpolicing, court backlogs and punitive bail laws have all contributed to a growing number of Aboriginal people being taken into police custody and being held for longer periods. This has been exacerbated by COVID-19 restrictions, which directly impact the welfare of Aboriginal people in custody as well as further lengthening the time many are being held … In 2020/21, VALS receive 11,850 custody notifications, down from 13,426 in 2019/20. However, the total number of times VALS contacted police stations rose by 38% – there were 65,902 contacts made, an average of 5.56 per custody notification, compared to 47,562 for an average of 3.54 per notification in 2019/20.
>
> This includes a substantially higher number of follow-up calls tagged as 'welfare checks', which VALS Custody Notification Officers make for people held in custody for extended periods to follow up on medication, behaviour, supply of food and other key factors in protecting the wellbeing of people detained by police. The number of welfare check calls was up to 30,511 in 2020/21, from 11,036 in 2019/20 – an increase of 176%. The higher number of total contacts, and far higher number of welfare check follow-ups, provide a clear indication of the fact that Aboriginal people are being held in police custody for longer periods, and the welfare needs of Aboriginal people are more acute. The CNS team recently supported a person who was held in police custody for 11 days, requiring 74 phone calls to the police station.[134]

The Legal Service emphasised that longer periods in custody have led to an increase in acute welfare issues, including in relation to reported self-harm incidents. It highlighted the critical nature of welfare checks undertaken by its staff, but noted that the increase in numbers of required welfare checks have stretched its resourcing beyond capacity.[135]

The Royal Victorian Association of Honorary Justices echoed these concerns, stating in its submission that the Victorian Aboriginal Legal Service and its community partners 'do not appear to be resourced appropriately to be able to provide after-hours support for their community'.[136]

The Victorian Aboriginal Legal Service stated that the Custody Notification Service is 'a vital safeguard for the wellbeing of Aboriginal people in police custody, and Victoria Police's responsibility to notify the [Service] has been legislated in recognition of this essential role. It advocated for an urgent increase in funding to maintain this critical role.[137]

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134 Victorian Aboriginal Legal Service, *Submission 139*, p. 153.

135 Ibid., pp. 153–154.

136 Royal Victorian Association of Honorary Justices, *Submission 50*, p. 4.

137 Victorian Aboriginal Legal Service, *Submission 139*, p. 154.

In addition, the Legal Service asserted that there has been 'a concerning number of incidents in which police officers question whether someone who has identified as Aboriginal is "really" Aboriginal.' It provided:

> VALS has its own processes for cases where there are serious doubts about Aboriginality, and it is never appropriate for police to question someone's Aboriginality when taking them into custody, or to prefer evidence from police records over someone's self-identification.[138]

The Legal Service recommended that Victoria Police must contact the Custody Notification Service in all circumstances where an individual identifies as Aboriginal, and that it should not 'act as gatekeepers to an Aboriginal person's rights' under the Bail Act.[139]

In bail proceedings, s 3A of the Bail Act provides that bail decision-makers must take into account a person's Aboriginality when making decisions, including the person's cultural background and ties to extended family or place, and any other relevant cultural issue or obligation. However, stakeholders asserted that these provisions are not well used by Victorian courts. Fitzroy Legal Service submitted that anecdotally, 'this provision is not widely applied in bail applications, and there has been relatively limited judicial consideration of how it should work in practice'.[140]

The Victorian Aboriginal Legal Service recommended that in order to improve use of s 3A of the Bail Act, Victorian courts should work directly with Aboriginal organisations to develop guidelines on the application of this section.[141] This has previously been recommended by the Australian Law Reform Commission in its 2018 report, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*:

> State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:
>
> - develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies; and
> - identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options.[142]

Fitzroy Legal Service similarly advocated for the development of guidelines on the application of this section, asserting that its expectation is that 'the consistent,

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138 Ibid., p. 155.

139 Ibid., pp. 13, 24.

140 Fitzroy Legal Service, *Submission 152*, p. 55.

141 Victorian Aboriginal Legal Service, *Submission 139*, p. 13.

142 Recommendations 2–5, Australian Law Reform Commission, *Pathways to justice — an inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples: Report 133*, Commonwealth Government, Canberra, 2017.

comprehensive and meaningful consideration of Aboriginality in bail decision making will lead to more Aboriginal people being granted bail'.[143]

In addition, the Victorian Aboriginal Legal Service submitted concerns around the cultural awareness of bail justices and their application of s 3A of the Bail Act. While some cultural awareness training has taken place for bail justices in the past, the Legal Service recommended that it be funded to deliver further training, including in relation to s 3A, for bail justices across the state.[144]

Crucially, the Aboriginal Justice Caucus highlighted the need for reform to bail processes in order to meet targets under the Closing the Gap Framework for reducing incarceration rates of Aboriginal and Torres Strait Islanders:

> It is necessary for policy reforms, including punitive bail laws, to take place in order for the Victorian Government to meet its Closing the Gap targets for reducing incarceration. Without reforms progress will go backwards.[145]

The Committee notes that recent legislative reform has sought to ensure the welfare of Aboriginal and Torres Strait Islander peoples in police custody and improve cultural considerations in bail processes. This has been done through the Custody Notification Service and the requirement for decision-makers to take into account a person's Aboriginality when making bail decisions. However, there is scope for improvement of these processes and greater cultural awareness in bail decision-making more broadly.

RECOMMENDATION 58: That the Victorian Government identify and remove barriers to culturally appropriate bail processes for Aboriginal and Torres Strait Islander peoples, and in particular:

- support the Victorian Aboriginal Legal Service to continue to facilitate the Custody Notification Service in conjunction with increases in demand, as required by ss 464AAB and 464FA of the *Crimes Act 1958* (Vic)
- amend s 464FA of the *Crimes Act 1958* (Vic) to provide that an investigating official must contact the Victorian Aboriginal Legal Service in all circumstances where a person taken into custody self-identifies as an Aboriginal person
- support the development of guidelines on the application of s 3A of the *Bail Act 1977* (Vic) in partnership with Aboriginal organisations and peak legal bodies, to ensure appropriate consideration of a person's Aboriginality during bail processes, in accordance with the recommendation of the Australian Law Reform Commission in its report, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.

143 Fitzroy Legal Service, *Submission 152*, p. 55.

144 Victorian Aboriginal Legal Service, *Submission 139*, pp. 65–66.

145 Aboriginal Justice Caucus, *Submission 106*, p. 3.

Children and young people

The *Children, Youth and Families Act 2005* (Vic) establishes a number of specific procedures for children and young people (between the ages of 10 and 18) with regard to custody and bail. This includes a presumption in favour of proceeding by summons, where a police officer commences a criminal proceeding against a child. Where a child is taken into custody, they must be brought before a court or, if a court is not sitting, a bail justice, within 24 hours. Children must also be placed in a remand centre when remanded by a court or bail justice, although they may be held in a police cell for up to two days for the purposes of being transported between facilities.[146]

Outside of these provisions, the bail thresholds and procedures discussed above otherwise apply. This includes the reverse onus provisions under the Bail Act. However, the offences relating to breach of bail no longer apply to young people under the age of 18.

DJCS provides that remand of young people should be a matter of last resort, as:

- it has a stigmatising effect on young people
- contact with other offenders allows the formation of criminal associations and networks
- it places vulnerable young people at risk
- it reduces the opportunity for positive rehabilitation.[147]

Stakeholders provided a number of specific recommendations to improve bail processes for children and young people, in addition to the broader recommendations discussed above. This included amendment of the Bail Act and/or *Children, Youth and Families Act 2005* (Vic):

- to enshrine the principle of ensuring outcomes are in the best interests of the child[148]
- to provide that any bail conditions must take into account a child's age and developmental stage[149]
- to include a consideration of the implications for dependent children, when making bail decisions for mothers and primary carers[150]
- to ensure that there is a presumption in favour of bail for young people.[151]

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146 *Children, Youth and Familes Act 2005* (Vic) ss 345–347.

147 Department of Justice and Community Safety, *Central After Hours Assessment and Bail Placement Service (CAHABPS)*.

148 See, for example: Victorian Aboriginal Legal Service, *Submission 139*, p. 13.

149 See, for example: ibid.

150 See, for example: ibid.

151 See, for example: Commission for Children and Young People, *Submission 64*, p. 2; Youth Affairs Council Victoria, *Submission 118*, p. 16; Smart Justice for Young People, *Submission 88*, p. 2.

Smart Justice for Young People—a coalition of organisations seeking policy and legislative change to improve justice outcomes for children and young people—advocated for remand to be used only 'in rare and exceptional circumstances', and only for children over the age of 16.[152] It stated that repeal of the reverse onus provisions would allow 'bail decision-makers to adopt a child centred approach and give due regard to principles such as using custody as a last resort and acting in the best interests of the child'.[153]

In relation to the reverse onus provisions, the Human Rights Law Centre's submission stated that children 'should never be subject to such provisions which can make time in prison the default setting'. This is particularly important as most children who are refused bail will ultimately not receive a custodial sentence, but through this system, are nevertheless exposed to damaging prison environments.[154] For example, the Sentencing Advisory Council reported that in 2017–2018, 58% of children remanded received a community order and only 34% received a custodial sentence. The outcome of the remaining 8% of children was unclear.[155]

At a public hearing, Victoria Police's Chief Commissioner told the Committee that police are working to revise internal procedures to ensure the use of summons for young people where possible:

> in relation to children, everything we are focused on at the moment is about keeping kids out of the justice system full stop, but also we have put in place protocols where if they are going to be considering any type of disposition other than just summonsing them they need to get advice from supervisors and our frontline prosecutions unit. So it is a key focus area for us.[156]

In relation to the Central After Hours Assessment and Bail Placement Service, which provides state-wide support to young people charged with an offence after hours, the Committee received evidence that there are limitations in terms of its hours of operations and the resources it has access to. For example, the Royal Victorian Association of Honorary Justices noted that the Service ceases to provide support at 3.00 am, after which time children are left unsupported, except where an Independent Person is required to attend. It also noted that there is often only a telephone service available and that bail placement options are limited:

> Unfortunately in most hearings before a Bail Justice, the support offered by CAHABPS to the young person is not in person but via the phone. This reduces the effectiveness of the service. In country and regional areas, CAHABPS support is only by phone and local support services are virtually non-existent.

152 Smart Justice for Young People, *Submission 88*, p. 2.

153 Human Rights Law Centre, *Submission 58*, p. 16.

154 Ibid., p. 7.

155 Sentencing Advisory Council, *Children held on remand in Victoria: A report on sentencing options*, September 2020, p. 42.

156 Chief Commissioner Shane Patton, *Transcript of evidence*, p. 30.

> In any case, CAHABPS have very limited options for placement of children. Under current youth justice processes, a Bail Justice cannot bail a child to a secure welfare unit without the explicit approval of the youth justice management team. If such support is not forthcoming, for whatever reason, the Bail Justice can be left with no option but remand, even though this may not be in the child's best interest.
>
> ...
>
> In most cases involving children there are no out-of-home after-hours bail placement options available. There are no processes to provide for a care worker to support a child even until the next morning. CAHABPS can occasionally find an alternative family member willing to take responsibility for the child, but this is a very rare occurrence.[157]

In its submission, the Youth Affairs Council Victoria recommended the expansion of hours for bail supports such as the Central After Hours Assessment and Bail Placement Service, with ideally 24-hour coverage.[158]

The Council also raised concerns around the operation of bail processes for young people with a disability. It recommended the introduction of an 'alternative process specifically designed for offenders with intellectual disabilities' outside of the usual bail system for this cohort.[159]

The Sentencing Advisory Council's 2020 report, *Children Held on Remand in Victoria: A report on Sentencing Outcomes*, raised a number of potential areas of reform in relation to children and young people's access to bail and related supports. These included 'establishing a fully resourced, Victoria-wide, 24-hour bail system specifically for children' and 'continuing to ensure that specialist services and programs are designed both with and for Aboriginal and Torres Strait Islander children'.[160] It noted that many children held on remand have breached their bail conditions:

> remanded children were charged with 658 justice procedures offences in 409 cases. More than two-thirds of those charges were related to breaching bail in some way (400 charges of committing an indictable offence whilst on bail, 38 charges of failing to answer bail and 10 charges of contravening a conduct condition of bail).[161]

The Inquiry also received evidence around the need for support following a grant of bail. In light of its findings around how young people often feel that bail conditions are arbitrary and poorly explained, the Youth Affairs Council Victoria recommended the establishment of a state-wide bail support program for children and young people which assists them to comply with their bail conditions.[162] It also recommended that any bail support that is provided to this cohort should encompass accommodation services, such as supported bail residences, including in rural and regional areas.[163]

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157 Royal Victorian Association of Honorary Justices, *Submission 50*, pp. 3–4.

158 Youth Affairs Council Victoria, *Submission 118*, p. 16.

159 Ibid., p. 18.

160 Sentencing Advisory Council, *Submission 17*, p. 2.

161 Ibid., p. 62.

162 Youth Affairs Council Victoria, *Submission 118*, pp. 15–16.

163 Ibid., pp. 17–18.

The Youth Junction advocated for further diversionary programs prior to sentencing through 'reinvestment in community-led youth evidence-based supports'. It highlighted the varied positive impacts of these programs, such as in terms of engagement with education and employment.[164] The importance of pre-sentencing diversionary programs are discussed further in Chapters 3 and 10.

The Victorian Government's *Youth Justice Strategic Plan 2020–2030* includes a number of objectives and commitments to reform the bail system for young people. These include:

- strengthening supports for young people on bail to help them to meet their bail conditions, including through allocation of a dedicated community case manager for young people on supervised and intensive bail and linkages to Aboriginal Community Controlled Organisations for Aboriginal young people
- undertaking analysis of the factors contributing to current rates of remand in order to prevent young people from entering remand where appropriate
- expediting hearing processes through the Fast Track Remand Court, which was established in 2017 and operates through the Children's Court
- expanding access to non-offence specific programs to maximise supports available to young people on remand, such as in relation to courses on anger management, emotional regulation and healthy relationships.[165]

In its submission, Smart Justice for Young People stated that in relation to the objectives contained in the Strategic Plan, 'more urgent action is required'.[166]

The Committee recognises the extremely serious impacts of time spent in custody for children and young people. Many young people who have been incarcerated for any length of time have experienced:

- stigmatisation
- increased risks of physical and psychological harm
- disruptions to:
  - family life
  - development
  - education
  - employment.

Further, incarceration itself is criminogenic, making rehabilitation and the ability to address the underlying causes of offending more difficult. In light of the Sentencing Advisory Council's findings that approximately two-thirds of remanded young people

164 The Youth Junction Inc., *Submission 51*, p. 8.

165 Victorian Government, *Youth Justice Strategic Plan 2020–2030*, Melbourne, 2020, p. 20.

166 Smart Justice for Young People, *Submission 88*, p. 16.

are not subsequently sentenced to a term of imprisonment, it is crucial that the bail system be amended to support young people to stay out of detention facilities.

The Committee considers that it is crucial that young people who have contact with the criminal justice system be supported to address the causes of their offending and re-establish connections with family or other support networks, as well as re-engage with education and/or employment in the community wherever possible. Being remanded in custody must be a last resort option only where an individual poses an unacceptable risk to community safety. The implementation of recommendations in this Chapter to amend the tests for bail under the Bail Act will assist in this space.

In addition, evidence received as part of this Inquiry indicates that additional support is needed to ameliorate the significant negative impacts on children and young people of being held in police custody, or in a remand centre, for any length of time. This should include investigation of the potential establishment of a 24-hour bail system for children and young people, including related supports, in accordance with the strategies raised in the Sentencing Advisory Council's 2020 report, *Children Held on Remand in Victoria: A report on Sentencing Outcomes*.

FINDING 42: Children and young people who are remanded in custody experience significant and varied negative impacts, including in terms of stigmatisation, increased risks of physical and psychological harm, and disruptions to family life, development, education and employment.

RECOMMENDATION 59: That the Victorian Government investigate the establishment of a state-wide, 24-hour bail system specifically for children, with accompanying support services including in relation to accommodation and the provision of independent support during any time in police custody.

9.3 Reclassification of offences

A number of stakeholders to the Inquiry raised issues relating to the classification of criminal offence provisions. In particular, the reclassification of certain indictable offences that are demonstrated to be linked to disadvantage and poverty. This includes, for example, low-level theft and public nuisance.

In its submission, Smart Justice for Women described the underlying conditions that often lead to this type of offending, and asserted that they require a response that avoids further criminalisation:

> A key driver of women's criminalisation and increasing imprisonment is the categorisation of certain offences related to survival and/or poverty as 'indictable offences'. This include shop thefts or petty thefts, and offences relating to alcohol and other drug use.
>
> ...

> Reclassifying these offences, which are symptomatic of underlying issues of ill-health and impoverishment, as summary offences would invite a different response that is properly directed towards diversion and rehabilitation rather than further criminalisation through a punitive sentencing process. In addition, it would remove these matters as a trigger for the double uplift provisions and the reverse onus tests in the Bail Act.[167]

The submission provided that, in particular, the following offences should be reclassified as summary offences:

- Theft, where the theft in question relates to property below a certain value
- Handling stolen goods, where circumstances indicate the offending relates to survival/poverty
- Obtaining property by deception, where circumstances indicate the offending relates to survival/poverty
- The common law offences of public nuisance and unlawful assembly
- Possess drug of dependence.[168]

Similarly, the Federation of Community Legal Centres submitted that various criminal offences in Victoria are 'committed due to underlying issues relating to income inequality, mental ill-health or substance use'. It provided examples of particular indictable crimes, such as shop thefts or petty thefts, offences relating to alcohol and other drug use, and common law offences of public nuisance and unlawful assembly. It also highlighted summary offences that similarly result from underlying disadvantage, such as public drunkenness, begging, and offensive language.[169]

The Federation's submission also highlighted the particular impacts of these types of offences on Aboriginal and Torres Strait Islander people and people experiencing poverty:

> Many minor offences are used by police to unfairly target Aboriginal and Torres Strait Islander people and people experiencing poverty. There have been repeated calls for the decriminalisation of minor offending and the implementation of non-punitive responses, following on from key recommendations made by the Royal Commission into Aboriginal Deaths in Custody.[170]

The Federation recommended review of the *Summary Offences Act 1966* (Vic) in order to assess which indictable offences could be reclassified as summary offences, and which summary offences should be decriminalised altogether.[171]

The Law Institute of Victoria also advocated for a review of legislation to 'reclassify penalties for minor examples of certain indictable offences as summary offences'. It provided examples of possession of a drug of dependence under s 73 of the *Drugs,*

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167 Smart Justice for Women, *Submission 94*, pp. 16–17.

168 Ibid.

169 Federation of Community Legal Centres Victoria Inc., *Submission 132*, p. 13.

170 Ibid.

171 Ibid.

Poisons and Controlled Substances Act 1991 (Vic) and theft offences where the amount does not exceed $500 under s 74 of the *Crimes Act 1958* (Vic).[172]

The Committee recognises the concerns of stakeholders to the Inquiry regarding the ways in which certain indictable and summary offences often correlate with persons experiencing different types of disadvantage. It considers that the Victorian Government should review relevant legislation with a view to minimising the criminalisation of low-level offending linked to underlying issues such as income stress or alcohol and other drug issues.

RECOMMENDATION 60: That the Victorian Government undertake a review of relevant legislation, including the *Summary Offences Act 1966* (Vic), in relation to offences often linked to underlying forms of disadvantage. Such a review should assess which indictable offences could appropriately be reclassified as summary offences, and whether any summary offences are appropriate for decriminalisation.

172 Law Institute of Victoria, *Submission 112*, p. 4.

10 Courts and sentencing

At a glance

This Chapter discusses Victoria's court system, court processes and sentencing matters. Victorian courts are currently facing significant caseload pressures which have been exacerbated by the impact of the COVID-19 pandemic. However, there is an opportunity to consider innovative procedural changes to help alleviate these pressures.

Key issues

- Court services, such as the Court Integrated Services Program and court-based diversion programs, should be expanded to improve accessibility and ensure they can meet demand.
- Aboriginal Victorians are less likely to receive a court-based diversion instead of sentencing.
- The Committee reached out to Victorian courts to invite them to participate in this Inquiry. However, each of the courts declined to respond.
- Restorative justice processes and non-adversarial options for sentencing processes can help promote healing and reduce recidivism.
- Victoria's specialist courts—including the Koori Courts, Assessment and Referral Court and Drug Courts—are providing a therapeutic alternative to traditional sentencing processes.
- Sentencing schemes (including mandatory and presumptive sentencing), minimum terms of imprisonment and non-parole periods are consistently failing to meet their objectives and are contributing to over-incarceration of vulnerable populations.
- The use of incarceration as a response to social and economic disadvantage is perpetuating disadvantage, and alternative sentencing options are required to move towards a rehabilitative justice model.

Findings and recommendations

Finding 43: The COVID-19 pandemic has exacerbated existing caseload pressures on Victorian courts. However, there are opportunities to explore innovative ways of managing these caseload pressures following from the pandemic response.

Finding 44: Additional research is required to determine whether judge-alone trials should be permanently introduced in Victoria's justice system, and if so, what measures should be incorporated to ensure the right to a fair trial.

Recommendation 61: That the Victorian Government continue to support the expansion of the Court Integrated Services Program to additional court locations including in rural and regional Victoria, and increase funding to enable the program to meet increases in demand.

Recommendation 62: That the Victorian Government investigate opportunities for improving access to court-based diversion programs, including:

- expanding eligibility to diversionary programs, including where the relevant charges may not be an individual's first offence
- clarifying the scope of the acknowledgment of responsibility requirement under s 59(2)(a) of the *Criminal Procedure Act 2009* (Vic)
- ensuring access to diversionary programs for different cohorts, including through the recruitment of Koori Diversion Coordinators for the Children's Court of Victoria's Youth Diversion Service.

Recommendation 63: That in the development and implementation of the Victim-Centred Restorative Justice Program, the Victorian Government should:

- ensure the program is based on best practice, and incorporates the experiences of Australian and international jurisdictions
- prioritise the views of victims of crime
- undertake consultation with Aboriginal Victorians and culturally and linguistically diverse communities, in order to ensure the model is culturally safe and appropriate
- ensure that it operates flexibly at different stages of the criminal justice process.

Finding 45: Victoria's specialist courts provide an important therapeutic alternative to traditional sentencing processes. They have been demonstrated to support individuals who are charged with an offence to address the underlying causes of their offending, reducing the risk of recidivism and improving community safety.

Finding 46: The Assessment and Referral Court list provides a therapeutic response to persons accused of an offence who have a mental illness and/or cognitive impairment, and has demonstrated success in supporting them to address the underlying causes of their offending.

Recommendation 64: That the Victorian Government:

- provide an update on its progress to expand the Assessment and Referral Court list to each of the 12 Magistrates' Court locations by 2026, in accordance with the recommendation of the Royal Commission into Victoria's Mental Health System
- consider additional methods to improve access to Assessment and Referral Court services, including a review of the current eligibility criteria.

Finding 47: Since their establishment, Victoria's Koori Courts have provided culturally safe and accessible criminal justice processes for Aboriginal Victorians. However, geographic and jurisdictional limitations restrict them from further supporting Aboriginal self-determination within the Victorian criminal justice system.

Recommendation 65: That the Victorian Government continue to support Koori Courts to provide culturally safe and appropriate criminal justice processes for Aboriginal Victorians, including through:

- expanding court locations to additional areas across Victoria, including in regional and rural areas
- considering the extension of the Courts' jurisdiction to hear additional types of criminal matters.

Finding 48: Evidence demonstrates that Drug Courts can successfully support individuals to address issues related to drug and/or alcohol dependency, reduce the number of days spent in prison and reduce rates of reoffending.

Recommendation 66: That the Victorian Government continue to support the ongoing expansion of the Drug Courts in Victoria, including through:

- funding the allocation of additional residential detox and rehabilitation beds that are prioritised for use by Drug Courts
- investigating the potential for a pilot program of a Youth Drug Court within the Children's Court of Victoria.

Finding 49: The Neighbourhood Justice Centre—a model of community justice—has been demonstrated to improve criminal justice outcomes through reducing rates of crime and recidivism and improving rates of compliance and participation in community work.

Recommendation 67: That the Victorian Government, in reviewing the *Sentencing Act 1991* (Vic), investigate the operation, effectiveness and impacts of the Act's minimum sentencing provisions (mandatory sentencing).

Finding 50: Short custodial sentences are associated with higher rates of recidivism than longer custodial sentences and custodial sentences combined with parole.

Recommendation 68: That the Victorian Government investigate the introduction of a presumption against short terms of imprisonment in favour of community-based sentences or other therapeutic alternatives. Such legislative reform should be informed by the experiences of other Australian and international jurisdictions and ensure that appropriate safeguards are incorporated to protect against persons being sentenced to longer terms of imprisonment.

Recommendation 69: That the Victorian Government, in relation to community correction orders:

- provide additional resourcing to Corrections Victoria to ensure that its management of individuals on community correction orders is as effective as possible, including through achieving high rates of order completion and allowing for appropriate and timely responses to cases of non-compliance
- collaborate with successful models of therapeutic justice, including the Neighbourhood Justice Centre, to continue developing ways in which community corrections can support individuals to address the causes of their offending and comply with the conditions of an order
- amend the *Sentencing Act 1991* (Vic) to provide that people with an acquired brain injury and/or intellectual disability, not diagnosed prior to the age of 18, are eligible for a justice plan.

Recommendation 70 That the Victorian Government consider amending the *Sentencing Act 1991* (Vic) to provide for courts to impose a sentence of a home detention order.

Recommendation 71: That the Victorian Government amend the Sentencing Act 1991 (Vic) to require, for the purposes of sentencing, courts to take into consideration the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

Finding 51: A sentencing guidelines council, with functions to develop sentencing guidelines for Victorian courts, may address some public concerns regarding whether sentencing practices adequately reflect community expectations.

Finding 52: In establishing a sentencing guidelines council, the voices of victims of crime should be prominent in the council's composition.

Recommendation 72: That the Victorian Government introduce legislation to establish a sentencing guidelines council. The legislation should consider appropriate features outlined in the Sentencing Advisory Council's *A Sentencing Guidelines Council for Victoria: Report*.

10.1 Victoria's criminal courts

As outlined in Chapter 1, Victoria's criminal courts hear and determine criminal matters for the State. There are four key courts that deal with criminal matters—the Magistrates' Court of Victoria, Children's Court of Victoria, County Court of Victoria and Supreme Court of Victoria (including the Court of Appeal). In addition, the High Court of Australia hears appeals on criminal matters from State courts, and the Coroners Court of Victoria has investigative functions regarding violent, unnatural and unexpected deaths. The Victims of Crime Assistance Tribunal deals with requests for financial restitution for victims of crime. Victoria also has specialist courts which provide therapeutic approaches to criminal matters. The specialist courts are discussed in detail in Section 10.3.

The court hierarchy for the four main criminal courts is shown in Figure 10.1.

Figure 10.1 Victoria's criminal court hierarchy

Source: Victorian Government, *Submission 93*, p. 84

In the Magistrates' Court and Children's Court, magistrates determine proceedings for summary (less serious) offences, as well as some indictable (more serious) offences that can be determined summarily.[1]

In the County Court and Supreme Court, judges conduct trials by jury when hearing matters related to indictable offences. Juries determine the issues in dispute, including whether an individual is guilty of the charges laid against them. The judge will determine what the relevant matters are and provide advice on the relevant law. However, between 25 April 2020 and 25 April 2021, 'judge alone trials' were permitted due to the public health measures implemented in response to the COVID-19 pandemic.[2]

Judges and magistrates make a broad range of decisions in relation to criminal proceedings, including:

- issuing warrants
- authorising forensic tests
- determining applications for bail
- determining whether an individual is fit to stand trial
- determining what evidence is admissible in a hearing
- imposing sentences.[3]

1 Victorian Government, *Submission 93*, p. 83.
2 Ibid.
3 Ibid., p. 84.

The Magistrates' Court deals with the majority of the State's criminal matters. A comparison of the number of matters dealt with by each court over the past three reporting periods is shown in Table 10.1 below.

Table 10.1 Number of finalised criminal matters (including appeals), by court and year

Court	2018–19	2019–20	2020–21
Magistrates' Court	173,778	135,840	126,613
Children's Court	9,230	8,142	7,708
County Court	5,364	4,351	2,942
Supreme Court	364	369	301

Source: Legislative Council Legal and Social Issues Committee. Data from court annual reports.

In addition, the Magistrates' Court is experiencing increased caseload pressures, largely resulting from a reduced capacity to hear cases due to the COVID-19 pandemic. In2019–20[4] and 2020–21[5], the number of cases initiated were greater than the number finalised.[6]

The Victorian Government submitted that courts are experiencing increasingly complex cases. It noted that this is occurring for various reasons, including:

- changes to law and policy
- the support needs of persons appearing before the courts
- increasing use of technology in evidence
- more complex forensic evidence
- higher numbers of people appearing in court without legal representation.

This increasing complexity has further impacted court caseloads, with cases taking longer to finalise.[7]

10.1.1 Judicial participation in the Inquiry

Throughout this Inquiry, the Committee sought advice and input from Victorian courts, through both written submissions and in the provision of evidence at public hearings. It considers that Victorian courts have a central role in informing the future direction of the criminal justice system, including identifying issues or areas for improvement. This is particularly important in light of the Inquiry's Terms of Reference which asked the Committee to consider judicial appointment, knowledge and expertise.

4 In 2019–20, a total of 145,625 cases where initiated in the Magistrates Court of Victoria.

5 In 2020–21, a total of 134,835 cases were initiated in the Magistrates Court of Victoria.

6 Magistrates' Court of Victoria, *Annual Report 2020–2021*, Melbourne, 2021, p. 40.

7 Victorian Government, *Submission 93*, p. 84.

However, disappointingly, all Victorian courts and tribunals with a role in the criminal justice system declined to participate in and inform this Inquiry.

One key reason provided to the Committee for this non-participation relates to the independence of the judiciary, with some responses stating that courts refrain from commenting on policy matters. The Committee notes, however, that Victorian courts have provided important evidence to several previous parliamentary inquiries without issue. This includes the following Victorian inquiries, among others:

- *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*[8]
- *Inquiry into end of life choices*[9]
- *Inquiry into vexatious litigants*[10]
- *Inquiry into sexting*.[11]

Further, Australian case law and the *Guide to Judicial Conduct for Australian Judicial Officers* supports a conclusion that it is not improper for a judge to provide extrajudicial advice or comment.[12] In particular, the third edition of the Guide provides:

> It is appropriate for a judge to make a submission or give evidence at such an inquiry if care is taken to avoid confrontation or the discussion of matters of a political rather than a legal nature, but prior consultation with the head of the jurisdiction is desirable. Again, the expertise or experience of a judge can be of great assistance in the examination of issues relating to legal or procedural matters. As long as discretion is exercised, this should not detract from the independence of the judiciary from the legislative and executive branches of government.[13]

The Committee is concerned by the implications of any precedent that may be established by Victorian courts broadly declining to assist parliamentary inquiries. It considers that judicial comment is important to inform parliamentary inquiries on matters relating to the law—including with regard to the State's criminal justice system—and does not contravene the independence of the judiciary. In relation to the Committee's desire to understand judicial training processes and the skills needed to undertake the role, the Committee believes there is no other avenue for it to gain that understanding. The Committee deeply regrets the lack of cooperation from the courts' sector to the Inquiry.

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8 Parliament of Victoria, Law Reform Committee, *Inquiry into access to and interation with the justice system by people with an intellectual disability and their families and carers*, 2013.

9 Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into end of life choices*, 2016.

10 Parliament of Victoria, Law Reform Committee, *Inquiry into vexatious litigants*, 2008.

11 Parliament of Victoria, Law Reform Committee, *Inquiry into sexting*, 2013.

12 *South Australia v Totani & Anor* [2010] HCA 39. 242 CLR 1; *Fardon v Attorney-General (Qld)* [2004] HCA 46. 223 CLR 575; The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct (3rd edn)*, report for The Council of Chief Justices of Australia and New Zealand, Melbourne, 2017, p. 24.Section 5.2

13 The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct (3rd edn)*, p. 24.

10.1.2 COVID-19 pandemic

Throughout the COVID-19 pandemic, courts experienced increased pressures on their caseloads because of the implementation of public health measures, with the number of pending cases up 65% between January 2019 and 30 May 2021.[14] In particular, the operation of jury trials has been extremely limited throughout the pandemic.[15]

In response, the Victorian Government implemented several changes to processes within the criminal justice system to ensure its safe operation and minimise public health risks. This included moving certain court hearings online, conducting 'judge alone' trials, and digitising processes.[16]

The *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), which commenced in April 2020, provided for courts to hold hearings by audio visual link, make some decisions 'on the papers' (without a hearing) and extend powers of registrars. Some changes were made permanent in 2021 to 'support the ongoing functioning of the courts, tribunals, legal system and integrity agencies, as well as facilitating the ongoing effort to address court backlogs'. This includes the use of eLodgements, an electronic document filing system.[17]

The Victorian Government provided an overview of the virtual operations of the courts during the pandemic:

> The Online Magistrates' Court launched in July 2020 and has heard over 9,000 matters to mid-2021 including pleas, sentencing indications, committals and applications, such as urgent Personal Safety Intervention Orders and family violence applications. The 2021–22 State Budget provided funding to further increase remote hearings as a way to address the COVID-19 related backlog and improve court access statewide.
>
> The ARC [Assessment and Referral Court], Drug Court, CISP [Court Integrated Services Program], VOCAT [Victims of Crime Assistance Tribunal], Child Witness Service and Intermediary Pilot Program continued remotely through telephone and AVL [audio visual link] services to support at-risk groups. New remote witness facilities for the Child Witness Service and Intermediary Program to support witnesses were set up for people to provide evidence remotely at local court locations. These innovations have the added benefit of allowing regional Victorians to access specialist services without the cost and stress associated with travel.[18]

The Government introduced the Justice Recovery Plan to support courts to reduce backlogs and finalise outstanding matters resulting from COVID-19. This includes increased use of technology to hear cases remotely, additional judicial resources and resolution of matters outside court.[19]

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14 Victorian Government, *Submission 93*, p. 13.

15 Law Institute of Victoria, *Submission 112*, p. 52.

16 Victorian Government, *Submission 93*, p. 63.

17 Ibid., p. 64.

18 Ibid.

19 Ibid.

In addition, the Koori Courts adapted hearing processes to provide for Elders and Respected Persons to appear remotely during the pandemic, to allow sentencing conversations to proceed safely. The Government noted that Elders and Respected Persons are a cohort 'among the most at-risk' to COVID-19.[20] The Drug Court introduced staggered appointments and hearings to reduce interpersonal contact, and increased use of audio visual technology. Similarly, the Assessment and Referral Court list and Court Integrated Service Program (CISP) transitioned to remote delivery of services and appointments where possible.[21]

The Government's submission asserted that the 'digital disruption brought forward by COVID-19 demonstrated the system's ability to adapt when necessary' and that, while challenging, new practices have been implemented across the justice system. It acknowledged that further work is needed to coordinate and develop 'technology solutions' for processes within the justice system. It noted that pandemic-related changes could deliver long-term benefits to the system, such as the 'use of online hearings, case management processes and software'. The submission also highlighted the use of 'on the papers' processes to 'progress matters without requiring parties to attend court locations'.[22]

Stakeholders had varied views on the changes to the court system introduced in response to the pandemic. The Centre for Innovative Justice highlighted the need to address court backlogs of criminal matters resulting from the COVID-19 response. It submitted that 'Failure to do so may lead to people languishing on remand for much longer periods of time'.[23] Merri Health also noted the increased timeframes for finalisation of serious criminal responses, and the impact for its clients.[24]

> **We know coronavirus has made it worse, but it takes too long. It will be three or four years by the time this gets to court. We live every day waiting for it to happen.**
>
> Merri Health client, quoted in Merri Health, *Submission 72*, p. 5.

At a public hearing, Mel Walker, Co-Chair of the Criminal Law Committee at the Law Institute of Victoria, explained that there is potential to expand the use of diversions 'on the papers' and prevent lower-level offending from coming before the courts:

> I think the other thing too is, when you are talking about the lower jurisdictions in terms of the Magistrates Court, we did a lot of work in relation to doing pleas on the papers and diversion on the papers as well. The LIV [Law Institute of Victoria] are doing a lot of work in diversion at the moment, trying to extend the diversion program and trying to make the diversion program a little bit more accessible to persons who should be given the opportunity of diversion. I think that also some of the lower end crime … does not necessarily need to go through the court system. It can be undertaken through either

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20 Ibid., p. 108.

21 Magistrates' Court of Victoria, *Magistrates' Court of Victoria (MCV) COVID-19 Response, 2021*, policy note, Melbourne, <https://www.mcv.vic.gov.au/sites/default/files/2021-04/MCV%20COVID%20recovery%20plan%20April%202021_0.pdf>, p. 2.

22 Victorian Government, *Submission 93*, pp. 13, 64.

23 Centre for Innovative Justice, *Submission 82*, p. 9.

24 Merri Health, *Submission 72*, p. 5.

> infringements or other diversionary programs that could be offered with those low-level crimes—and get that out of the court system—that really do not need any real judicial intervention.[25]

Tania Wolff, President of the Law Institute of Victoria, stated that, 'If there is any COVID-19 silver lining, it is our preparedness to seriously look at innovative solutions'.[26] Tania Wolff explained that there is an opportunity to revise what matters come before the courts:

> I think we need to look at the low-hanging fruit and look at the Magistrates Court being the court that has the biggest issue of backlog. It is certainly ripe for revision as to what kind of offending needs to go through the court system and criminal justice process … but also diversion: increasing its scope, being able to triage and reclassify some offences to be able to be dealt with separate to going through a court process.[27]

In its submission, the Law Institute of Victoria also recommended a review of the 'operation and effectiveness of judge-alone trials' and consideration of its 'utility as a permanent hybrid measure on an opt-in basis and with the agreement of both parties'.[28] Mel Walker told the Committee that judge-alone trials 'were very successful during the pandemic' and warranted consideration as a more permanent mechanism.[29] Currently, the Australian Capital Territory, South Australia, New South Wales, Queensland and Western Australia have legislated for trial by judge alone.[30]

In April 2021, the Magistrates' Court released information on its COVID-19 response. It acknowledged the increase in pending matters resulting from the pandemic response and stated that 'the recovery of the crime and family violence jurisdictions will take time'. It provided:

> The reality is that we cannot return to pre-COVID-19 operations, with crowded court buildings and court users remaining onsite for the purposes of legal advice, negotiation, service engagement and hearings. This has necessitated the whole sector pivoting their models of service to accommodate the new reality, and we are working closely with our stakeholders to ensure that services are both available and fit for purpose in our current environment … Despite the challenges, there have also been opportunities for positive reform during the COVID-19 pandemic.
>
> We have advanced our strategic planning to enable alternative forms of access to justice. We are engaging with the community in new ways and we are offering real options to court users in terms of how they engage with the Court, especially in the family violence space. When the community could not come to us, we have taken the Court to them …

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25 Mel Walker, Co-Chair of Criminal Law Committee, Law Institute of Victoria public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 15.

26 Tania Wolff, President, Law Institute of Victoria, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 10.

27 Ibid., p. 15.

28 Law Institute of Victoria, *Submission 112*, p. 7.

29 Mel Walker, *Transcript of evidence*, p. 15.

30 Judicial College of Victoria, *Judge alone trial applications*, (n.d.), <https://www.judicialcollege.vic.edu.au/sites/default/files/2020-10/Judge%20Alone%20Trial%20Applications%20%28221020%29.pdf> accessed 14 February 2022, p. 2.

> We have made enormous gains in our technology capability, and mobilised and modernised court practice, enabling us to list, hear and resource our work in ways previously unimagined. We are agile and seeking to leverage the benefits to facilitate innovative, accessible, fair, transparent and efficient justice.[31]

The Committee is concerned about the significant caseload pressures on Victorian courts, which have worsened in conjunction with the COVID-19 pandemic. It encourages the Victorian Government to support the court system to continue to explore innovative means of relieving these pressures, in consultation with relevant stakeholders.

FINDING 43: The COVID-19 pandemic has exacerbated existing caseload pressures on Victorian courts. However, there are opportunities to explore innovative ways of managing these caseload pressures following from the pandemic response.

The Committee notes that the introduction of judge-alone trials may help alleviate caseload pressures on Victorian courts and could have a role as a permanent mechanism in the future. However, the Committee considers it appropriate that further research is undertaken to ensure that judge-alone trials do not impact an accused person's right to a fair trial.

FINDING 44: Additional research is required to determine whether judge-alone trials should be permanently introduced in Victoria's justice system, and if so, what measures should be incorporated to ensure the right to a fair trial.

10.1.3 Court-based supports

Victorian courts facilitate a wide range of support services and aids to improve fair and equitable access to the criminal justice system. These include:

- Victims and Witness Assistance Service—Provided through the Office of Public Prosecutions, it supports victims of serious crimes through court processes.
- Child Witness Service—A specialist service that aims to reduce trauma and stress experienced by children during court proceedings.
- Victims of Crime Helpline—An information helpline that provides advice to victims of crime about court processes and related services.
- Court Network—Volunteers assist court users with information on court processes before they have to appear in court and can provide non-legal support while court proceedings are underway.
- Mental Health Advice and Response Service—Provides clinical mental health support to court users and advice to judicial officers and court services.

31 Magistrates' Court of Victoria, *Magistrates' Court of Victoria (MCV) COVID-19 Response, 2021*, pp. 6–7.

- Intermediary Program—Provides communication specialists to support vulnerable witnesses to provide their best evidence in court.

The Victims of Crime Helpline, Victims and Witness Assistance Service and Intermediary Program are discussed in more detail in Chapter 6.

In addition, the CISP is a court-based support and referral service that aims to help individuals to address the causes of their offending.

Court Integrated Services Program

The CISP is a support and referral service which aims to reduce the likelihood of individuals reoffending. An accused individual is assigned a case manager who assists them to access support in areas such as:

- drug and alcohol treatment services
- crisis and supported accommodation
- disability and mental health services
- acquired brain injury services
- Koori specific services.

The case manager reviews ongoing progress and provides updates to the relevant magistrate. In addition, an accused person may be required to participate in monthly 'check ins' before the magistrate.[32]

A person can commence in CISP at any stage between charges being laid and sentencing, provided that a person:

- has been charged with an offence
- consents to involvement in the program
- is experiencing at least one of the following:
  - physical or mental disabilities or illnesses
  - drug and alcohol dependency and misuse issues
  - inadequate social, family and economic support that contributes to the frequency or severity of their offending
  - homelessness.[33]

An accused person typically participates in the program for approximately four months.[34]

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32 Magistrates' Court of Victoria, *Bail support (CISP)*, 2019, <https://www.mcv.vic.gov.au/find-support/bail-support-cisp> accessed 21 December 2021.

33 Ibid.

34 Ibid.

Although first established in 2006, CISP was only accessible—until recently—to accused persons with matters listed before the Magistrates' Court.[35] In its submission, the Victorian Government stated that the program is being expanded to the County Court of Victoria as part of a pilot program:

> An 18-month pilot has expanded the CISP program to the CCV [County Court of Victoria] and the Indictable Crime Stream at Melbourne's MCV [Magistrates' Court of Victoria] allowing CISP support to continue when an accused person is committed to the CCV. This multi-jurisdictional expansion will enable continuity of care across jurisdictions, further reducing the risk of reoffending, improving order completion rates, and improving individual and community health and safety more broadly.[36]

The Government also noted the findings of a 2010 evaluation of the program by the Department of Justice, *Court Integrated Services Program – tackling the causes of crime,* which found that it had achieved high rates of referrals, met retention and engagement targets, and successfully matched intervention approaches to the risks and needs of participants.[37] The evaluation observed:

- a 20% reduction in reoffending rates for CISP participants during the program
- a 30.4% reduction in reoffending frequency post program completion.[38]
- At the time of writing, there was no updated statistics on the impact of CISP on reoffending.

In addition, the CISP Remand and Outreach Program is a joint initiative between the Magistrates' Court and Corrections Victoria to support individuals on remand to address the issues that have prevented a grant of bail. Staff work in prisons to identify participants that may benefit from support. If a participant is successfully granted bail, they are supported within the community on CISP. Program participation is prioritised for particular cohorts, including:

- Aboriginal Victorians
- women
- people in custody for the first time with complex mental health or cognitive functioning issues
- people experiencing homelessness
- those with significant alcohol and/or other drug history.[39]

35 Victorian Government, *Submission 93, Attachment 1*, p. 8.

36 Victorian Government, *Submission 93*, p. 55.

37 Ibid.

38 Department of Justice, *Court Integrated Services Program: Tackling the causes of crime executive summary evaluation report*, Victorian Government, Port Melbourne, 2010.

39 Victorian Government, *Submission 93, Attachment 1*, p. 8.

Stakeholders welcomed the impact of CISP and its benefits for participants. The Law Institute of Victoria provided a snapshot of the varied work of the program in recent years, including its support for individuals on remand:

> In 2017–18, 3,602 referrals were made to CISP, with 3,524 referrals made in 2018–19. CISP was also extended to prisons to assist people on remand. The CISP Remand Outreach Program completed 954 assessments in 2017–18 and 1,220 assessments in 2019–20. Additionally, CISP also operates at the Bail and Remand Court, completing 332 assessments in 2018–19. The LIV recognises that there is a large proportion of accused people that have a variety of underlying issues which contribute to offending. As such, expanding funding for CISP will ensure that it is able to be accessed by more people who would benefit from its support.[40]

Samantha Sowerwine, Principal Lawyer of Homeless Law at Justice Connect, told the Committee that CISP has been effective for its clients, particularly in accessing housing and other services to support bail applications.[41] The Justice Reform Initiative described CISP as 'an excellent model'.[42] The Law Institute of Victoria submitted that it is a cost-effective tool that is integral to supporting individuals while on bail, and advocated for expansion of funding for this and other court-based services.[43]

Liberty Victoria noted the need for further bail support and supervision programs, highlighting that CISP is 'not available for all accused and some offences (for example sexual offences) are expressly excluded'.[44]

The Victorian Aboriginal Legal Service recommended expanding CISP across all Magistrates' Court locations in Victoria and ensuring that there are sufficient numbers of Koori CISP workers to support Aboriginal Victorians on remand.[45]

The Centre for Innovative Justice submitted that while early evaluations of CISP indicated positive outcomes, there was limited research into the experiences of vulnerable cohorts, and that in some circumstances, therapeutic bail support can 'act to marginalise vulnerable cohorts further'. It noted that this was particularly prevalent when 'viewed in the context of inadequate service provision'.[46]

The Committee notes that evidence received was broadly positive about CISP, particularly its facilitation of support for individuals to address the causes of their offending and access bail. It believes some concerns that the program may not be appropriate for all participants, and that other more targeted interventions are required for vulnerable cohorts. In light of the increasing numbers of individuals being held on

40 Law Institute of Victoria, *Submission 112*, p. 28.

41 Samantha Sowerwine, Principal Lawyer, Justice Connect Homeless Law Justice Connect, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 31.

42 Justice Reform Initiative, *Submission 103*, p. 6.

43 Law Institute of Victoria, *Submission 112*, p. 27.

44 Liberty Victoria, *Submission 140*, p. 18.

45 Victorian Aboriginal Legal Service, *Submission 139*, p. 13.

46 Centre for Innovative Justice, *Submission 82, Attachment 1*, p. 81.

remand, the Committee encourages the Victorian Government to provide additional funding to CISP to enable access to the program commensurate with increased demand.

RECOMMENDATION 61: That the Victorian Government continue to support the expansion of the Court Integrated Services Program to additional court locations including in rural and regional Victoria and increase funding to enable the program to meet increases in demand.

10.1.4 Diversion

> **Prison is "the greatest power the State wields over its citizens" said Melbourne born and internationally acclaimed academic Norval Morris, Adviser to President John Kennedy and Professor of Law and Criminology at the Chicago University, and it is! It is a power that, once exercised, is extremely difficult and very expensive to challenge, let alone reverse. Being sentenced to a term of imprisonment has a lasting impact on the individuals concerned and the broader community. It is not the answer to their criminal behaviour. Sanctions that are alternatives to custody exist …**
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> Carmel Benjamin, *Submission 164*, p. 5.

Diversionary programs can prevent early or continued contact with the criminal justice system, usually through access to therapeutic supports. Diversion can occur at the pre-charge or pre-sentencing stage, through Victoria Police, or through court-based programs once a case comes before a court.

Diversionary practices that take place prior to cases coming before the courts, particularly the use of cautions by Victoria Police, are discussed further in Chapter 5.

Specialist therapeutic courts and CISP offer diversionary programs and pathways, and are discussed in more detail in Sections 10.3 and 10.1.3. Other diversionary programs and services are outlined in Table 10.2. As noted in Chapter 5, two key diversionary programs operated by Victorian courts are the Criminal Justice Diversion Program for adults and the Youth Diversion Service for children and young people.

Table 10.2 Post-charge diversion programs and services

Program	Description
Criminal Justice Diversion Program	The program aims to divert first-time or low-risk individuals from the criminal justice system by having their matter adjourned for up to 12 months. During the adjournment period, participants must participate in programs and/or activities identified by the court to address their underlying causes of offending. Case management or supervision is not provided. Individuals can only be considered for the program under certain conditions, including that they 'take responsibility for their actions' (but are not required to plead guilty). Successful participation in the program results in the individual being discharged without a finding of guilt. However, if an individual's participation is deemed unsatisfactory and they are subsequently found guilty, the court must take into account the extent of their participation in the program during sentencing. The Criminal Justice Diversion Program is available in the Magistrates' Court of Victoria. It is established under s 59 of the *Criminal Procedure Act 2009* (Vic).
Youth Diversion Service	Operated through the Children's Court of Victoria, the Youth Diversion Service operates in a similar way to the Criminal Justice Diversion Program. It is based on restorative justice principles, and aims to assist participants to take responsibility for their actions, repair harm and increase insight into the impacts of their offending upon the victim, their family and the community. Children and young people can have court proceedings adjourned for up to four months in order to participate in diversion programs or services. They must acknowledge responsibility for the offence. Youth diversion is provided for by div 3A of the *Children Youth and Families Act 2005* (Vic).
Mental Health Court Liaison Service	The service aims to provide early intervention within criminal justice processes by identifying individuals with mental illness at the post-charge, pre-sentence stage. It provides assessment and advice to courts and referrals to treatment providers. The service is funded by the Victorian Government and provided by Forensicare.
Mental Health Advice and Response Service	The service seeks to address the overrepresentation of persons with a mental illness in the criminal justice system. It provides advice and support to individuals within the court system as well as specialist clinical mental health advice to judges and community corrections services regarding appropriate mental health interventions. It can support diversion in some cases through mental health legislation. The service currently operates in the MCV and as a pilot program at the Melbourne CCV.

Source: Victorian Government, *Submission 93*, p. 54, Attachment 1, p. 21; *Criminal Procedure Act 2009* (Vic) s 59; *Children Youth and Families Act 2005* (Vic) Division 3A.

The Magistrates' Court explains the process for accessing diversion:

1. **Confirm if a diversion is available**—A potential diversion is discussed with the prosecution to obtain their consent. A diversion notice is then served on the individual, with a copy provided to the court ahead of the mention hearing.
2. **Court attendance**—The individual attends court for the mention hearing. Prior to the hearing, a court registrar will facilitate a questionnaire and interview to help to determine whether a diversion is appropriate. The registrar may also consult with any victims.

3. **Judicial officers' decision**—The relevant judicial officer will make a decision on the basis of the questionnaire and interview. If a diversion is granted, the court will set certain conditions to be met as part of a diversion plan, such as counselling and/or treatment, donation to a charitable organisation or an apology or compensation to the victim. The matter is then adjourned and a date set for a completion hearing. If diversion is not granted, the matter is referred to the general court listings.
4. **Diversion plan is followed**—The individual follows the conditions of the diversion plan. Prior to their completion hearing, they provide evidence of their compliance with the diversion plan to the court. If conditions are completed, charges are dismissed without a finding of guilt and recorded similarly to an official warning.[47]

As discussed in Chapter 5, s 59(2)(c) of the *Criminal Procedure Act 2009* (Vic) provides that the prosecution must consent to an individual participating in a diversionary program. Similarly, prosecutorial consent is required for the diversion of children and young people under s 356D(3)(a) of the *Children Youth and Families Act 2005* (Vic). Prosecutorial consent is typically required of Victoria Police. Issues around the granting of consent by police are discussed in detail in Chapter 5.

The Victorian Government highlighted findings of a 2004 evaluation of the Criminal Justice Diversion Program, which found that 94% of diversions through the program were successfully completed, with positive responses from participants.[48] The Australian Red Cross quoted research undertaken in 2016, which found that diversionary programs in Victoria had been well received by magistrates, and are viewed as a positive mechanism for minimising young peoples' contact with the criminal justice system.[49] In its submission, Victorian Association for the Care and Resettlement of Offenders (VACRO) stated that 'It is well established that diversion and problem-solving courts encourage desistance.'[50]

Stakeholders welcomed available diversionary programs and highlighted their importance in reducing the risk of reoffending and preventing further contact with the criminal justice system. The Australian Red Cross submitted that:

> Diversionary approaches are practical tools and initiatives that police, courts and corrections can use to prevent someone from becoming further involved in the criminal justice system. They generally target the factors that are contributing to a person's offending behaviour, for example drug or alcohol abuse. They enable a person to address the underlying causes of their offending often in lieu of another punishment and so can prevent a person from becoming entrenched in a cycle of offending.[51]

In relation to health-based responses, ermha365—a mental health and disability services provider—submitted that through court-ordered diversionary programs, such

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47 Magistrates' Court of Victoria, *Diversion*, 2020, <https://www.mcv.vic.gov.au/find-support/diversion> accessed 17 January 2021.

48 Victorian Government, *Submission 93, Attachment 1*, p. 5.

49 Red Cross Australia, *Submission 83*, p. 10.

50 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 35.

51 Red Cross Australia, *Submission 83*, p. 10.

as community-based treatment opportunities, 'we can stop criminalising the symptom and start treating the cause'. It stated that by 'supporting diversion towards therapeutic pathways, Victoria can expand its range of non-custodial sentencing options' and offer alternative mechanisms for rehabilitating low-risk individuals.[52]

Various stakeholders advocated for expanding the availability of the Criminal Justice Diversion Program and Youth Diversion Service, including where an individual is not a first-time offender. Smart Justice for Young People and the Human Rights Law Centre believed that access to diversion should not 'be restricted by prior offending or by categories of offending, be dependent on an admission of guilt' or be conditional on either police or prosecutorial consent.[53] The Human Rights Law Centre also stated that diversionary programs should 'be available at all stages of the legal system, and opportunities to access diversion should be as broad as possible'.[54]

The Law Institute of Victoria stated:

> Members argue that diversions should not necessarily be a 'one-time' offering, especially for low-level offending, exceptional offending, offenders that have committed an offence for the first time, offenders where a conviction or finding of guilty would significantly impact a person's employment and for offenders that are unfairly criminalised or where the reasons for offending should be addressed by rehabilitative support.[55]

Additionally, the Institute submitted that its members agreed that diversion through a restorative justice approach is appropriate for increasing the scope of matters available for diversion.[56] This proposal is discussed further in Section 10.2.

The Centre for Innovative Justice recommended expanding opportunities for diversion of women involved in low-level offending from prosecution. It cited results of evaluations of diversionary programs which found that 'female participants tended to achieve more successful outcomes than men'. It stated that this evidence suggested that 'rather than being available only to first time offenders, diversion is an effective path for criminalized women overall, albeit with the provision of appropriate supports'.[57]

Another issue raised is the requirement for acknowledgment of responsibility under s 59(2)(a) of the *Criminal Procedure Act 2009* (Vic). The Law Institute of Victoria raised concerns about these provisions, as s 59(3) of the Act provides that such acknowledgment is inadmissible as evidence in a court proceeding for that offence, and does not constitute a plea. It asserted that:

> The LIV is concerned with members reporting instances whereby Victoria Police has precluded an accused's participation in the diversion program where the accused

52 ermha365, *Submission 84*, p. 6.

53 Smart Justice for Young People, *Submission 88*, p. 9; Human Rights Law Centre, *Submission 58*, p. 22.

54 Human Rights Law Centre, *Submission 58*, p. 16.

55 Law Institute of Victoria, *Submission 112*, pp. 65–66.

56 Ibid., p. 68.

57 Centre for Innovative Justice, *Submission 82*, p. 10.

> has exercised their right to silence during a police interview, with the argument being that the exercise of that right indicates an absence of remorse. Members have further outlined that this "no comment conundrum" could be resolved through clarification of sub-section 59(2)(a) of the *Criminal Procedure Act 2009* (Vic), in order to preserve the right to silence and the right to defend the charge, if diversion is refused.[58]

On this basis, the Institute recommended that the extent of acknowledging responsibility under s 59(2)(a) of the *Criminal Procedure Act 2009* (Vic) should be clarified to 'preclude the exercise of the right to silence from being interpreted as an absence of remorse and a basis to refuse access to a diversion program'.[59]

A further issue raised by stakeholders is that funding for diversionary services and programs is limited. The Australian Red Cross submitted that these programs 'can be few and some not well known', and that resourcing 'is inconsistent'. It noted that diversionary programs rely on a mixture of government, community and philanthropic funding, and on the work of community members. Further, people in rural and regional areas 'experience inequitable access to diversion'.[60]

In addition, different cohorts experience varying access to diversion. In its submission, ermha365 explained that there are insufficient diversionary programs for people with a mental health issue or disability:

> Instead of community-based justice programs, people with disabilities and mental health presentations are more likely to find themselves in custodial settings. Alternative criminal justice programs and services should be provided in the same way as disability and mental health programming and staffed by trained personnel with professional backing from experienced service providers.[61]

The Australian Red Cross noted that recent research has found that Aboriginal and Torres Strait Islander youth 'who offend for the first time were less likely to receive a caution or be directed to a diversion program than non-indigenous offenders'.[62]

The Springvale Monash Legal Service reported a lack of diversionary options for people charged with family violence offences, including those that may be both a perpetrator and a victim-survivor:

> We have observed that there appears to be a widespread reluctance by the informant, prosecution and the Court to place clients charged with assault-related offences on a diversion program, including where the assault may have occurred in the context of family violence. This may be in circumstances where, notwithstanding the nature of the offence, diversion may otherwise be appropriate … We see an urgent need to further explore and research the extent that the criminal justice system, at all stages, is able to adequately account for and respond to family violence-related offences where

58 Law Institute of Victoria, *Submission 112*, p. 73.

59 Ibid., p. 6.

60 Red Cross Australia, *Submission 83*, p. 11.

61 ermha365, *Submission 84*, p. 11.

62 Red Cross Australia, *Submission 83*, p. 11.

the perpetrator is at the same time a victim-survivor of family violence; whether any legislative reforms are needed; and what related training may be needed for police, the prosecution, the legal profession, judges and Magistrates.[63]

Smart Justice for Young People advocated for all young people to be 'provided consistent and equitable access to diversion'. It said that this requires substantial investment in, and promotion of, 'culturally appropriate and specific diversion programs for all Victorian young people of different cultural groups delivered by community agencies'.[64]

The Australian Psychological Society recommended expanding existing diversionary programs to address individual needs and provide evidence-based solutions to reduce the risk of reoffending.[65] The Australian Red Cross advocated for further investment in diversionary programs that are co-designed, evidence-based and long-term to reduce rates of reoffending. It said that these should be available state-wide, evaluated regularly to ensure they are appropriate and effective, and tailored to respond to the particular needs of different cohorts, such as Aboriginal Victorians, young people, and people from culturally and linguistically diverse backgrounds.[66]

A number of stakeholders to the Inquiry highlighted the particular importance of diversion for children and young people in light of the criminogenic nature of any contact with the criminal justice system for this cohort. The Centre for Innovative Justice highlighted Victoria's 'long-standing focus on diversion of young people away from the formal justice system' as having 'contributed to a consistently low rate of youth justice involvement in Victoria'.[67]

The Commissioner for Aboriginal Children and Young People advocated for early intervention and diversionary processes to be prioritised 'at all points on the youth justice continuum'.[68] Dr Duncan Rouch submitted that the 'better alternatives to imprisonment of young people are community-based diversionary and support programs'.[69]

The *Youth Justice Strategic Plan 2020–2030* includes a reform direction for youth justice in Victoria towards improving diversion and supporting early intervention. It acknowledges that this 'provides the greatest opportunity to address youth crime' and that many young people do not progress further into the youth justice system due to diversionary mechanisms at different intervals.[70] Specifically, over half of all young people involved in incidents of offending receive cautions from Victoria Police,

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63 Springvale Monash Legal Service, *Submission 146*, pp. 9–10.

64 Smart Justice for Young People, *Submission 88*, pp. 7–8.

65 Australian Psychological Society, *Submission 90*, p. 5.

66 Red Cross Australia, *Submission 83*, p. 12.

67 Centre for Innovative Justice, *Submission 82, Attachment 1*, p. 69.

68 Commission for Children and Young People, *Submission 64*, p. 2.

69 Dr Duncan Rouch, *Submission 19*, p. 5.

70 Victorian Government, *Youth Justice Strategic Plan 2020–2030*, Melbourne, 2020, p. 13.

and since the Youth Diversion Service commenced in the Children's Court in 2017, over 4,600 diversions have been granted.[71]

The Strategic Plan identifies one action to improve the court-based diversion system for children and young people in Victoria. This includes reviewing the Youth Diversion Service by 2021 to ensure it is delivering the right outcomes for young people, their families, victims and the community.[72] However, it is unclear whether this review is underway or if it has been completed.

Smart Justice for Young People submitted that:

> Effective diversion practices encourage young people to take responsibility for their behaviour and understand the harm they have caused, while supporting them to address the underlying causes of their offending.[73]

Amnesty International recommended the introduction of a legislative presumption in favour of diversion for children and young people.[74]

In relation to young Aboriginal Victorians, the Human Rights Law Centre recommended further investment be made in 'Aboriginal and Torres Strait Islander-designed and led diversionary programs and alternatives to prison'. The Victorian Aboriginal Legal Service advocated for the recruitment of Koori Diversion Coordinators to 'improve the cultural safety of the Children's Court Youth Diversion service'.[75]

In the Committee's view, it is clear that diversionary options are an important and effective means of supporting individuals to address the causes of their offending and avoid further, harmful contact with the criminal justice system. Victoria's therapeutic courts and services play an important role in this space.

The Committee sought participation throughout this Inquiry from Victorian courts, through both written submissions and in the provision of evidence at public hearings. However, as noted, all Victorian courts and tribunals with a role in the criminal justice system declined to participate in and inform this Inquiry. As a result, it is unclear what diversionary options are commonly available for judicial officers and which options would benefit from further investment or development.

In relation to the Criminal Justice Diversion Program and Youth Diversion Service, the Committee acknowledges stakeholder calls to broaden the circumstances in which a person may be able to access diversion. It considers that courts should have further discretion in this space to grant access to these programs.

71 Ibid., p. 18.

72 Ibid., p. 19.

73 Smart Justice for Young People, *Submission 88*, p. 8.

74 Amnesty International, *Submission 89*, p. 20.

75 Victorian Aboriginal Legal Service, *Submission 139*, p. 26.

RECOMMENDATION 62: That the Victorian Government investigate opportunities for improving access to court-based diversion programs, including:

- expanding eligibility to diversionary programs, including where the relevant charges may not be an individual's first offence
- clarifying the scope of the acknowledgment of responsibility requirement under s 59(2)(a) of the *Criminal Procedure Act 2009* (Vic)
- ensuring access to diversionary programs for different cohorts, including through the recruitment of Koori Diversion Coordinators for the Children's Court of Victoria's Youth Diversion Service.

10.2 Restorative justice

As discussed in Chapter 8, some victims of crime advocated for the expanded use of restorative approaches in Victoria. Restorative approaches to justice can provide improved justice outcomes that promote psychosocial healing for victims of crime, as well as people who have committed criminal offences. The Victims of Crime Commissioner noted that 'some victims perceive restorative justice as fairer, more satisfying, more respectful, and more legitimate than what is offered by the traditional criminal justice system.'[76]

The Australian Red Cross described the purpose and scope of restorative justice:

> Restorative justice is one form of diversion. The term refers to programs aimed at bringing multiple parties together in relation to an offence (including both the offender and the victim, or a representative) and having the parties work towards a resolution of an issue through discussion, conferencing and mediation. Restorative measures offer an avenue for offenders to develop an awareness of how their behaviour impacts others and creates space for conversations that serve the overall diversionary process. Restorative justice programs show increased satisfaction from both the offender and the victim, and reduced recidivism when compared with conventional justice approaches such as incarceration or probation.[77]

Common principles across restorative programs are that they cause no further harm, work with the parties involved in the matter, and set relations right.[78]

The central restorative justice process in Victoria is 'group conferencing'. This is where people who have caused harm are brought together with those who have been harmed and their supporters, with support from relevant services. According to the Australian Association for Restorative Justice, group conferencing has been delivered at various stages of the criminal justice system, including:

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76 Victims of Crime Commissioner, *Submission 99*, p. 44.

77 Red Cross Australia, *Submission 83*, pp. 10–11.

78 Australian Association for Restorative Justice, *Submission 63*, p. 1.

- during diversion
- as part of sentencing support
- in the post-sentence phase
- during corrections pre-release planning.

Its submission argued that evaluations show that successful programs have led to a 'significant reduction in reoffending, relative to comparable cases that are not referred'. Crucially, it stated that these programs demonstrate positive outcomes for victims of crime.[79]

The Australian Red Cross similarly asserted that these programs result in 'increased satisfaction from both the offender and the victim, and reduced recidivism when compared with conventional justice approaches such as incarceration or probation'.[80]

The Australian Association for Restorative Justice stated that increased use of restorative justice could provide positive impacts at various stages of the criminal justice system, such as:

- increase the proportion of cases diverted from court,
- expand sentencing support in court,
- provide for more post-sentence healing, and
- provide for more effective pre-release planning.[81]

It further provided that these practices can be used in detention settings to enhance centre management and support rehabilitative and therapeutic outcomes.[82]

Victoria Legal Aid emphasised the benefits of restorative approaches for victims of crime, highlighting that research has shown that these can improve experiences of the justice system:

> There is evidence that participation in restorative justice processes can improve victims' experience of the criminal justice system and reduce the rate of reoffending … The Centre for Innovative Justice found that victims who participated in its pilot program reported feeling a greater level of satisfaction with their experience of the criminal justice system, even in cases where people are charged with more serious offences.[83]

At a public hearing, Emeritus Professor Arie Freiberg AM, Chair of the Sentencing Advisory Council, noted that group conferences have been employed for children and young people, but not for adults:

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79 Ibid., p. 8.

80 Red Cross Australia, *Submission 83*, p. 11.

81 Australian Association for Restorative Justice, *Submission 63*, p. 9.

82 Ibid., p. 2.

83 Victoria Legal Aid, *Submission 159*, p. 13.

> We are failing compared to other jurisdictions. I think the question is, 'What can we learn from other jurisdictions?'. Adult restorative justice conferences—we have got some in the children's jurisdiction. This is a changed paradigm of the relationship between offenders and victim.[84]

The Australian Association for Restorative Justice similarly asserted that restorative approaches have been 'significantly underutilised' in Victoria's criminal justice system.[85]

Two restorative justice programs currently in operation in Victoria are the Youth Justice Group Conferencing program and the Family Violence Restorative Justice Service. The Victorian Government has also announced the establishment of a Victim-Centred Restorative Justice Program, which is scheduled to begin in early 2022.[86] Chapter 8 discusses the Victim-Centred Restorative Justice Program in more detail.

The *Sentencing Act 1991* (Vic) (Sentencing Act) provides for circumstances in which the Magistrates' Court or County Court can defer sentencing of a person found guilty of an offence for a period of up to 12 months, including to allow them to participate in a program aimed at addressing the impact of the offending on the victim.[87] This can include a restorative justice process. However, as explained by the Australian Association for Restorative Justice, this provision has not been utilised since its introduction in 2010 due to a lack of available options:

> As it happens, Victorian law already allows for cases involving adult perpetrators of crime to be referred to a group conference, as occurs in the ACT. Changes to the state's *Sentencing Act* in 2010 (Section 83A) make it *legally* possible for sentencing in adult cases to be deferred, and for a case to be referred to a group conference. However, eleven years after the law was changed, there is still no funding to make it *practically* possible for judicial officers to refer cases involving adult offenders to a restorative process.[88]

Restorative justice processes exist in other Australian jurisdictions. In the ACT, the *Crimes (Restorative Justice) Act 2004* provides for a system of restorative justice that brings together victims of crime and their supporters with persons that have committed an offence. It seeks to enhance victims' rights by facilitating restorative justice 'as a way of empowering victims to make decisions about how to repair the harm done by offences'.[89]

Offenders can be referred at any stage, including at the pre-court stage, during court processes and following sentencing (up to the end of the term of the order or sentence).

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84 Emeritus Professor Arie Freiberg AM, Chair, Sentencing Advisory Council, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 27.

85 Australian Association for Restorative Justice, *Submission 63*, p. 1.

86 Victorian Government, *Victim Support Update: Reforms we will deliver to support victims of crime - Establishing a new Victim-Centred Restorative Justice Program*, 2021, <https://www.vic.gov.au/victim-support-update/reforms-we-will-deliver-support-victims-crime#establishing-a-new-victim-centred-restorative-justice-program> accessed 23 January 2022.

87 *Sentencing Act 1991* (Vic) s 83A.

88 Australian Association for Restorative Justice, *Submission 63*, p. 12.

89 *Crimes (Restorative Justice) Act 2004* (Vic) s 6.

A restorative justice process occurs through group conferencing, with information exchanged either face-to-face or through letters or messages. The process is coordinated by a convenor who takes participants through three stages (see Table 10.3 below).

Table 10.3 Restorative justice meeting process, Australian Capital Territory

What happened?	The offender will be asked to talk about what led up to the offence and what happened during and after the offence. They will also be asked how they think others were affected.
How were people affected?	Starting with the victim, the convenor asks everyone what they thought when the offence happened and how they feel now. The offender will find out how people were hurt by what happened and will probably find out some things about the offence that they didn't know.
How to make things better?	The convenor asks everyone what they think needs to happen to make things better. This may form an agreement between the victim and the offender about what they need to do to repair the harm caused by the offence. Everyone who participates makes sure that what is in the agreement is fair and reasonable.

Source: Department of Justice and Community Safety, *An explanation of restorative justice in the ACT*, ACT Government, 2019, <https://justice.act.gov.au/sites/default/files/2019-08/RestorativeJustice_GeneralInfo_Pamphlet_SEPT_2012.pdf> accessed 28 January 2022.

The Australian Association for Restorative Justice spoke positively of the ACT restorative justice system, stating that it provides 'a victim-centred restorative response' which enables the 'people most directly affected by a crime to be directly involved in addressing the resulting harm'.[90]

In addition, New Zealand also provides for restorative justice conferences, with services provided by community-based groups who are contracted by the Ministry of Justice. A number of Māori providers are available to provide culturally-informed and safe services. To participate, an individual must either plead or be found guilty, and consent to take part. A conference facilitator confirms participation with both the individual who committed the offence and any victims of the offending. The facilitator can also inform the court if a restorative justice process is not appropriate under the circumstances. Cultural needs of all parties are considered in planning the conference, and cultural support persons can attend. The conference takes place openly and informally, and a plan of action may be decided between parties to 'help put things right'.[91]

A 2018 survey of the satisfaction of victims of crime with New Zealand's restorative justice process found that:

- 86% were at least fairly satisfied with the process
- 73% felt slightly or a lot better

90 Australian Association for Restorative Justice, *Submission 63*, p. 10.

91 Ministry of Justice, *How restorative justice works*, 2022, <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works> accessed 25 January 2022.

- 6% said that the meeting made them feel slightly worse or a lot worse.[92]

In 2014, the Centre for Innovative Justice published the findings of a report into innovative justice responses to sexual offending, commissioned by the Commonwealth Attorney-General's Department. The report found that the current criminal justice system, through 'its single option of investigation by police and prosecution through the courts, is failing to provide an adequate response to the majority of victims of sexual assault'. It stated that to support victims, further options are needed that are responsive, inclusive, flexible and fair.[93]

The Centre outlined a best practice restorative justice conferencing model for sexual offending. Some of the key features of this model are outlined in Box 10.1.

BOX 10.1: Restorative justice conferencing for sexual offending, Centre for Innovative Justice

- All jurisdictions should develop a restorative justice statutory framework. This will ensure consistency, accountability and transparency. Legislation should not be overly prescriptive, in recognition of the importance of flexibility and case-by-case assessments.
- Restorative justice conferencing principles and guidelines should be developed. Guidelines should be both general and specific to sexual offending, and be based on the two-tiered guidelines developed in New Zealand.
- Restorative justice units should be introduced within respective state and territory Departments of Justice to oversee all restorative justice conferencing programs.
- Specialist gender violence teams should be incorporated within each restorative justice unit to oversee the administration of sexual offence restorative justice conferencing.
- Assessment panels should be established to determine suitability for sexual offence restorative justice conferencing on a case-by-case basis. The assessment panels should comprise forensic mental health professionals, representatives of the OPP, senior restorative justice conference facilitators, and victim and offender specialists. The specialist gender violence team should coordinate and support the assessment panel.
- A workforce of victim and offender specialists, modelled on New Zealand's Project Restore program, should be developed. A victim and offender specialist should be assigned to each case deemed suitable by the assessment panel.

(Continued)

92 Gravitas Research and Strategy Ltd, *Ministry of Justice – Restorative Justice Survey: Victim Satisfaction Survey 2018*, report for Ministry of Justice, 2018.

93 Centre for Innovative Justice, *Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community*, RMIT University, Melbourne, 2014, pp. 6–7.

BOX 10.1: Continued

- Jurisdictions should adopt a two-stage process for determining whether a sexual offence case is appropriate for a restorative justice conference: first, eligibility and second, suitability.
- Basic eligibility criteria should be developed, with no specific offence or offender exclusions.
- Further consultations should be conducted in relation to whether there should be a minimum age for victims to participate in sexual offence restorative justice conferencing.
- Ten years should be the minimum age for offender participation, in appropriate cases.
- Opportunities for referral to restorative justice conferencing should be provided at all stages of the criminal justice system.
- Further consultation should take place with police, the OPP, the legal profession and counsellors in relation to developing either oral or written information about restorative justice conferencing that can be given to victims during the 'options talk' and at the prosecution stage.
- A comprehensive consultation process should be undertaken with Aboriginal and Torres Strait Islander communities and a range of community organisations in relation to the justice needs of these communities. This should occur prior to the implementation of any restorative justice model to ensure that the perspectives and needs of Aboriginal and Torres Strait people are accounted for early in the design phase.
- A comprehensive consultation should be undertaken to ensure appropriate application of restorative justice conferencing to culturally and linguistically diverse communities.
- Restorative justice conferencing should be introduced in three phases, relating to type of offending and stage of the criminal justice process:
  - First: non-sexual, general adult restorative justice conferencing at all stages of the criminal justice system
  - Second: sexual offence restorative justice conferencing at all stages of the criminal justice system, except the post-charge stage, and
  - Third: post-charge sexual offence restorative justice conferencing.
- Ongoing monitoring and evaluation of the restorative justice program should be a core function of the restorative justice units and specialist gender violence teams.

Source: Centre for Innovative justice, *Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community*, RMIT University, May 2014, pp. 6–7.

Various stakeholders to the Inquiry recommended the use of restorative justice processes in Victoria. The Victims of Crime Commissioner stated that:

> Not all victims of crime want the same thing. For this reason, it is clear that the conventional criminal justice system, with its single pathway of prosecution through the courts, cannot meet the needs of all victims.[94]

The Commissioner recommended that the Victorian Government undertake 'a comprehensive, holistic external review of the existing programs … to ensure best practice in restorative justice is shared across the justice and service system.' The Commissioner believed the review should consider ways in which 'a more streamlined approach should be developed providing victims with a consolidated, central contact point and a clearer sense of pathways to various restorative justice practices.'[95]

In its submission, the Law Institute of Victoria recommended a pilot program of restorative justice diversion to 'expand non-adversarial pathways to justice pre-plea for summary offences and offences triable summarily'. It outlined the potential benefits of this type of program:

> The LIV understands that restorative justice diversion would address the necessity for the criminal justice system to better respond to the needs of victims involved in criminal proceedings. The LIV recognises that the use of restorative justice processes is better suited to address offences against the person, particularly because it ensures that the complainant is validated, heard, and believed. Members note that a restorative justice diversion model could remain within the framework of section 59 of the *Criminal Procedure Act 2009* (Vic). The sentencing guidelines outlined in sub-section 5(1) of the *Sentencing Act 1991* (Vic) could be utilised to formulate the conditions of diversion, similar to the conditions for community correction orders.[96]

The Institute stated that particular areas of focus for restorative justice diversion include family violence offences, sexual offences, and offences related to theft from an employer.[97]

An example of restorative justice processes as a mechanism for diversion is provided in Case Study 10.1.

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94 Victims of Crime Commissioner, *Submission 99*, p. 45.

95 Ibid., p. 46.

96 Law Institute of Victoria, *Submission 112*, p. 67.

97 Ibid., p. 68.

CASE STUDY 10.1: Khem's story

Khem was sexually abused by her sibling when she was a child. Khem informed her parents about the abuse, but they failed to acknowledge and prevent continued harm.

Legal proceedings were brought when Khem was an adult; however, there were evidentiary issues associated with the prosecution case. Also, Khem struggled throughout preparations for the matter, due to her mental health issues that arose from the trauma.

The Office of Public Prosecution and counsel for the defendant discussed what could be offered to Khem, instead of subjecting her to a committal hearing, trial, and cross-examination. Specifically, the needs of each party were discussed and the main issue that was identified was the failure of Khem's family to validate her claims and assist her in seeking support. Khem did not want her sibling to be imprisoned.

After discussion with the Magistrate, Khem and the offender, the parties believed that a diversion hearing using restorative justice principles would best address the needs of each party. Ultimately, the hearing was conducted with Khem linked into a courtroom that was attended by her sibling and family. Khem's sibling accepted responsibility for the offending and provided an apology. Also, Khem's family were able to acknowledge their role in her trauma. The outcome of the hearing was significant for all parties involved.

Source: Law Institute of Victoria, *Submission 112*, p. 68.

The Victorian Aboriginal Legal Service recommended expanding the use of restorative approaches across the Victorian legal system more broadly, and stated that these should be 'co-designed with Aboriginal communities to ensure they are culturally safe and will have the greatest possible rehabilitative potential for Aboriginal people'.[98] The Aboriginal Justice Caucus stated that the provisions under the Sentencing Act could be better utilised for restorative group conferencing. It recommended that culturally specific and responsive group conferencing be employed as an aid to sentencing across a range of matters. The Caucus noted that this would require appropriate administrative arrangements, including employment of skilled facilitators.[99]

Victoria Legal Aid recommended introducing a legislated restorative justice process, available:

- for all suitable persons who have committed an offence
- where both parties agree
- at various stages throughout the justice system.

98 Victorian Aboriginal Legal Service, *Submission 139*, p. 37.

99 Aboriginal Justice Caucus, *Submission 106*, p. 6.

It also recommended expanding the availability of children's group conferencing, with appropriate safeguards.[100]

Professor Bronwyn Naylor advocated for extended access to restorative justice mechanisms for young persons and adults, which are 'aimed at changing offender understanding of their offending behaviour as well as addressing victim justice needs for acknowledgement, voice and validation'.[101]

The Committee notes the evidence received from diverse stakeholders to the Inquiry regarding the importance and potential of restorative justice processes, and in particular, the views of victims of crime, as outlined in Chapter 8. It considers that there is a clear need for additional mechanisms to provide non-adversarial opportunities for justice outcomes where parties consent and it is deemed appropriate by a court or restorative justice facilitator. In this respect, the Committee welcomes the Victorian Government's announcement of a new Victim-Centred Restorative Justice Program, to commence in 2022, to build on previous, more limited programs.

Any restorative justice group conferencing program should be developed on the basis of best practice models and the experiences of other jurisdictions. The Victorian Government noted that the new program will include the development of a Restorative Justice Knowledge Hub to ensure that the program is well-designed and innovative. The Committee encourages the Victorian Government to ensure that the program prioritises the views of victims of crime in its development. In addition, that it is created in consultation with Aboriginal Victorians and culturally and linguistically diverse communities to ensure the model is culturally safe and appropriate. It should also operate flexibly at different stages of the criminal justice process.

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RECOMMENDATION 63: That in the development and implementation of the Victim-Centred Restorative Justice Program, the Victorian Government should:

- ensure the program is based on best practice, and incorporates the experiences of Australian and international jurisdictions
- prioritise the views of victims of crime
- undertake consultation with Aboriginal Victorians and culturally and linguistically diverse communities, in order to ensure the model is culturally safe and appropriate
- ensure that it operates flexibly at different stages of the criminal justice process.

100 Victoria Legal Aid, *Submission 159*, p. 13.

101 Professor Bronwyn Naylor, *Submission 57*, p. 6.

10.3 Specialist courts

Victoria's specialist courts provide therapeutic, specialist approaches to justice issues, particularly in relation to criminal matters. They seek to support accused individuals to address the underlying causes of their offending through the use of court processes as a therapeutic intervention. This approach contributes to reduced risks of recidivism.[102]

The Victorian Government submitted that evaluations of specialist courts 'consistently show that they provide a positive return on investment and better outcomes for people who engage with them, and the community more broadly'. It stated that particular outcomes include a reduction in the frequency and severity of reoffending as well as improved employment rates.[103]

At a public hearing, Rebecca Falkingham, Secretary of the Department of Justice and Community Safety (DJCS), stated that: 'Problem-solving courts are, we really think, the way of the future.'[104]

In Victoria, there are several specialist courts including:

- the Assessment and Referral Court List
- Koori Courts
- Drug Courts
- the Specialist Family Violence Court
- the Neighbourhood Justice Centre.

Each court has its own eligibility criteria and processes, such as the type of offending, the individual's address, and whether or not they plead guilty. As a result, not every person involved in court processes can have their matter dealt with through a specialist court.

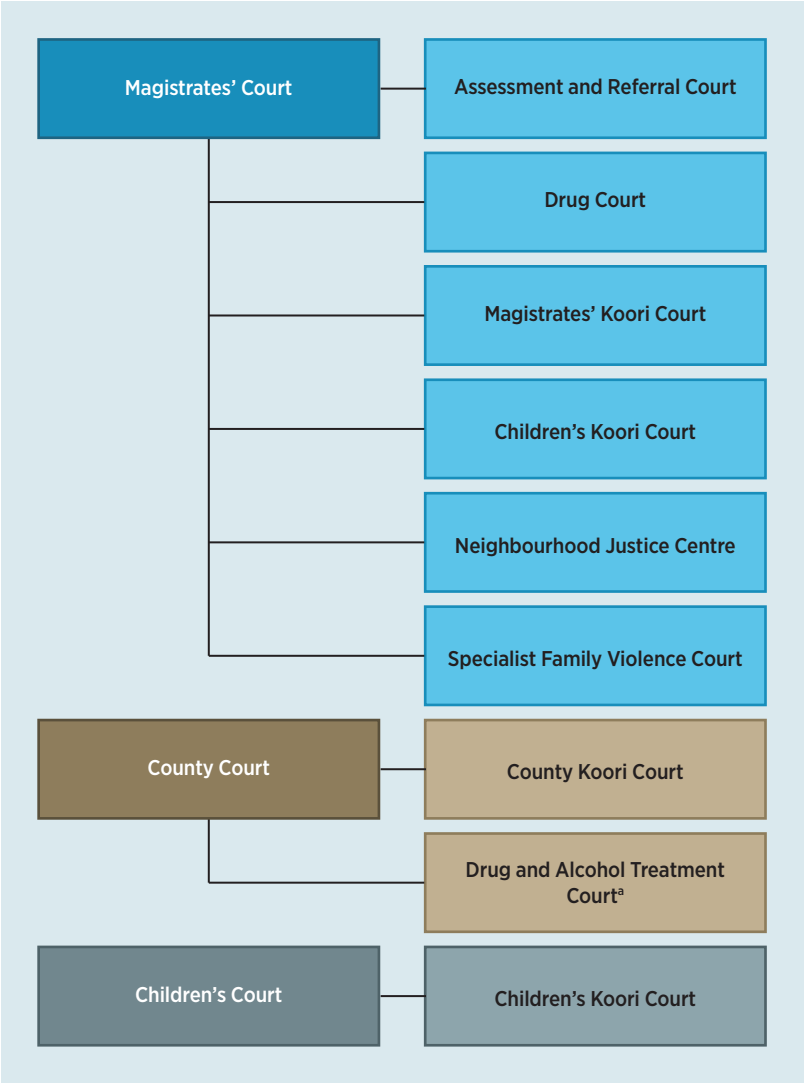
Victoria's specialist courts each operate within the Magistrates' Court, the Children's Court, or the County Court as set out in Figure 10.2.

102 Victorian Government, *Submission 93*, p. 85.

103 Ibid.

104 Rebecca Falkingham, Secretary, Department of Justice and Community Safety, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 7.

Figure 10.2 Victoria's Specialist Courts



a. The Drug and Alcohol Treatment Court is running as a pilot program.

Source: Legislative Council Legal and Social Issues Committee.

Stakeholders broadly supported the potential of therapeutic approaches to improve justice outcomes. The Australian Psychological Society explained that therapeutic jurisprudence is informed by behavioural science principles which aim to optimise the engagement of individuals with legal processes. It stated:

> Once offenders have been charged and appear before a court, further opportunities are available in relation to court processes to reduce risk of re-offending. Some of these relate to practices informed by therapeutic jurisprudence, which utilise principles from behavioural science to optimise offender engagement in legal processes. Examples include ensuring interactions between legal officers (such as lawyers, judicial or other court staff) and defendants promote a working alliance underpinned by collaboration. In addition, providing reasons for sentencing that are comprehensible to defendants,

> particularly if they have an intellectual disability or mental health problem, may be helpful. Interactions within court proceedings may either impede, be neutral or improve wellbeing, and subsequent involvement in the criminal justice system.[105]

The Law Institute of Victoria described therapeutic jurisprudence as a 'practical method that can be used to improve the outcomes connected with participant wellbeing and offender rehabilitation'.[106] Justice Connect, a legal assistance service, submitted that the problem-solving courts—Victoria's specialist courts—use principles of therapeutic jurisprudence to respond to complex social and health issues. It stated that this approach 'provides important benefits to the accused as well as the broader community by providing targeted and integrated supports that reduce the likelihood of reoffending'.[107]

The Justice Reform Initiative—an organisation seeking criminal justice reform—similarly described the specialist courts as having 'a key role to play in reducing recidivism'. It explained that these courts are becoming more prominent and are now 'entrenched in the justice system', bringing 'new techniques to judicial practice' such as solution-focused judging.[108]

At a public hearing, Professor James Ogloff, Professor of Forensic Behavioural Science at Swinburne University of Technology, described how specialist courts can form part of an integrated service response:

> the specialist courts such as the Drug Court and the ARC list in the Magistrates Court—I think these things are helpful because in many ways they stitch together some of the inadequacies you see in the broader society. As you will have heard from many people who have given evidence, so many of the social plights people experience and their individual problems do not necessarily cause the offending but they contribute to it, and so if there are courts that can take a more restorative justice, therapeutic approach, that can help. It speaks to the issue of this broader integrated system where the courts have a significant role to play.[109]

Smart Justice for Women asserted that therapeutic approaches offer an alternative to traditional sentencing methods:

> There are real alternatives to the traditional process of sentencing that can deliver tailored, rehabilitative outcomes that benefit the individual and the community as a whole. Therapeutic sentencing options and practices, such as structured and supported deferral of sentences, can provide support to women while in the community and reduce the likelihood that they will be sentenced to a term of imprisonment once their matters are finalised.[110]

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105 Australian Psychological Society, *Submission 90*, p. 6.

106 Law Institute of Victoria, *Submission 112*, p. 74.

107 Justice Connect, *Submission 158*, p. 24.

108 Justice Reform Initiative, *Submission 103*, pp. 7–8.

109 Professor James Ogloff, Professor of Forensic Behavioural Science and Director, Centre for Forensic Behavioural Science, Swinburne University of Technology, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 31.

110 Smart Justice for Women, *Submission 94*, p. 20.

In its submission, Victoria Legal Aid stated that therapeutic courts have the potential to address other intersecting issues and have shown to have high rates of success, but that overall access continues to be restricted. In particular, it noted that regional and rural communities do not have the same access as metropolitan areas, and that support should be extended across the State.[111] Expansion of specialist courts in regional and rural areas is discussed further in Chapter 14.

Various stakeholders recommended the further extension of therapeutic justice through Victoria's specialist courts to support their availability and accessibility.[112] First Step Legal Service stated that this would address limitations around the courts' 'resource constraints, limited geographical coverage and/or restrictive eligibility criteria'. It called for expansion of 'the provision of specialist problem solving courts across Victoria as part of concerted and sustained investment in services that have a proven capacity to reduce recidivism'.[113]

Tania Wolff, from the Law Institute of Victoria, recommended that the Victorian Government expand specialist courts and fund initiatives that mainstream therapeutic practices within the court system.[114]

In addition to increased capacity, the Australian Psychological Society suggested the development of further types of specialist court, such as a Mental Health Court or Special Circumstances Court.[115] Tracie Oldham, who has personal experience of the criminal justice system as a victim of childhood sexual abuse, suggested that a specialist court to deal with historical sexual offences should be established.[116]

Professor Ogloff stated that there is evidence to support the further expansion of specialist courts. However, he noted that individuals often experience multiple compounding issues and for this reason, specialist courts may require broad therapeutic mandates:

> I think there are questions nationally and internationally about: do you make them so specialised or do you try to have courts which are—because the reality is that with, say, the Drug Court, the problem is, if you look again at, again, mental illness, our data show 75 per cent of people who are in Forensicare, either community or inpatient, have a co-occurring drug problem, and then they also have, often, personality disorders and intellectual disability. So I think the approach more and more is having problem courts which have broader mandates and the service system that goes along with them. So definitely an increase in the number of courts and the resourcing, but if you speak to—and you probably have—people who run those courts, it is: what are the services that can go along with that?[117]

111 Victoria Legal Aid, *Submission 159*, p. 12.

112 See, for example, Professor Bronwyn Naylor, *Submission 57*, p. 6; Smart Justice for Women, *Submission 94*, p. 9; Law Institute of Victoria, *Submission 112*, p. 7; Victorian Aboriginal Legal Service, *Submission 139*, p. 19; Australian Psychological Society, *Submission 90*, p. 10; First Steps Legal, *Submission 113*, p. 2.

113 First Steps Legal, *Submission 113*, p. 7.

114 Tania Wolff, President, Law Institute of Victoria, transcript, 24 August 2021, p. 15. Tania Wolff, *Transcript of evidence*.

115 Australian Psychological Society, *Submission 90*, p. 10.

116 Tracie Oldham, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 54.

117 Professor James Ogloff, *Transcript of evidence*, p. 32.

FINDING 45: Victoria's specialist courts provide an important therapeutic alternative to traditional sentencing processes. They have been demonstrated to support individuals who are charged with an offence to address the underlying causes of their offending, reducing the risk of recidivism and improving community safety.

10.3.1 Assessment and Referral Court

The Assessment and Referral Court is a court list for persons accused of an offence who have a mental illness and/or cognitive impairment, such as an intellectual disability, acquired brain injury or autism spectrum disorder. Sitting within the Magistrates' Court, it aims to 'help people address underlying factors that contribute to their offending behaviours'.[118]

For a person to be referred to the Assessment and Referral Court, the following steps must be followed:

- **Confirm availability**—The person must be charged with an offence within the catchment area of an existing Assessment and Referral Court and be on bail at the time of referral. The Court is available at Magistrates' Court locations in Frankston, Latrobe Valley, Korumburra, Melbourne and Moorabbin.
- **Check eligibility**—The person must be diagnosed with a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder, or neurological impairment. The diagnosis must cause a 'substantially reduced capacity' in the areas of self-care, self-management, social interaction or communication. The person must also be able to benefit from receiving services through a support plan, such as in relation to psychological or welfare services.
- **Seek a referral**—A referral can be made at a bail hearing or mention hearing by the person accused of an offence or their family, a community service organisation, magistrates, Victoria Police, or lawyers of CISP. The accused individual must consent to being referred to the Assessment and Referral Court.
- **Attend an assessment**—Eligibility must be assessed by a case manager at the Assessment and Referral Court. If accepted, the accused person must enter a formal plea in order to access a support plan. If a guilty plea is entered, sentencing will occur within the Assessment and Referral Court. However, if a plea of not guilty is entered, a contested hearing will take place within a mainstream court.[119]

Victoria Legal Aid provided a case study of a client, Edwin, and their experience with the Assessment and Referral Court (Case Study 10.2).

118 Magistrates' Court of Victoria, *Assessment and Referral Court (ARC)*, 2018, <https://www.mcv.vic.gov.au/about-us/assessment-and-referral-court-arc> accessed 21 December 2021.

119 Ibid.

CASE STUDY 10.2: Edwin's story

Edwin is a man in his early 40s living in Melbourne's inner suburbs. He was diagnosed with schizophrenia in his 20s and has had several hospitalisations over the years.

In 2016, Edwin experienced a prolonged mental health crisis, involving increasingly unusual behaviour and ultimately criminal offending.

After a period in custody, Edwin was referred into the Assessment and Referral Court (ARC), where he was allocated a case manager and linked in with other community support services.

While participating in ARC, Edwin reconnected with his mother, and she attended his monthly court appearances with him.

Edwin and his mother see his participation in ARC as a turning point in his life. 'It was a lot more personal, one on one experience' recalls Edwin, 'you feel as though you are understood a lot more, you're heard with what you're saying. The extra time the judges [sic] put in for you really gives you the motivation to do the right thing.'

Edwin's mother appreciated how the magistrate addressed the participants with professional care and encouragement. 'The programme provided him with a different pathway that was not adversarial; but one of encouragement and respect permitting an alternative to one of decline into habitual anti-social behaviours and possible criminality.'

'The ARC program provided us with hope.'

Edwin feels ARC has provided him an opportunity to move on with his life and work towards achieving his goals and aspirations.

Source: Victoria Legal Aid, *Submission 159*, Appendix 4.

Stakeholders were positive about the work of the Assessment and Referral Court and its problem-solving approach. Ian Gray, Patron of the Justice Reform Initiative and former Chief Magistrate of Victoria, described it as a 'great model'.[120] First Step Legal Service submitted that the Court list has provided individual and community benefits:

> The Assessment and Referral Court that delivers mental health treatment and case management under the supervision of the court produces substantial reductions in both the frequency and seriousness of offending that persist over time, reducing incarceration rates.[121]

Stan Winford, Associate Director of Research, Innovation and Reform at the Centre for Innovative Justice, provided feedback from persons that had appeared before the Assessment and Referral Court list, stating:

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120 Ian Gray, Patron and former Chief Magistrate of Victoria, Justice Reform Initiative, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 23.

121 First Steps Legal, *Submission 113*, p. 7.

> some of the people we worked with had been in the assessment and referral court, for example. They all spoke quite glowingly about their experience in terms of them being listened to, that they were in an alliance with the person and the people around them who were working to help them address the challenges that they faced. Those are the sorts of approaches that I think we need more of.[122]

The Law Institute of Victoria, Victorian Aboriginal Legal Service, Office of the Public Advocate and Law and Advocacy Centre for Women argued that the Court should be expanded to additional locations.[123] In its submission, the Victorian Aboriginal Legal Service noted the need for support in regional areas in particular, as well as the limited nature of the Court list's eligibility criteria:

> Many Aboriginal people in prison are affected by mental illness or acquired brain injuries. However, their access to Assessment and Referral Court is limited by two key factors. One is the restricted geographic availability of ARC - only five Magistrates' Courts, all in Melbourne or Gippsland. Aboriginal people are much more likely than other Victorians to live in rural parts of the state, and the lack of availability of ARC in many courts where Aboriginal people appear means they are denied equitable access.
>
> The eligibility criteria for ARC are also a limiting factor, because people are required to be on bail in order to be referred to ARC. Victoria's punitive bail laws and their disproportionate effects on Aboriginal people therefore prevent many people from accessing therapeutic support, instead pushing them towards inappropriate criminal legal responses.[124]

Emily Piggott, Advocacy Coordinator at VALID, noted the benefits of therapeutic options in sentencing. However, she stated that there are often limited programs and services available to magistrates:

> unfortunately for the magistrates sentencing, from what I understand from talking to those magistrates, there are a range of other options that they would really love to be able to use but they simply do not have those options available to them. They also play an incredibly important role in an almost sort of case management sense with some people, with the fact that they monitor people, check in on people and really want to work out what is happening for a person. They really investigate, 'Who is this person? What do they need? What do they want? What will work for this person?'. It is such a fabulous approach, but they simply do not have the resources available to them. So it is fantastic for a magistrate to have that interest, but if they do not have the resources, if they are not able to say, 'Well, I think this person needs to be in stable housing' or 'Who is going to refer this person to this service?', then it all falls apart a bit.[125]

122 Stan Winford, Associate Director, Research, Innovation and Reform, Centre for Innovative Justice, RMIT University, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 38.

123 Law Institute of Victoria, *Submission 112*, p. 7.; Victorian Aboriginal Legal Service, *Submission 139*, p. 39.; Law and Advocacy Centre for Women, *Submission 135*, p. 22.; Office of the Public Advocate, *Submission 153*, p. 45.

124 Victorian Aboriginal Legal Service, *Submission 139*, p. 267.

125 Emily Piggott, Advocacy Coordinator, VALID, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 57.

Similarly, the Justice Reform Initiative submitted that the Court list is highly successful, but that resourcing was needed to facilitate the accompanying court programs that participants can be referred to.[126] Table 10.4 below outlines the referral and acceptance rates at the Assessment and Referral Court for financial years 2019–20 and 2020–21.

Table 10.4 Assessment and Referral Court statistics, 2019–20 and 2020–21

Location	Referral (number of clients)		Acceptance (number of clients)		Acceptance rate (%)	
	2019–20	2020–21	2019–20	2020–21	2019–20	2020–21
Frankston	31	24	17	4	55	20
Latrobe Valley	64	46	22	16	34	28
Moorabbin	20	16	10	8	50	47
Melbourne	61	41	35	30	57	59

Note: Latrobe Valley includes ARC at the Korumburra and Wonthaggi Magistrates' Courts.

Source: Magistrates' Court of Victoria, *Annual Report 2020–21,* Magistrates' Court of Victoria, 2021 <https://www.mcv.vic.gov.au/sites/default/files/2021-11/Annual%20Report_20-21_0.pdf> accessed 14 February 2022.

To meet demand, the Royal Commission into Victoria's Mental Health System recommended that the Assessment and Referral Court list be expanded to each of the 12 Magistrates' Court locations by 2026.[127]

The Committee welcomes the important work of the Assessment and Referral Court list, and the positive outcomes it has had for participants. However, the Committee is concerned by the significant drop in acceptance rates in 2019–20 and 2020–21. The Committee believes the Victorian Government should provide an update on its progress to expand the Court list to all 12 Magistrates' Court locations, as recommended by the Royal Commission into Victoria's Mental Health System. Further, the Committee supports a review of eligibility criteria for the Assessment and Referral Court to improve accessibility for more participants.

FINDING 46: The Assessment and Referral Court list provides a therapeutic response to persons accused of an offence who have a mental illness and/or cognitive impairment, and has demonstrated success in supporting them to address the underlying causes of their offending.

126 Justice Reform Initiative, *Submission 103*, p. 5.

127 Victorian Government, *Submission 93*, p. 85.

RECOMMENDATION 64: That the Victorian Government:

- provide an update on its progress to expand the Assessment and Referral Court list to each of the 12 Magistrates' Court locations by 2026, in accordance with the recommendation of the Royal Commission into Victoria's Mental Health System
- consider additional methods to improve access to Assessment and Referral Court services, including a review of the current eligibility criteria.

10.3.2 Koori Court

Victoria's Koori Courts were established in response to the 1991 Royal Commission into Aboriginal Deaths in Custody and the overrepresentation of Aboriginal and Torres Strait Islanders in the criminal justice system. A pilot court first operated in the Magistrates' Court in 2002, and courts have since expanded into the Children's Court and County Court.[128] Koori Courts have a number of objectives, including reducing recidivism and improving participation of Aboriginal communities in sentencing processes.[129]

To have a matter dealt with in a Koori Court, participants must be of Aboriginal and Torres Strait Islander background. They must plead guilty and agree to have their matter dealt with in a Koori Court. Further, participants must live within—or have been charged within—the boundary area of the relevant Koori Court.[130] Certain restrictions apply on the types of offences that can be heard in the Koori Courts:

- the Children's Koori Court cannot hear sexual offences
- the Magistrates' Koori Court cannot hear family violence or sexual assault offences
- the County Koori Court cannot hear sexual offences
- family violence or breaches of intervention orders can only be heard at the County Koori Court in Mildura.

To have a matter heard in a Koori Court, an individual must seek a referral after entering a guilty plea. If determined to be eligible, the matter is then listed in the relevant Koori Court.

In Koori Courts, judicial officers have access to the same sentencing options as mainstream courts. However, Koori Courts seek to ensure sentencing outcomes are culturally appropriate and reduce the risk of reoffending.[131] Elders and Respected Persons are present and provide cultural advice to the judicial officer in relation to the individual and the circumstances.

128 Sentencing Advisory Council, *A quick guide to sentencing (6th edn)*, Melbourne, 2021, p. 6.

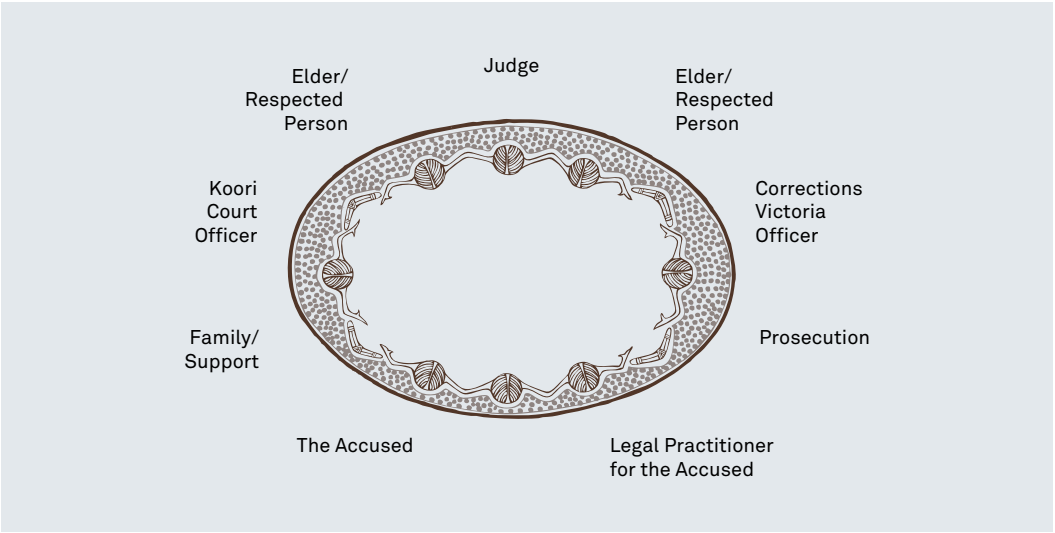
129 Victorian Government, *Submission 93*, p. 108.

130 Magistrates' Court of Victoria, *Koori Court: A defendant's guide*, Melbourne, 2018, p. 2.

131 Ibid.

During proceedings, the layout of the hearing differs to a usual courtroom layout. Hearings are less formal and take place around an oval table, with participants including the relevant judicial officer, the prosecution, Elders and Respected Persons, Corrections Victoria officers, Koori Court officers, legal practitioners, an accused person and their family or other support persons. While the layout varies slightly between the Koori Courts, an example is shown in Figure 10.3.

Figure 10.3 Sentencing conversation participants and seating, County Koori Court



Source: County Court of Victoria, *County Koori Court*, Factsheet, 2018, p. 3.

Table 10.5 outlines the three Koori Courts operating within Victoria.

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Table 10.5 Victoria's Koori Courts

Court	Description
Magistrates' Koori Court	The Magistrates' Koori Court deals with less serious offences. It operates as a division of the Magistrates' Court in Bairnsdale, Broadmeadows, Geelong, Latrobe Valley, Melbourne, Mildura, Shepparton, Swan Hill and Warrnambool.
Children's Koori Court	First established in 2005, the Children's Koori Court aims to 'reduce offending behaviour and reduce the number of young Koori people being sentenced to a period of detention'. The Children's Koori Court operates as a specialist court at the Children's Court in Melbourne and the Magistrates' Court in Bairnsdale, Dandenong, Geelong, Hamilton, Mildura, Morwell, Portland, Shepparton, Swan Hill and Warrnambool.
County Koori Court	Established in 2008 under the *County Court Amendment (Koori Court) Act 2008* (Vic), the County Koori Court deals with more serious offences. As the County Court is an appellate court, the County Koori Court also hears sentence appeals from the Magistrates' Koori Court. The County Koori Court operates in the County Court in Bairnsdale, Melbourne, Mildura, Morwell and Shepparton.

Source: Sentencing Advisory Council, *A quick guide to sentencing*, 2021 (6th edn), Melbourne, p. 6; Children's Court of Victoria, 'Koori Court' (2021) <https://www.childrenscourt.vic.gov.au/criminal-division/koori-court> accessed 14 January 2022; County Court of Victoria, 'County Koori Court' (2018) Fact sheet, p. 1; Victorian Government, *Submission 93*, p. 108.

A 2011 evaluation of the County Koori Court found that it had resulted in reduced rates of reoffending and improved awareness of justice processes within Aboriginal communities. According to the Victorian Government, other evaluations have:

> identified that the commitment and cooperation of the Elders, judicial officers, court staff, and support services are critical to the court's success in improving the experience of Aboriginal accused people.[132]

However, Koori Courts continue to experience significant demand.

In its submission, the Victorian Government stated that the Koori Courts are the largest funded initiative of the Aboriginal Justice Agreement.[133] Under Stage 4 of the Agreement—*Burra Lotjpa Dunguludja*—Koori Courts are being expanded to additional locations across the three court jurisdictions. Other actions under the Agreement include a pilot program hearing contraventions of family violence intervention orders in at least one Magistrate's Koori Court location.[134]

The Aboriginal Justice Caucus explained the importance of Koori Courts:

> The Koori Court model, established in 2001, exclusively sentences Aboriginal and Torres Strait Islander peoples and operates in a more culturally safe manner in comparison to mainstream court hearings. The Koori Court puts culture and healing at the forefront through the inclusion of Aboriginal Elders participation in the hearing and ultimately aims to reduce reoffending and avoid incarceration. The AJC recommend Investing in the Koori Court model to expand to all courts will allow Aboriginal and Torres Strait Islander peoples access to appropriate and culturally safe sentencing alternatives.[135]

Aunty Linda Bamblett, Chief Executive Officer of the Victorian Aboriginal Community Service Association Ltd, noted the success of Koori Courts and the value they provide to the broader legal system:

> if you are looking for the influence of Aboriginal people and the support that Aboriginal people can give you, you only have to look at the Koori Court and the expansion and the other areas that that has reached into. It started off with the Magistrates Court, and there were two pilots—one in Shepparton and one in Broadmeadows. It has now expanded across the state. We now have the Children's Koori Court. We now have programs in the family court and family violence courts. So you only need to look at your own system to see the value that Aboriginal people play in assisting judiciaries in their findings and decisions.[136]

132 Victorian Government, *Submission 93*, p. 108.

133 Ibid.

134 *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4, A partnership between the Victorian Government and Aboriginal Community* (2021) Melbourne, p. 47.

135 Aboriginal Justice Caucus, *Submission 106*, p. 14.

136 Aunty Linda Bamblett, Chief Executive Officer, Victorian Aboriginal Community Service Association Ltd (VASCAL), public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 14.

Aunty Linda Bamblett also emphasised the central role of Elders and Respected People in Koori Court processes, stating that they are critical to the success of the model.[137]

Several stakeholders noted the limited geographic reach of the Koori Courts. The Victorian Aboriginal Legal Service, Australian Red Cross and Victoria Legal Aid contended that there is a need to ensure greater access across Victoria to culturally informed and safe criminal justice processes.[138] Victoria Legal Aid also advocated for more frequent sittings, stating:

> Despite the community and cultural benefits of the Koori Court, it is not available statewide. Furthermore, in some regional locations it sits as infrequently as every six weeks; in our experience a young person may go to the mainstream court instead of waiting for a Koori Court date due to the delay.[139]

The Australian Red Cross explained that a further challenge relates to the eligibility criteria that a person must plead guilty to be referred to a Koori Court, rather than allowing matters to be referred at other stages.[140] The Victorian Aboriginal Legal Service asserted that this limited jurisdiction also extends to the types of offences that the courts can deal with:

> The Koori Courts that currently operate in Victoria provide an example of what can be achieved by Aboriginal community involvement, and have been deemed successful in addressing offences committed by Aboriginal persons in Victoria, in regards to the cultural-appropriateness of both the proceedings and sentences imposed, as well as the prevention of future offences. However, these Courts have limited jurisdiction in respect of both types of offences and plea requirements, coupled with the fact that Koori Court sits at only 12 Magistrates' Court locations and five County Court locations at present. The role of Aboriginal Elders and Respected Persons is also limited in a way that prevents Koori Courts from being truly self-determined institutions. The expansion of the Koori Courts system is a logical and necessary next step to progress towards realising Aboriginal self-determination within the Victorian criminal legal system.[141]

At a public hearing, Monique Hurley, Senior Lawyer at the Human Rights Law Centre, similarly noted the Koori Courts' limited jurisdiction. She advocated for support to be provided to realise self-determination within the courts:

> I think Koori Court is an example of something that is working really well, and it is unfortunate that the jurisdiction of that court at the moment is limited to people who are choosing to plead guilty. I do not need to tell you this … but I think Aboriginal people have all of the solutions to this, and I think we just need to really invest and support

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137 Ibid., p. 13.

138 Victorian Aboriginal Legal Service, *Submission 139*, p. 14; Red Cross Australia, *Submission 83*, p. 9; Victoria Legal Aid, *Submission 159*, p. 11.

139 Victoria Legal Aid, *Submission 159*, p. 11.

140 Red Cross Australia, *Submission 83*, p. 9.

141 Victorian Aboriginal Legal Service, *Submission 139*, p. 44.

> them to be able to develop and deliver the programs that are already in the works to support people and to further develop the Koori Court.[142]

Victoria Legal Aid and the Victorian Aboriginal Legal Service believed that Koori Courts should be enabled to hear bail applications and be involved in earlier points of criminal proceedings.[143] Victoria Legal Aid explained that this would allow for culturally safe justice processes across the different stages of the criminal justice system:

> The Koori Court is limited to a plea and diversion court. The Koori Court should be able to hear matters from commencement to end. Enabling the Koori Courts to hear bail applications and take jurisdiction at the pre-resolution stage would allow people to engage early in a culturally appropriate program that would address underlying criminogenic factors, reducing the likelihood of reoffending and improving their sentence outcomes.[144]

The Victorian Aboriginal Legal Service also argued that Koori Courts should be allowed to make Drug and Alcohol Treatment Orders as an alternative to a custodial sentence—where imprisonment would otherwise be likely. It further suggested that they should be given jurisdiction to hear matters that are contested and where a person has not yet entered a plea, as well as to divert people to culturally appropriate diversion programs and services.[145]

The Committee welcomes the widespread, positive evidence received from stakeholders on the impact of Koori Courts in providing culturally safe criminal justice processes for Aboriginal Victorians. It acknowledges the significant work undertaken by the Courts and considers that there is compelling evidence to support expanding their jurisdictional scope. The Committee notes that its final report for the *Inquiry into the use of cannabis in Victoria* recommended that the Victorian Government consider allowing Koori Courts to issue Drug and Alcohol Treatment Orders.[146]

FINDING 47: Since their establishment, Victoria's Koori Courts have provided culturally safe and accessible criminal justice processes for Aboriginal Victorians. However, geographic and jurisdictional limitations restrict them from further supporting Aboriginal self-determination within the Victorian criminal justice system.

142 Monique Hurley, Senior Lawyer, Human Rights Law Centre, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 39.

143 Victoria Legal Aid, *Submission 159*, pp. 10–11. Victorian Aboriginal Legal Service, *Submission 139*, p. 14.

144 Victoria Legal Aid, *Submission 159*, pp. 10–11.

145 Victorian Aboriginal Legal Service, *Submission 139*, p. 39.

146 Department of Justice and Regulations, *Corrections Victoria*, 2015, p. xviii.

RECOMMENDATION 65: That the Victorian Government continue to support Koori Courts to provide culturally safe and appropriate criminal justice processes for Aboriginal Victorians, including through:

- expanding court locations to additional areas across Victoria, including in regional and rural areas
- considering the extension of the Courts' jurisdiction to hear additional types of criminal matters.

10.3.3 Drug Court

> **if you ever want to have a great day in a Victorian court I highly recommend that you go to a Drug Court graduation. I have often seen tears in courts, but not very often tears of joy like you do in Drug Courts. It just shows how people who have been through decades of trauma and addiction and being caught up in the criminal justice system can, if we put the right time and space and effort into them, turn their lives around and become really meaningful contributors, reconnect with their families and do all the things that we want.**
>
> Dan Nicholson, Executive Director, Criminal Law, Victoria Legal Aid, public hearing, via Zoom, 21 October 2021, *Transcript of evidence*, p. 21.

The Drug Court operates as a post-sentence therapeutic court focused on treatment and rehabilitation. The Court imposes and administers Drug and Alcohol Treatment Orders (DATOs) to people who are sentenced to an offence where drug and/or alcohol dependency contributed to their offending. It currently operates in the Magistrates' Court in Dandenong and Melbourne, with funding allocated to expand to Ballarat and Shepparton. A pilot Drug and Alcohol Treatment Court program is also underway in the County Court.[147]

A DATO has two elements:

- **custodial:** a term of imprisonment which does not exceed two years, to be served in the community to allow access to drug and/or alcohol treatment
- **treatment and supervision:** additional support to address a person's drug and/or alcohol dependency.[148]

Judicial officers are responsible for supervising individuals subject to a DATO, and support is provided by case managers, clinical advisors, alcohol and drug counsellors, Victoria Police and Victoria Legal Aid.

Individuals on a DATO are required to:

- attend Drug Court each week, or when required

147 Victorian Government, *Submission 93*, p. 85.

148 Magistrates' Court of Victoria, *Drug Court*, 2022, <https://www.mcv.vic.gov.au/about_us/drug-court> accessed 14 January 2022.

- participate in routine drug and/or alcohol testing
- undertake assessment and engage in treatment programs, such as drug and/or alcohol, medical, psychiatric or psychological treatment
- attend other relevant programs, such as educational, vocational or employment programs
- comply with any conditions set in conjunction with the DATO, such as a curfew.[149]

The Victorian Government stated that the Drug Court offers an 'alternative sentencing option which recognises the causal interrelationship between substance use, other comorbidities, and social factors, to provide targeted treatment and supports'.[150] It provided results of a 2014 evaluation by KPMG of the Court's work, which reported a cost-benefit ratio of $5 community dividend for every $1 spent on the program. The evaluation also found:

- a 32 per cent reduction in unemployment rates of participants
- a 70 per cent reduction in the number of prison days required by Drug Court participants who would have been placed in custody if not for the treatment order
- a 23 per cent reduction in reoffending rates for program participants compared to the control group.

The reduction in reoffending rate was significantly higher for participants who had graduated from the program, at 68 per cent compared with the control group.[151]

At a public hearing, Rebecca Falkingham of DJCS described the successes of the Court and its future expansion:

> We are working with Court Services Victoria and the Magistrates Court to roll out the Drug Court regionally to Ballarat and Shepparton, with hearings expected to begin in early 2022, and the committee would be well aware of some of the data that exists both in Ballarat and in Shepparton in relation to some of the offending that we see. We think that it will be a real game changer in those LGAs in terms of allowing the Drug Court to be able to supervise offenders trapped in the cycle of substance-related offending and provide much more targeted treatment and supports to reduce the risk of reoffending and further harm by holding offenders accountable for their actions.
>
> The existing Drug Courts in Melbourne and Dandenong have proved to be really successful … and the cost-benefit ratio of a $5 community dividend for every one dollar spent on the program is something that I remind our colleagues in the Department of Treasury and Finance about all the time—that it is a good investment to make into the future of the courts.[152]

Various Inquiry stakeholders similarly supported the work of the Drug Court.

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149 Ibid.

150 Victorian Government, *Submission 93*, p. 85.

151 Ibid., p. 107.

152 Rebecca Falkingham, *Transcript of evidence*, p. 7.

The Alcohol and Drug Foundation explained that Drug Courts 'recognise the role that alcohol and other drug dependence can play in offending and the importance of addressing that dependence'. It advocated for the further expansion of the Court to additional locations, highlighting that the 'currently limited number of Drug Courts means that by accident of geography, a person can be ineligible to access a Drug Court program that might otherwise help them'.[153] Liberty Victoria, the Victorian Council of Social Service and Uniting Vic. Tas similarly recommended the expansion of the courts to additional locations.[154]

The Victorian Alcohol and Drug Association welcomed the recent expansion of the Drug Court in Victoria but noted the need to prioritise 'equity of access' through the additional allocation of residential rehabilitation beds that are prioritised for use by Drug Courts.[155]

Windana Drug and Alcohol Recovery submitted that Drug Courts should be equipped to 'provide linkages for aftercare support for those participants who may still benefit from support at the expiration of the order'. It argued that the Courts should also have 'a set number of residential withdrawal and rehabilitation beds allocated across the state which are adequately funded to meet the needs of this cohort'.[156]

First Step Legal Service noted the success of the Drug Court in reducing risks of recidivism for participants that complete the program.[157] Smart Justice for Women advocated for the adoption of a 'harm-reduction approach to drug-related offending that prioritises rehabilitative and community-based responses'.[158]

The Law Institute of Victoria asserted that the therapeutic approach used in the Drug Court is more appropriate than traditional punitive methods in responding to persons who have committed offences and who are influenced by drug and/or alcohol dependency issues:

> The LIV [Law Institute of Victoria] also recognises that the range of therapeutic treatment approaches offered by the Drug Court are an essential support to offenders that struggle with drug and/or alcohol addiction. This support differs greatly from the punitive measures that are imposed in the traditional criminal justice system … The current court system is ill-equipped to adequately support offenders who have committed offences that have arisen out of a drug and/or alcohol dependency. The LIV considers that there is a need for less adversarial and more therapeutic approaches to justice, that of which can be achieved through expanding services like the Drug Court.[159]

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153 Alcohol and Drug Foundation, *Submission 100*, p. 6.

154 Liberty Victoria, *Submission 140*, p. 15; Uniting Vic. Tas, *Submission 129*, p. 4; Victorian Council of Social Service, *Submission 137*, p. 33.

155 Victorian Alcohol and Drug Association, *Submission 128*, p. 16.

156 Windana, *Submission 117*, p. 4.

157 First Steps Legal, *Submission 113*, p. 7.

158 Smart Justice for Women, *Submission 94*, p. 10.

159 Law Institute of Victoria, *Submission 112*, pp. 75–76.

The Victorian Aboriginal Legal Service noted that the role of the Drug Court could be expanded beyond only people who are likely to receive a term of imprisonment. It stated that broadening the scope of the Court would 'allow people charged with minor drug offences to access a rehabilitation-focused approach to dealing with their substance use issues'.[160]

In its submission, the What Can Be Done Steering Committee—a group convened to progress the implementation of recommendations of a Churchill Fellowship report written by Magistrate Jennifer Bowles—recommended the establishment of a Youth Drug Court within the Children's Court of Victoria.[161] It provided the results of Magistrate Bowles' research into the need for residential therapeutic treatment options for young people suffering substance abuse and/or mental illness. As part of her Fellowship research, Magistrate Bowles examined the work of the Youth Drug Court in Christchurch (see Box 10.2).

BOX 10.2: Youth Drug Court, Christchurch

The Youth Drug Court was established in March 2002 by His Honour Judge Walker. Initially commencing under a pilot program, the Court is now a permanent list which sits once a fortnight in Christchurch. To be admitted into the program a young person (14–16 years of age) "must be a serious offender, in terms of type of offence or number of offences and must have a moderate to severe dependence on a substance, which is contributing to their offending."

The meeting is attended by all members of the 'Drug Court Team' and the solicitor of the young person appearing before the Court. The young person does not attend the pre-court meeting.

The Drug Court Team consists of:

- the Judge
- a social worker
- police prosecutor
- youth justice coordinator
- drug treatment clinician
- Ministry of Education representative
- the court registrar assigned to the Drug Court.

(Continued)

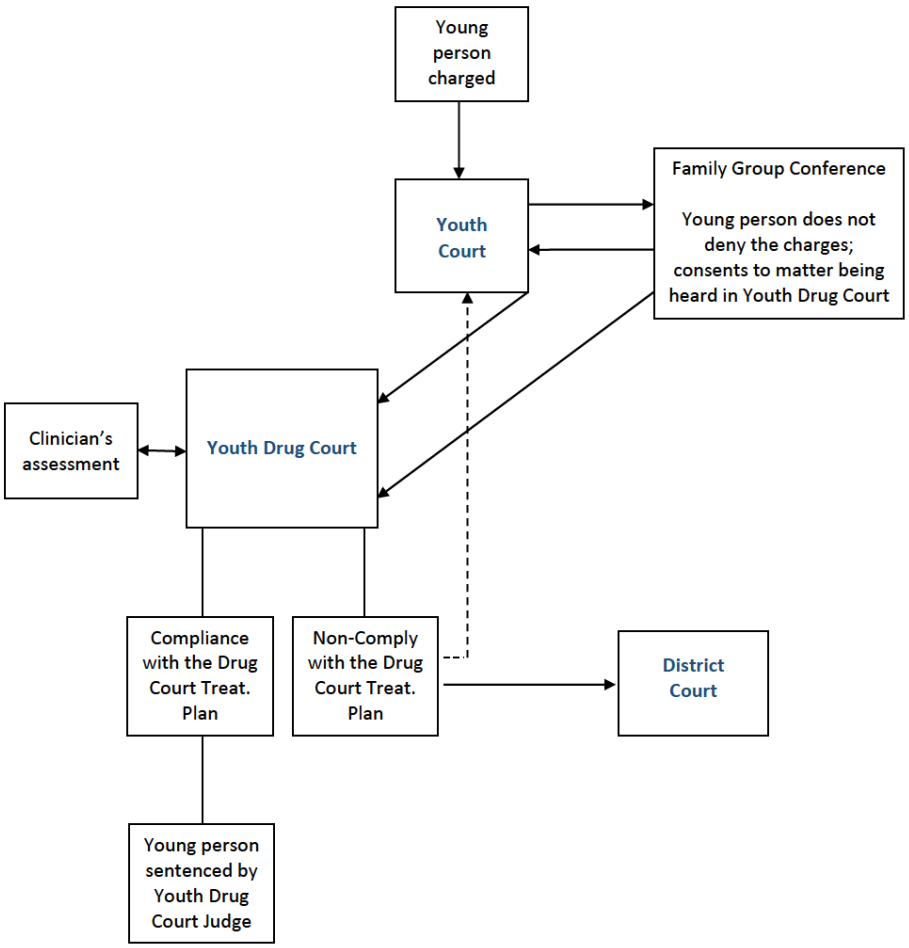
160 Victorian Aboriginal Legal Service, *Submission 139*, p. 107.

161 What Can Be Done Steering Committee, *Submission 74, Attachment 1*, p. 13.

BOX 10.2: Continued

The Youth Drug Court social worker prepares a progress report regarding all of the young people in the list. It is circulated prior to the meeting and provides the foundation for discussing the current situation. The report includes details of the drug dependency which resulted in the young person being accepted onto the program and the treatment plan.

Process by which a young person comes into the Youth Drug Court



The following is an example of a Drug Court Treatment Plan:

1. That James be accepted into Youth Drug Court.
2. That James continues to attend his alternative education course and be supported in doing so.
3. That a mentor be engaged to work with James.
4. That James is to see his case manager at Youth Speciality Service (YSS) regularly to monitor his alcohol and drug use and to provide alcohol and drug counselling.

Source: What Can Be Done Steering Committee, *Submission 74*, Attachment 2, pp. 55–57.

Based on her research, Magistrate Bowles concluded that the current justice system is not working for a significant number of children and young people experiencing issues related to drugs, alcohol and/or mental health. Magistrate Bowles recommended the establishment of a Youth Drug Court within the Children's Court.[162]

While the Children's Court operates a Family Drug Treatment Court, this program is contained within the Court's Family Division and focuses on parents whose children have been removed from their care due to parental alcohol and/or other drug dependency or misuse.[163]

The Committee recognises and welcomes the proven work of the Drug Court in supporting individuals through rehabilitation as an alternative to their incarceration. This type of therapeutic alternative in sentencing can reduce the risk of reoffending and, as a result, improve community safety. The Committee notes stakeholder concerns regarding inequitable access to Drug Courts across Victoria, but recognises that the Victorian Government is working to expand the Court to additional locations in Shepparton and Ballarat, and is undertaking a pilot program in the County Court.

FINDING 48: Evidence demonstrates that Drug Courts can successfully support individuals to address issues related to drug and/or alcohol dependency, reduce the number of days spent in prison and reduce rates of reoffending.

RECOMMENDATION 66: That the Victorian Government continue to support the ongoing expansion of the Drug Courts in Victoria, including through:

- funding the allocation of additional residential detox and rehabilitation beds that are prioritised for use by Drug Courts
- investigating the potential for a pilot program of a Youth Drug Court within the Children's Court of Victoria.

10.3.4 Specialist Family Violence Court

Specialist Family Violence Courts were introduced in Victoria in response to the recommendations of the 2016 Royal Commission into Family Violence. Five Specialist Family Violence Courts were initially established within the Magistrates' Court through funding from the 2017–18 State Budget. The 2021–22 State Budget provided funding to expand to the seven remaining court locations.[164]

The courts operate on six core principles, which are that they are:

- victim-survivor centred

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162 What Can Be Done Steering Committee, *Submission 74, Attachment 2*, p. 60.

163 Children's Court of Victoria, *Family Drug Treatment Court*, 2021, <https://www.childrenscourt.vic.gov.au/family-division/family-drug-treatment-court> accessed 25 January 2022.

164 Victorian Government, *Submission 93*, p. 108.

- risk informed
- therapeutic
- inclusive
- partnership driven
- evolving.

Key components of the court model include:

- remote witness facilities
- specialist magistrates and court workers
- dedicated police prosecutors and civil advocates
- safe waiting areas
- security
- separate entry and exit points for applicants and respondents
- multi-lingual and multi-format signage.[165]

The Victorian Government outlined the therapeutic approach employed by Specialist Family Violence Courts, explaining:

> SFVCs [Specialist Family Violence Courts] are a cornerstone of Victoria's family violence reform agenda and provide victim-survivors with greater support and security on their day at court. When a victim-survivor arrives at court, they are directed by court staff to a safe waiting area. Family violence practitioners are available to offer support, and staff facilitate meetings with other services such as legal services, support programs or police. This opportunity for the court to intervene at the early stages of intervention order proceedings is a critical enabler of positive resolution of matters and safety. Victim-survivors who have attended SFVCs have described the experience as supportive and easier than they expected. In particular, safe waiting areas help victim-survivors and their families to feel comfortable during their day at court and give them greater choice in how they participate in their hearing. This includes the option to use remote witness facilities to give evidence via AVL [audio visual link], or enter the court room through a secure entrance directly connected to the safe waiting area, and appear from behind a screen so that the respondent cannot see them.[166]

The Government also described the Court Mandated Counselling Order Program, which requires male respondents to attend behavioural change programs to help them to 'understand why they have acted abusively and learn or strengthen non-violent ways of being with partners and children'. Counselling orders have conditions attached, with contravention of conditions a criminal offence.[167]

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165 Ibid., pp. 108–109.

166 Ibid., p. 109.

167 Ibid.

Further, the model supports pre-court engagement and resolution for family violence intervention order matters. This supports the finalisation of matters prior to them needing to go to court. The Victorian Government reported that this has been demonstrated to lead to greater compliance with orders and increased safety outcomes for victim-survivors.[168]

At a public hearing, Rebecca Falkingham from DJCS explained:

> Creating specialist courts has been a top priority in that regard, providing greater security, comfort and choice for people experiencing family violence, while incorporating innovative approaches to managing perpetrator offending. The courts are staffed by experts, dedicated magistrates, operational staff and family violence practitioners who benefit from ongoing training to make sure they are well equipped to meet the needs of victim-survivors.[169]

The Committee commends the Victorian Government on the important work undertaken to date in establishing Victoria's Specialist Family Violence Courts and ensuring their continued expansion across the State.

10.3.5 Neighbourhood Justice Centre

The Neighbourhood Justice Centre was first established in the City of Yarra in 2007, under the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic). Modelled off the Red Hook Community Justice Center in New York City, it provides a broad range of therapeutic justice services to victims of crime, persons who have committed an offence, civil litigants and the community. The Centre provides place-based justice for the local community, with the aim of making 'the places we live, work, and raise families safe and resilient through compassionate, tailored and appropriate justice solutions'.[170]

The Centre hosts various elements of the justice system 'under one roof', including:

- Multi-jurisdictional courts and tribunals, including the Magistrates' Court, criminal division of the Children's Court, Victorian Civil and Administrative Tribunal and Victims of Crime Tribunal.
- Client services, including in relation to mental health, housing and homelessness, drug and/or alcohol addiction, financial, and family violence, as well as cohort-specific services for Aboriginal Victorians, the LGBTIQ+ community, and refugees and migrants.
- Legal and justice agencies, including Victoria Legal Aid, Fitzroy Legal Services and Community Correctional Services.

168 Ibid.

169 Rebecca Falkingham, *Transcript of evidence*, p. 3.

170 Neighbourhood Justice Centre, *What we do*, 2021, <https://www.neighbourhoodjustice.vic.gov.au/about-us/our-story/what-we-do> accessed 14 January 2022.

- A program and innovation team, who undertakes crime prevention, community engagement, stakeholder engagement, education initiatives and program development.[171]

The Australian Institute of Criminology's 2015 evaluation of the Neighbourhood Justice Centre described the introduction of 'community' or 'neighbourhood' justice models as 'one of the most important recent developments in criminal justice'.[172] The report noted the inherent difficulties in assessing the effectiveness of the community justice model as there may be a variety of factors contributing to positive outcomes. However, it found that the Neighbourhood Justice Centre 'has achieved significant improvements in at least two areas critical to the justice system: community order compliance and recidivism'.[173]

The Victorian Government noted that earlier evaluations—in 2009 and 2011—also demonstrated the effectiveness of the community justice model in reducing crime and recidivism rates and increasing participants' compliance and participation in community work.[174]

Louise Glanville, Chief Executive Officer of Victoria Legal Aid, described the benefits for participants of the community justice model:

> If you look, for example, at the Neighbourhood Justice Centre, you will see still that their breach rates of bail are far lower than other courts. This partly reflects the wraparound nature of services and the fact that people's offending can be very much influenced by the conditions in which they themselves have grown up. It also helps to deal with things like the intersections between things like child protection, family violence and the experiences that people have in that domain. We know that if we can deal earlier on or in a more problem-solving way with these issues, whether around and in a court or outside a court, then that is going to have cost benefits for society and community generally. So there is a real dollar benefit here in these sorts of innovations.[175]

The community justice model offers a holistic, wraparound suite of services to support individuals in contact with the criminal justice system to address the causes of offending. The Neighbourhood Justice Centre in the City of Yarra has been demonstrated to result in improved criminal justice outcomes.

FINDING 49: The Neighbourhood Justice Centre—a model of community justice—has been demonstrated to improve criminal justice outcomes through reducing rates of crime and recidivism and improving rates of compliance and participation in community work.

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171 Ibid.

172 Stuart Ross, 'Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program', *Australian Institute of Criminology: Trends & issues in crime and criminal justice*, no. 499, 2015, p. 1.

173 Ibid., p. 7.

174 Victorian Government, *Submission 93*, p. 109.

175 Louise Glanville, Chief Executive Officer, Victoria Legal Aid, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 23.

10.4 Sentencing

10.4.1 Sentencing law and considerations

There are two sources of sentencing law in Victoria: statute and common law.

The Sentencing Act sets out the purposes and principles of sentencing, considerations of the court when sentencing and a hierarchy of sentencing options for adults.[176]

The purpose of the Sentencing Act is to promote consistency in the sentencing of offenders across Victorian courts by:

- providing fair procedures for imposing sentences and dealing with individuals who breach conditions of their sentence
- preventing crime and promoting respect by enshrining principles of deterrence, rehabilitation, and justice in sentencing
- providing sentencing principles to be applied by all Victorian courts.[177]

At the time of writing, DJCS was undertaking a review of the Sentencing Act. However little public information was available for the Committee to consider.

In addition, the *Children, Youth and Families Act 2005* (Vic) (Children, Youth and Families Act) establishes sentencing processes for children sentenced by the Children's Court of Victoria. Where a child is sentenced by another court—such as where the Children's Court does not have jurisdiction with regard to the charges against a child—the Sentencing Act applies.

In addition sentencing legislation, judicial officers must also have regard to case law (common law).

The Victorian Sentencing Manual is written by the Judicial College of Victoria and outlines the methods, principles and purposes that the judiciary should employ when sentencing. It offers guidance on sentencing on a wide range of areas such as:

- youth and youth detention
- community correction orders
- fines
- imprisonment.

Sentencing in Victoria requires application of a process of 'instinctive synthesis'. In undertaking instinctive synthesis, judicial officers identify the relevant features of the case, assess their significance under the circumstances and make a judgement

176 Sentencing Advisory Council, *Sentencing Law in Victoria*, 2021, <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-law-victoria> accessed 27 January 2022.

177 *Sentencing Act 1991* (Vic) s 1.

as to the appropriate sentence based on these factors. Therefore, while sentencing decision-making is informed by sentencing law, it is ultimately determined by the particular circumstances of the case.[178]

In determining a sentence, courts consider evidence and submissions from both the prosecution and defence. They may also consider:

- a pre-sentence report, which sets out information around an individual's personal circumstances
- services that may reduce the risk of reoffending
- other suitable treatments or services
- the appropriateness of proposed conditions
- the impacts of sentencing on any victims, primarily through the use of victim impact statements.[179]

Purposes

Section 5(1) of the Sentencing Act prescribes the purposes of sentencing, which are to:

- punish offenders in a just manner
- deter the offender from reoffending and the community from committing similar offences
- facilitate the offender's rehabilitation
- denounce the offending conduct
- protect the community.[180]

The Victorian Sentencing Manual provides further guidance on these purposes, as outlined in Table 10.6.

Table 10.6 Sentencing purposes

Just punishment and denunciation	• Community's expectation on the appropriate punishment for certain offences should be an aspect of sentencing. • A *just sentence* requires that the courts consider several factors when deciding an appropriate punishment, such as: the offender's circumstances, nature of the offences (including the gravity of the crime), existing sentencing principles, and the impact of offending on any victims. • *Denunciation* of a crime through sentencing signals to the community the courts and society's disapproval and condemnation of the offender's conduct. • If these two purposes are not met, there is a risk that the community's respect for the law would be diminished.

178 Sentencing Advisory Council, *A quick guide to sentencing (6th edn)*, p. 31.

179 Victorian Government, *Submission 93*, p. 86.

180 *Sentencing Act 1991* (Vic) s 5 (1)(a)-(e)

Deterrence	• Two types of deterrence: general and specific • *General deterrence* is used to deter others in the community from committing similar offences. • *Specific deterrence* is used to deter the offender from reoffending.
Rehabilitation	• Serves public interest by stopping an offender from committing more offences in the future. • Rehabilitation of an offender is two-fold: remorse and reform. • An offender must demonstrate *remorse* for their action. This is measured by post-offence behaviour (however a court is not obliged to accept this as a factor in sentencing).
Protection of the community	• Community protection is often considered the primary purpose of sentencing. However, protection can be limited by the proportionality principle of sentencing. • An offender's circumstances are the most important consideration in assessing the need for community protection. • Section 6D of the Sentencing Act prescribes that in sentencing serious offences, if the court believes imprisonment is justified then community protection should be the principal purpose of sentencing.

Source: Judicial College of Victoria, *Victorian Sentencing Manual (4th edn)*, Melbourne, 2021, pp. 59–72.

Community perceptions of sentencing was a common theme discussed throughout the Inquiry. Stakeholders considered whether sentencing in Victoria is appropriately meeting community expectations. In its submission, the Victorian Government addressed this issue, stating that evidence suggests that judicial officers are usually less lenient than juries:

> research has shown that Australians are less punitive than is commonly portrayed. Research on Australian jurors has found that most suggest a more lenient sentence than a judge, while only a small portion suggested a more severe sentence. Results showed there was little difference with respect to their choice of custodial or non-custodial sanctions, but when they did select a custodial sentence, jurors were on average more lenient than the judge by 12 months. This builds on previous research published by the SAC that found the community recognises rehabilitation to be the main purpose of sentencing, especially in first time or young offenders, with punishment being the main purpose for those with a criminal history. General deterrence was the least likely purpose that respondents nominated.[181]

Sentencing factors

Section 5(2) of the Sentencing Act sets out factors a court must have regard to in sentencing. These are:

- any prescribed maximum penalty for the offence
- any standard sentences which apply
- current sentencing practices
- the nature and gravity of offending

181 Victorian Government, *Submission 93*, p. 87.

- the culpability of the offender and their degree of responsibility
- consideration of whether the offence was motivated by prejudice, either wholly or partly
- the impact on the victim
- the personal circumstances of the victim
- any injury, loss or damage resulting from the offending
- whether the offender pleaded guilty
- the offender's previous character
- the presence of aggravating or mitigating factors.[182]

Maximum penalties are used as a guidepost by judicial officers when deciding the appropriate sentences for individual cases. Maximum penalties are set via the penalty scale established under s 109 of the Sentencing Act, which prescribes a maximum penalty determined by the level of offending. Therefore, any offence which is prescribed at the level specified in s 109 is eligible for the prescribed maximum penalty.[183]

Aggravating and mitigating factors are described in Table 10.7.

Table 10.7 Aggravating and mitigating factors considered in sentencing

Aggravating factors	Details about the individual or the offence which could increase their culpability and lead to a maximum or enhanced sentence. Aggravating factors can include: • pre-meditated offending • committing a crime as part of a group which outnumbers the victim • use of a weapon • a breach of trust by the person who committed the offence towards the victim.
Mitigating factors	Details about the person who committed the offence or the offence itself which could decrease the person's culpability and lead to a reduction in their sentence. Mitigating factors can include, in relation to the person who committed the offence: • their age • disadvantaged background • previous good character • likely effects of imprisonment.

Source: County Court Victoria, *Sentencing: Mitigating and aggravating factors*, 2020, <https://www.countycourt.vic.gov.au/learn-about-court/sentencing> accessed 20 January 2022.

Sentencing principles

The Victorian Sentencing Manual outlines several 'fundamental principles' that should be considered alongside the gravity of an offence, purposes of sentencing, the

182 *Sentencing Act 1991* (Vic) s 5(2).

183 Ibid., s 109.

circumstances of the case and any other policy considerations. These fundamental principles are outlined in Table 10.8 below.

Table 10.8 Sentencing principles

Principle	Overview
Proportionality	The principle defines the upper and lower limits of a punishment by the courts. The aim of proportionality is to balance between excessive leniency or severity in sentencing. Proportionality can apply to all aspects of sentencing, including total sentence, non-parole periods or suspended sentences.
Parsimony	The principle is a common law rule which provides that a sentence should be no more severe than what is necessary to achieve the purposes of sentencing. Parsimony holds that the court must be satisfied that no other sentence is appropriate before imposing a term of imprisonment. For example, a sentence of imprisonment should not be imposed if a treatment or community corrections order would serve the purposes of sentencing.
Totality	The principle requires that when sentencing a person convicted of multiple offences, the court ensures that the aggregate sentence is a 'just and appropriate' measure of the total criminality involved. Totality is often achieved by making sentences concurrent (served together) or imposing lower sentences which are served consecutively (one after the other). The Sentencing Manual outlines three basic steps courts can take when applying the totality principle: • Determine appropriate sentence for each charge and designate the highest term imposed as the 'base sentence'. • Determine the extent of cumulation (whether the sentence is wholly or partially concurrent). • Based on the above determinations, consider the appropriate total effective sentence.
Double punishment	Double punishment has a legislative and common law basis whereby a person cannot be punished for the same criminal conduct twice. It is like the rule of 'double jeopardy' where a person cannot be tried in a court of law more than once for the same criminal incident. However, the double punishment rule means a person can only be punished once for an offence for which they are convicted.
Avoidance of a crushing sentence	This principle requires that a court should not impose a significantly overhanded sentence unless there are special circumstances. According to the Sentencing Manual, a 'crushing sentence' refers to a punishment which 'might provoke a feeling of helplessness in the offender (if and) when they're released or destroy any reasonable expectation they have for a useful life after release'. However, it is equally inappropriate to determine a minimum sentence with a view of ensuring 'some measure of life after release'. Special circumstances which could warrant a harsher sentence can include: • crimes which garner significant public outcry or revulsion • where the person who committed the offence is persistent and unrepentant • where the person has committed several crimes of considerable gravity.
Parity	This principle, which is recognised in legislation and common law, requires that the courts should have consistency in punishment. However, courts must also assess the individual and the circumstances of the crime to determine the specific punishment. The principle therefore ensures similarity, but not uniformity, in how offences are punished by the courts. Any significant differences in sentencing for the same offence should be capable of a rational explanation by the courts.

Source: Judicial College of Victoria, *Victorian Sentencing Manual (4th edn)*, pp. 39–54.

10.4.2 Sentencing schemes

Some serious offences are subject to 'sentencing schemes', which must be taken into consideration by courts during sentencing these offences. This includes:

- standard sentences
- Category 1 and 2 offences (mandatory and presumptive sentences)
- Category A and B serious youth offences
- minimum terms of imprisonment and non-parole periods
- serious offenders—including persons convicted of serious sexual, arson, drug and violent offences. When sentencing individuals convicted of these offences, community protection must be the primary sentencing purpose.

Standard sentences

Section 5A of the Sentencing Act establishes a standard sentencing scheme for certain serious offences committed on or after 1 February 2018. This replaced the baseline sentence scheme, which was abolished in 2018.[184]

Standard sentences are 'numerical guideposts' when sentencing prescribed serious offences.[185] The serious offences with standard sentences, under the *Crimes Act 1958* (Vic) and the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), are:

- murder
- homicide by firearm
- rape
- culpable driving causing death
- trafficking in a large commercial quantity of a drug of dependence
- eight different sexual offences involving children.[186]

When a court imposes a sentence for any of these offences, the standard sentence scheme prescribes that the court 'must take into account the sentence that parliament has specified as representing the 'middle of the range of objective seriousness' for that type of offence'.[187]

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184 Victorian Government, *Submission 93*, p. 102.

185 Sentencing Advisory Council, *Sentencing Schemes: Standard sentences*, 2021, <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-schemes> accessed 27 January 2022.

186 Ibid.

187 Sentencing Advisory Council, *Standard sentences confirmed as 'valid and capable of practical operation'*, 2018, <https://www.sentencingcouncil.vic.gov.au/news-media/news/standard-sentences-confirmed-valid-and-capable-practical-operation> accessed 27 January 2022.

Most standard sentences are set at 40% of the maximum penalty, except offences where the maximum penalty is life imprisonment. For example, the maximum penalty for culpable driving is 20 years' imprisonment therefore the standard sentence is eight years' imprisonment.[188]

The Law Institute of Victoria raised strong concerns around the operation of the standard sentencing scheme, highlighting that it restricts the scope of judicial discretion afforded in sentencing. It submitted that 'independent, highly qualified, professional, and experienced judicial officers are best placed to impose an appropriate sentence'. Further, that judicial discretion could be improved through reducing both standard and mandatory sentencing schemes 'which require specific sentences to be imposed, irrespective of the circumstances of the case'. It explained:

> At present, judges are required to make an assessment of the offender's moral culpability. This is a nuanced task which is vitally important to an offender receiving the appropriate sentence. The LIV submits that any form of baseline sentencing scheme is simply a variation on the theme of mandatory sentencing – a concept which the LIV has consistently and strongly opposed.[189]

The Law Institute of Victoria highlighted the importance of instinctive synthesis in sentencing. This approach—which the High Court of Australia has affirmed as the most suitable method for identifying an appropriate sentence—requires judicial officers to '[identify] all the factors that are relevant to the sentence, [discuss] their significance and then [make] a value judgment as to what is the appropriate sentence given all the factors of the case'.[190] The Law Institute asserted that while instinctive synthesis is still the correct approach in determining a sentence, there are concerns that standard sentencing has resulted in 'a two-stage sentencing practice, resulting in an artificial compression in sentencing towards the standard sentence'. It further argued that the scheme has led to an 'unwarranted rise' in sentence length.[191]

The Sentencing Advisory Council—in public guidance on sentencing schemes in Victoria—has asserted that standard sentences constitute one factor to be taken into consideration and do 'not create two-stage sentencing nor remove the approach to sentencing known as instinctive (or intuitive) synthesis'.[192]

The Law Institute of Victoria advocated for a review of the standard sentence scheme, including its impact on sentencing outcomes and departure from the principle of 'instinctive synthesis'.[193] The Committee did not receive any further evidence from other stakeholders regarding the operation of the standard sentencing scheme.

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188 Ibid.

189 Law Institute of Victoria, *Submission 112*, p. 39.

190 *Markarian v The Queen* [2005] HCA 25, [51].(McHugh, J)

191 Law Institute of Victoria, *Submission 112*, p. 40.

192 Sentencing Advisory Council, *Guide to sentencing schemes in Victoria 2021*, Melbourne, 2021, p. 6.

193 Law Institute of Victoria, *Submission 112*, p. 5.

Mandatory and presumptive sentencing

In 2017, the Victorian Government introduced Category 1 and Category 2 offences into the Sentencing Act. When courts are sentencing any Category 1 or Category 2 offences, they are required to impose a 'custodial order'—either imprisonment, a drug treatment order or a youth justice centre order.[194] However, in some circumstances, courts may impose other sentences that are not custodial orders. For Category 1 offences, this can occur only for designated offences (certain offences against emergency or custodial workers on duty) and where special reasons exist. For Category 2 offences, this can occur where an individual has impaired mental functioning, has provided assistance to authorities, where the court proposes certain orders, or there are other substantial and compelling circumstances.[195]

For Category 1 offences, a custodial order cannot also include a community correction order in addition to the term of imprisonment. However, for Category 2 offences, a combined order of imprisonment and a community correction order can be made if specific circumstances exist.[196]

Table 10.9 outlines the offences which, at the time of writing, are classified as Category 1 and 2 offences.

Table 10.9 List of Category 1 and 2 offences, Sentencing Act

Category 1	• Murder • Causing serious injury intentionally in circumstances of gross violence • Causing serious injury recklessly in circumstances of gross violence • Trafficking in a large commercial quantity of a drug of dependence • Cultivation of a large commercial quantity of a narcotic plant • Rape • Rape by compelling sexual penetration • Incest with child, lineal descendant or step-child (if victim under 18) • Sexual penetration of a child under 12 • Persistent sexual abuse of a child under 16 • Causing serious injury intentionally to an emergency worker, custodial officer or youth custodial officer • Causing serious injury recklessly to an emergency worker, custodial officer or youth custodial officer • Causing injury intentionally or recklessly to an emergency worker, custodial officer or youth justice custodial worker • Aggravated home invasion • Aggravated carjacking • Intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving (where injury caused)

194 *Sentencing Act 1991* (Vic) div 2, pt 3.

195 Sentencing Advisory Council, *Guide to sentencing schemes in Victoria 2021*, p. 5.

196 Ibid., pp. 4–5.

Category 2	• Manslaughter • Child homicide • Causing serious injury intentionally • Kidnapping • Arson causing death • Trafficking in a commercial quantity of a drug of dependence • Cultivation of a commercial quantity of a narcotic plant • Providing documents or information facilitating terrorist acts • Intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving • Armed robbery (where a firearm was used, a victim suffered injury or the offence was committed in company) • Home invasion • Carjacking • Culpable driving causing death • Dangerous driving causing death

Source: Sentencing Advisory Council, *Sentencing Schemes*, February 2021, <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-schemes> accessed 23 April 2021.

In a 2008 research paper on mandatory sentencing, the Sentencing Advisory Council described the contentious nature of mandatory sentencing:

> Mandatory sentencing is a controversial issue that creates significant debate and divisions both in the community and in government. It has been implemented, in Australia and around the world, in various forms including 'three strikes' legislation and, in an attenuated form, as presumptive minimum sentences and standard non-parole periods. The goal of these legislative initiatives has been to increase consistency in sentencing and to improve public confidence in the courts by ensuring that sentences properly reflect community views.[197]

In considering the objectives and effectiveness of mandatory sentencing schemes, the report concluded that 'on the basis of existing research … mandatory and other prescriptive schemes are unlikely to achieve their aims'. It stated that where these schemes do 'achieve some of their aims, the research indicates that they are achieved at a high economic and social cost'.[198]

Several stakeholders to the Inquiry advocated to amend the mandatory sentencing scheme. The Law Institute of Victoria submitted that mandatory sentencing results in 'unjust outcomes', which do not consider the particular circumstances of the individual or the offence:

> Mandatory sentencing schemes provide fixed minimum penalties, as prescribed by legislation, for committing a criminal offence. In Victoria, there exists mandatory imprisonment minimum terms of imprisonment for Category 1 and Category 2 offences, which do not fulfil its stated aims nor provide marginal deterrent effects, reduce

197 Dr Adrian Hoel and Dr Karen Gelb, *Sentencing matters: Mandatory sentencing*, Sentencing Advisory Council, Melbourne, 2008, p. 1.

198 Ibid.

> crime rates or provide consistency in sentencing. By their very nature, the mandatory sentencing regimes, and the subsequent "one size fits all" approach to sentencing, leads to unjust outcomes, as offenders with unequal capability and circumstances are sentenced to the same minimum sentences of imprisonment, or more.[199]

The Institute recommended a review of the effectiveness of the mandatory sentencing scheme—with a view to its repeal—to facilitate judicial discretion and consideration of the particular circumstances.[200]

The Human Rights Law Centre contended that mandatory sentencing laws can drive rates of incarceration, particularly for Aboriginal Victorians. It explained:

> 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 might have unintended consequences and be grossly inappropriate.[201]

The Federation of Community Legal Centres similarly stated that these laws lead to increased rates of incarceration, are expensive to implement and are not proven to be an effective form of deterrence:

> Mandatory sentencing laws signify a departure from standard approaches to sentencing which provide for a maximum penalty to be imposed upon conviction based on the gravity of the offence. These provisions constrain judicial discretion to determine the most appropriate sentence in each individual case having regard to any mitigating factors or alternative sentencing options. They conflict with principles of proportionality and 'imprisonment as a last resort'.[202]

The Federation noted the disproportionate impact of the schemes on certain groups, including Aboriginal Victorians. It argued that the laws 'fail to have regard to the context of offending and the intersectional disadvantage experienced by many people who interact with the criminal legal system' and should be repealed.[203]

In its submission, the Victorian Aboriginal Legal Service also recommended that mandatory sentencing schemes be repealed, explaining that:

- They erode the fundamental principle of an independent judiciary and discretion in sentencing;
- They increase incarceration rates, and are therefore more costly;
- Mandatory sentencing is not an effective deterrent;
- They contradict the principle of proportionality and imprisonment as a last resort;

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199 Law Institute of Victoria, *Submission 112*, p. 41.

200 Ibid., p. 5.

201 Human Rights Law Centre, *Submission 58*, p. 16.

202 Federation of Community Legal Centres Victoria Inc., *Submission 132*, p. 14.

203 Ibid.

- Mandatory sentencing schemes have proven to be an ongoing driver of the over-incarceration of Aboriginal and Torres Strait Islander people. In this regard, mandatory sentencing contradicts the Victorian Government's commitment to addressing over-incarceration of Aboriginal people;
- Mandatory sentencing for offences against emergency workers acts as a deterrent and disincentive for Aboriginal people to call on emergency and protective services to assistance in a time of crisis.[204]

At a public hearing, Emeritus Professor Arie Freiberg AM from the Sentencing Advisory Council, described mandatory sentencing as 'often inappropriate'. Professor Freiberg stated:

> The sentencing restrictions in the Act are overly complex, inconsistent and unduly restrictive of judicial discretion. The growth of these category 1 and 2 and category A and B youth offences are complex and making the sentencing exercise too difficult. I am sorry to say to parliamentarians, but the mandatory sentencing provisions are often inappropriate, meaning that some people who should not be in jail are in there. The Act is unwieldy. It has got countless amendments.[205]

The Committee notes that there are widespread community concerns regarding the operation and effectiveness of mandatory sentencing laws in Victoria. Given DJCS' current review into the operation of the Sentencing Act, the Committee hopes that the Victorian Government will take the evidence provided to the Inquiry into consideration and ensure the schemes are effective, operating as intended and meet community expectations.

RECOMMENDATION 67: That the Victorian Government, in reviewing the *Sentencing Act 1991* (Vic), investigate the operation, effectiveness and impacts of the Act's minimum sentencing provisions (mandatory sentencing).

Minimum terms of imprisonment and non-parole periods

The Sentencing Act establishes minimum non-parole periods for prescribed offences. Minimum non-parole periods are prescribed imprisonment terms a person must serve before they are eligible for release. For example, the minimum non-parole period for the offence of manslaughter by single punch or strike is 10 years' imprisonment.

Separate to minimum non-parole periods, the Sentencing Act also sets out minimum imprisonment sentences for prescribed offences. Currently there are only two offences under the Act which have minimum sentence provisions:

- contravening a supervision order (12 months)
- causing injury to on-duty emergency or custodial workers (six months).

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204 Victorian Aboriginal Legal Service, *Submission 139*, p. 21.

205 Emeritus Professor Arie Freiberg AM, *Transcript of evidence*, p. 31.

Judges can depart from minimum sentences if they have determined a 'special reason' to do so. The Sentencing Manual outlines four circumstances where the minimum sentence may not be imposed:

- if the offender has assisted in the investigation or prosecution of the offence
- if the offender proves at the time of offending they had a mental impairment
- if the court intends to impose a Court Secure Treatment Order or Residential Treatment Order
- if there are 'substantial and compelling reasons' which are 'exceptional and rare'.[206]

Table 10.10 outlines the offences which have statutory minimum imprisonment sentences and non-parole periods in Victoria.

Table 10.10 Offences with statutory minimum imprisonment sentences and non-parole periods in Victoria

Offence	Minimum imprisonment sentence	Minimum non-parole period
Manslaughter in circumstances of gross violence	–	10 years
Manslaughter by single punch or strike	–	10 years
Causing serious injury intentionally or recklessly in circumstances of gross violence to an on-duty emergency or custodial worker	–	5 years
Causing serious injury intentionally or recklessly in circumstances of gross violence	–	4 years
Causing serious injury intentionally to an on-duty emergency or custodial worker	–	3 years
Aggravated carjacking	–	3 years
Aggravated home invasion	–	3 years
Causing serious injury recklessly to an on-duty emergency or custodial worker	–	2 years
Intentionally exposing on-duty emergency or custodial worker to risk by driving	–	2 years
Contravening a supervision order	12 months	–
Causing injury intentionally or recklessly to an on-duty emergency or custodial worker	6 months	–

Source: Sentencing Advisory Council, *Sentencing Schemes*, February 2021, <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-schemes> accessed 23 April 2021.

206 Judicial College of Victoria, *Victorian Sentencing Manual (4th edn)*, Melbourne, 2021, pp. 242–243.

10.4.3 Sentencing options

The following sections discuss two of the primary sentencing options for courts: incarceration and community-based sentencing. The potential of home detention as a sentencing option is also considered.

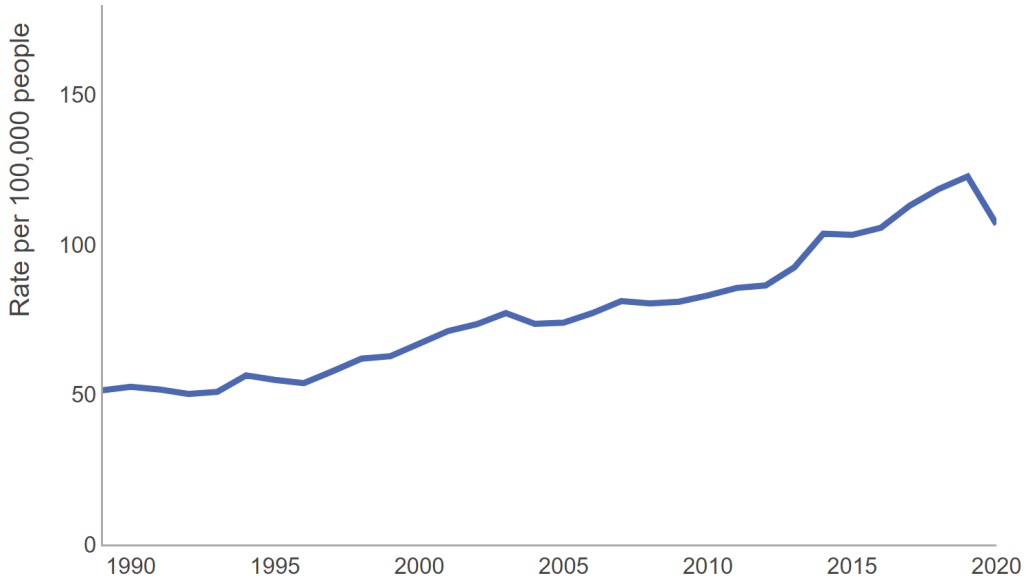
Imprisonment

The Victorian Sentencing Manual explains that imprisonment should only be used as a last resort:

> Legislation and the common law state that imprisonment is the sanction of last resort and is not to be imposed unless the court is satisfied that no other penalty is appropriate. Specifically, the *Sentencing Act 1991* (Vic) ss 5(4)-(4C) … state[s] that a sentence requiring confinement of the offender cannot be imposed unless the court considers that the sentencing purposes cannot be met by another sentence.[207]

Nevertheless, there has been a rapid and ongoing increase in the rate of imprisonment in recent years. Figure 10.4 displays the changing imprisonment rate over the past thirty years. In 1990, this was 52.6 per 100,000 people, which by 2019 had increased to a high of 122.8 per 100,000 people in 2019. There has been a decrease to 106.8 people per 100,000 in 2020. However, this can be partially attributed to the justice measures implemented as part of the COVID-19 response. Chapter 2 examines rates of imprisonment and other statistics related to the criminal justice system in more detail.

Figure 10.4 Imprisonment rate per 100,000 people, Victoria, 1990 to 2020



Source: Sentencing Advisory Council, *Victoria's Imprisonment Rates*, 2021 <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-imprisonment-rates> accessed 28 January 2022.

207 Ibid., para 8.1.

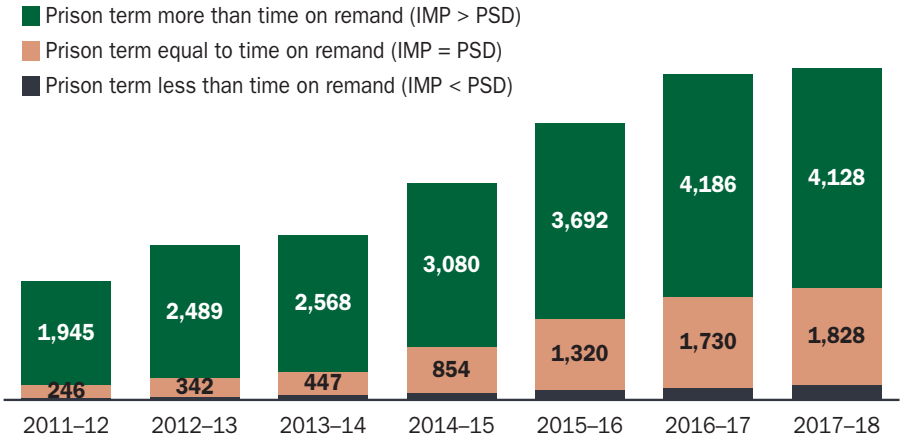
The increasing rate of imprisonment has led to resourcing challenges and a more volatile environment within facilities, with impacts for both staff and incarcerated persons (see Chapter 11). The Justice Reform Initiative provided sentencing data which demonstrates the increasing use of imprisonment as a sentence:

> Sentencing data for the Magistrates Court shows an increase in the percentage number of cases sentenced to imprisonment (just under 5% to just over 13% from 2005 to mid-2020), and a decrease in the use of Community Corrections orders. The use of the time-served prison sentence appears to be contributing to this (certainly since mid-2018)-driving a higher rate of incarceration.[208]

'Time served' sentences are sentences for a term of imprisonment equal to that already served while awaiting sentencing. In 2020, the Sentencing Advisory Council released its report into time served prison sentences. The report found that the recent rise in Victoria's remand population is a key driver of the increased use of prison sentences. It reported that the use of time served prison sentences grew by 643% between 2011–12 and 2017–18, and now account for 20% of all prison sentences (previously 5%). Approximately 96% of these sentences were under six months in length, and they made up 39% of the increase in prison sentences imposed by Victorian courts in the five years up to June 2018. The Sentencing Advisory Council submitted that this indicates that the 'increasing remand population is causing courts to impose prison sentences more often, without actually requiring people to spend more time in prison'.[209]

Figure 10.5 (duplicated from Chapter 2) demonstrates the increase in time served sentences between 2011–2018 as a proportion of all prison terms imposed in this time.

Figure 10.5 Prison terms imposed by all Victorian adult courts, 2011–2012 to 2017–2018



Source: Sentencing Advisory Council, *Time Served Prison Sentences in Victoria*, Sentencing Advisory Council, Melbourne, Victoria, 2020, p. 9.

208 Justice Reform Initiative, *Submission 103*, p. 6.

209 Sentencing Advisory Council, *Submission 17*, p. 4.

In addition, the Sentencing Advisory Council's 2020 report concluded that sentencing practices are becoming increasingly punitive:

> [T]he findings in this report suggest that criminal justice responses have become increasingly punitive in recent years: the overall number of people in prison has increased, the number and proportion of people sentenced to imprisonment have increased, the number and proportion of people held on remand have increased, and the number of time served prison sentences that either exceed or equal the ultimate prison sentence has increased.[210]

As discussed in Chapters 11 and 12, time spent in prison can have varied negative outcomes, including the loss of employment, housing or custody of children. It can generate and exacerbate existing mental health issues, and compound existing forms of disadvantage. For these reasons, many stakeholders advocated for reform to the ways in which imprisonment is used as a sentence in Victoria.

In its submission, the Sentencing Advisory Council stated that there are varied implications of time served sentences:

- the limited opportunities for someone sentenced to a time served prison sentence to make transitional arrangements for their release (e.g. housing, employment, transport);
- the limited opportunities for the criminal justice system to provide targeted programs addressing offending behaviour to someone held on remand, given that they are presumed innocent until proven guilty;
- the extent to which a time served prison sentence is capable of achieving key sentencing purposes such as rehabilitation or community protection; and
- whether the increasing likelihood of receiving a time served prison sentence might inappropriately encourage some people on remand to plead guilty in the hope of being released earlier than if they proceeded to trial.[211]

The Australian Psychological Society submitted that time served sentences increase 'the risk to public safety by limiting the opportunity for intervention', with many people 'released back into the community without key risk factors or reintegration needs being addressed'.[212]

The Justice Map—an organisation undertaking advocacy in relation to criminal justice—submitted that the justice system is being used as a response to social and economic disadvantage:

> While the numbers of marginalised people being imprisoned are skyrocketing, there has been no increase in crime—in fact it has decreased. Thus, in exploring strategies for reducing recidivism, our focus must be on investigating what has changed in this era of

210 Sentencing Advisory Council, Time served prison sentences in Victoria (2020), 18.

211 Sentencing Advisory Council, *Submission 17*, p. 4.

212 Australian Psychological Society, *Submission 90*, p. 4.

> mass incarceration. The answer is that governments are choosing to respond to social and economic inequality with punishment and surveillance at an unprecedented scale.[213]

Professor Bronwyn Naylor argued that alternative sentencing options are needed based on cost, impact on recidivism, and harms to over-incarcerated groups:

> There is little evidence that imprisonment deters offending. There is however considerable evidence that prisons can be harmful to detainees, and they disproportionately hold highly disadvantaged people – people with physical and mental ill-health, with cognitive impairments, with low levels of education, suffering addiction to drugs and alcohol, and (for women) having extensive experience of family violence … At the same time imprisonment is a very expensive response to criminal behaviour. In Victoria imprisonment cost $323.45 per prisoner per day in 2019–207 ($118,060 per prisoner per year) or $2.3 million for the 7151 people in prison on 30 June 2020. The 2019–2020 Victorian budget included $1.8 billion for prisons and other correctional programs. Given cost, recidivism, and the harm to over-incarcerated groups, it is important for Victoria to look for alternative approaches to criminal behaviour.[214]

Professor Naylor asserted that there should be a reduction in the use of imprisonment as a sentence, with rates of imprisonment higher in Victoria, and across Australia, than in many comparable international jurisdictions.[215] The Centre for Innovative Justice similarly advocated for limitations on the use of imprisonment. In particular, it provided that this could occur through:

- Restrictions in the use of imprisonment in non-violent crimes;
- A prohibition on sentences of six months or less (subject to access to appropriate community-based alternatives);
- A presumption against remanding in custody or imprisoning pregnant women or women with dependent children, as stipulated under the Bangkok Rules;
- Changes to increase the availability of parole, or release "on licence". In the UK, adults serving a prison sentence of less than two years are released after serving half their sentence, with the remainder of the sentences served in the community "on licence" (or subject to conditions), and a further period of supervision under the Transforming Rehabilitation Programme; and
- Provision for culturally appropriate sentencing dispositions which take greater account of the circumstances of the individual charged and the context of the offending, as recommended by the ALRC.[216]

Other stakeholders also advocated for the introduction of a presumption against short sentences. Victoria Legal Aid stated that short sentences are 'particularly detrimental as they cause great disruption to existing support systems without offering time to access programs and supports in prison'. It recommended the abolishment of short sentences,

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213 The Justice Map, *Submission 157*, p. 5.

214 Professor Bronwyn Naylor, *Submission 57*, pp. 1–2.

215 Ibid., pp. 5–6.

216 Centre for Innovative Justice, *Submission 82*, p. 11.

noting similar reform that has occurred in international jurisdictions. For example, Scotland introduced a presumption against sentences of less than 3 months in 2010, which was extended to 12 months or less in 2019. In Australia, Western Australia has abolished short sentences, and in New South Wales, judicial officers must give reasons for the imposition of a term of imprisonment of less than 6 months.[217]

While not advocating for the introduction of a presumption against short sentences, Fiona Dowsley of the Crime Statistics Agency did note that recidivism data from 2018–19 indicates that 'the shorter the sentence, the higher the rate of return to imprisonment within [a] two year period'. She said that older people, people serving longer sentences and those released on parole had a lower rate of return to prison.[218]

The Victorian Government acknowledged the difficulty around ensuring rehabilitative outcomes for persons serving short sentences, stating:

> Programs often provide support and intervention over a set period of time, including offence specific programs. It is therefore difficult for people on short term sentences to effectively engage in this support. Premature withdrawal from treatment, or having insufficient time to complete programs, can increase risk of reoffending.[219]

Dan Nicholson, Executive Director of Criminal Law at Victoria Legal Aid, made similar observations:

> short periods of imprisonment are long enough to disrupt things that you may have going on, that are helping you in your life—housing, jobs, social supports—but really not long enough for you to get into programs in corrections or youth justice and to start to deal with the underlying causes of offending there …
>
> It also has a system impact, because if you have a very large number of people churning in and out of the corrections system and indeed the youth justice system, it is very hard for those systems to deal with underlying causes of offending, to run the criminogenic programs, to give people the kind of support they need, because people are churning in and out all the time.[220]

The Victorian Government contended that people serving short sentences can 'be more volatile than people serving longer sentences, as they have less time to adjust to the prison environment'. It stated that, 'As the proportion of people on remand or serving short sentences increases comparative to people serving longer sentences, the level of instability across the system may also rise.'[221]

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217 Victoria Legal Aid, *Submission 159*, p. 9.

218 Fiona Dowsley, Chief Statistician, Crime Statistic Agency, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 4.

219 Victorian Government, *Submission 93*, p. 68.

220 Dan Nicholson, Executive Director, Criminal Law, Victoria Legal Aid, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 24.

221 Victorian Government, *Submission 93*, p. 68.

Smart Justice for Women argued that short sentences should be abolished in Victoria given their highly detrimental impact:

> There has been a significant increase in the number and proportion of Victorian prisoners who spend a short time in custody. Short sentences are particularly detrimental: they are long enough to significantly disrupt existing supports, but not long enough to provide access to programs or promote meaningful recovery while in custody. Reducing the number of people on remand or serving short sentences, in favour of properly supported and supervised community sentences, would reduce recidivism.
>
> For these reasons, it is [our] position that short sentences should be abolished. However, this must be accompanied by safeguards to protect against 'sentence creep' where a person is sentenced to a greater period of imprisonment than would otherwise be warranted in order to overcome the abolition of short sentences. There must also be investment in adequate and appropriate community-based options that can be used instead of short sentences.[222]

Smart Justice for Women suggested that these issues could be referred to the Victorian Law Reform Commission for further consideration.[223]

The Aboriginal Justice Caucus advocated for the reintroduction of suspended sentences and the establishment of new sentencing options, with incarceration only to be used as a last resort.[224] Currently, New South Wales and Victoria are the only jurisdictions in Australia which have abolished suspended sentences, though Tasmania is moving to phase them out.[225]

Victoria Legal Aid provided data from the Productivity Commission to demonstrate that community sentences are more appropriate for decreasing recidivism compared to short sentences. The Productivity Commission reported that 54.9% of released prisoners (who had served short sentences) returned to either prison or community corrections within a two-year period, whereas only 23.9% of individuals who completed community corrections orders returned to prison or community corrections in the same period.[226]

The Committee is concerned about the continuing increase in imprisonment rates in recent years, and the impacts this has on the State's prison population, resourcing, recidivism and community safety. Importantly, evidence received through this Inquiry demonstrates that short sentences—including time served sentences—are likely to be detrimental in a number of ways.

The Committee acknowledges evidence that short custodial sentences are linked with higher rates of recidivism and reimprisonment.

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222 Smart Justice for Women, *Submission 94*, p. 21.

223 Ibid.

224 Aboriginal Justice Caucus, *Submission 106*, p. 6.

225 Arie Freiberg, 'Suspended sentences in Australia: Uncertain, unstable, unpopular and unnecessary?', *Law and contemporary problems*, vol. 82, no. 1, 2019.

226 Victoria Legal Aid, *Submission 159*, p. 9.

FINDING 50: Short custodial sentences are associated with higher rates of recidivism than longer custodial sentences and custodial sentences combined with parole.

The Committee considers imprisonment an important component of Victoria's criminal justice system which should only be used as a last resort, as provided for under the Sentencing Act. In this respect, the Committee recommends that the Victorian Government investigate the introduction of a presumption against short terms of imprisonment. Any such introduction should be accompanied by appropriate safeguards.

RECOMMENDATION 68: That the Victorian Government investigate the introduction of a presumption against short terms of imprisonment in favour of community-based sentences or other therapeutic alternatives. Such legislative reform should be informed by the experiences of other Australian and international jurisdictions and ensure that appropriate safeguards are incorporated to protect against persons being sentenced to longer terms of imprisonment.

Incarceration and detention are discussed further in Chapters 11 and 12.

Community-based sentencing options

A community correction order (CCO)—provided for under pt 3A of the Sentencing Act—is an order served in the community. It can encompass a variety of requirements and restrictions, depending on a person's situation and needs, and is aimed at promoting opportunities for rehabilitation.[227] It includes basic conditions such as not reoffending or leaving Victoria without authorisation, and additional conditions depending on the circumstances. Conditions could include:

- supervision
- unpaid community work
- treatment and rehabilitation
- curfews
- bans on entering specified areas or places
- bans on entering licensed premises
- bans on contacting or associating with specific people or groups
- residential restrictions or exclusions.[228]

227 Victorian Government, *Submission 93*, p. 40.

228 Corrections Victoria, *Orders*, 2020, <https://www.corrections.vic.gov.au/community-corrections/orders> accessed 27 January 2022.

A person can be sentenced to a CCO on its own or in conjunction with imprisonment or a fine. CCOs are the most commonly used community order.[229]

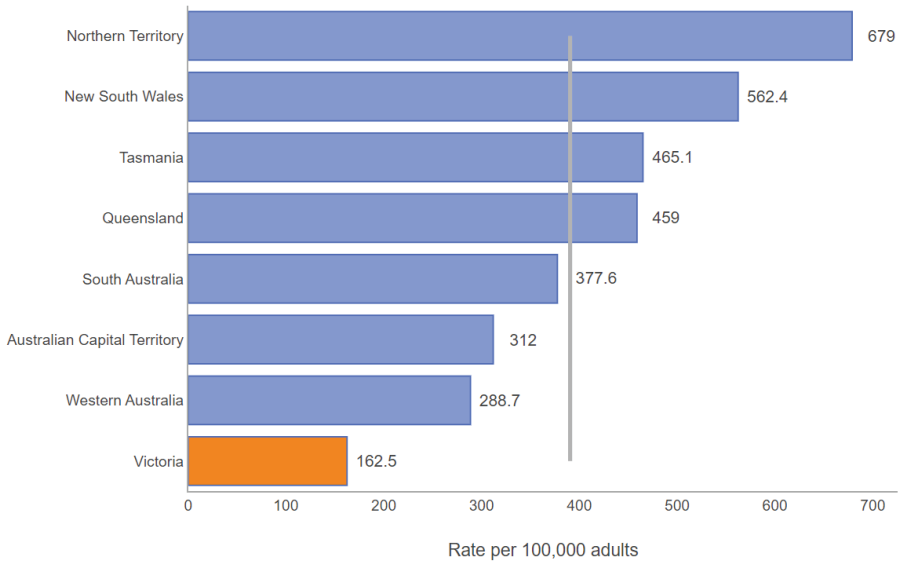
Community Correctional Services—a division of Corrections Victoria—manages people on CCOs. Community corrections officers provide individual oversight and ensure that CCO conditions are complied with.

CCOs were introduced in January 2012 to provide a flexible, non-custodial sentencing option, and replaced a number of other orders.[230] They increased the options available to the courts through providing for the ability to:

- impose orders for longer periods in the higher courts
- order greater numbers of unpaid hours of community work
- attach a broader range of conditions that reflect an individual's circumstances.[231]

The Sentencing Advisory Council reported that, as at December 2020, Victoria's rate of community-based sentences was 162.5 people per 100,000 adults—the lowest rate of any Australian jurisdiction. Figure 10.6 is a comparative graph of community-based sentencing rates across Australian jurisdictions. The vertical line displays the national rate (390.6 people per 100,000 adults).

Figure 10.6 Rate of people serving community-based sentences in each Australian state and territory, December 2020



Source: Sentencing Advisory Council, *Community-Based Sentences*, 2021, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/community-based-sentences> accessed 14 January 2022.

229 Victorian Government, *Submission 93*, p. 40.

230 This includes Community-Based-Orders (CBOs), Intensive Correction Orders (ICOs) and Combined Custody and Treatment Orders (CCTOs). Suspended sentences were also abolished at this time.

231 Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of people in prisoners in Victoria* report for Victorian Government, PP no. 94, Melbourne, 2015, p. 19.

Shortly after the introduction of CCOs, suspended sentences were gradually phased out in Victoria and could no longer be used for offences committed from 1 September 2014. Prior to this, suspended sentences were by Victorian courts. They provided for a term of imprisonment which is either partially or fully suspended for a specified period, during which time the individual lives in the community. A suspended sentence has conditions attached, including that the person does not commit further offences that would be punishable by a term of imprisonment. If the person does commit such an offence, their new sentence will be applied in addition to the original sentence.[232]

While courts had the option to apply a partially suspended sentence, the Sentencing Advisory Council reported that in the years prior to their abolition—between 2008 and 2012—approximately 90% of suspended sentences handed down in the in the Magistrates' Court were fully suspended.[233]

Professor Arie Freiberg from the Sentencing Advisory Council told the Committee that one of the factors contributing to Victoria's growing remand and prison populations is sentencing practices, including 'the phasing out of suspended sentences and the use of orders combining imprisonment with community corrections'.[234]

Recent changes to sentencing laws have also led to an increase in the number of persons on CCOs, with the number nearly doubling between 2013 and 2016 (from 5,871 to 11,730). In response to the growing use of CCOs, Corrections Victoria undertook an internal review of Community Correctional Services, which identified several challenges to the CCO system:

- system challenges in managing unexpected growth
- legislative changes driving higher-risk offender profiles
- broadening expectations of the services that CCS delivers—community corrections being seen as both one step away from prison and an early intervention option for offenders
- constrained CCS resources and access to community treatment options
- challenges in recruiting and training appropriately qualified staff
- case management roles for managing serious offenders being filled by inexperienced staff.[235]

Since this review, the Victorian Government has allocated significant funding to address the identified issues and the number of persons on CCOs has stabilised. [236] In the 2018–19, the average daily number of people on CCOs was 10,519. This number dropped

232 Ibid.

233 Ibid.

234 Emeritus Professor Arie Freiberg AM, *Transcript of evidence*, p. 26.

235 Victorian Auditor-General, *Managing Community Correction Orders*, PP no. 225, Melbourne, 2017, pp. vii–viii.

236 The Hon Daniel Andrews, *Stronger community corrections system to keep Victorians safe*, media release, Victorian Government, Online, 16 January 2017.

to 9,704 at 30 June 2020 and 8,401 persons at 25 June 2021—the decrease is attributed to limited court functioning due to public health orders.[237]

In its 2017 report, *Managing Community Correction Orders*, the Victorian Auditor-General stated that CCOs have social benefits, including the maintenance of social and economic support networks while making amends for offending and undergoing rehabilitation. The report found that individuals 'who receive community-based sentences also tend to have much lower rates of reoffending', although this can be partially attributed to those on CCOs being considered a lower risk cohort. In 2014–15, 24.9% of people on CCOs returned to corrective services, compared to 53.7% of persons who have been incarcerated. However, it also found that there is an increasing complexity of persons on CCOs, with has implications for the risk of reoffending.[238]

Kerry Burns, Chief Executive Officer of the Centre Against Violence, asserted that Corrections Victoria has limited powers to deal with contraventions of CCOs:

> Community corrections orders—we think that we need to better equip the department of justice to manage breaches of community corrections orders, because we have seen them wait months for a matter to return to court, and in those months that person is running amok, sometimes committing more crimes, but there are no tools to deal with it. So they need also a contingency plan…[239]

This reflects the 2017 findings of the Victorian Auditor-General, who recommended that Corrections Victoria review processes for managing non-compliance with conditions of CCOs, including taking individuals back to court for breaches of conditions.[240]

Professor Freiberg commented on the management of persons on CCOs, and the rates of contraventions of conditions:

> There was a huge investment in community corrections, and there are problems. We do a monitoring report quite often, and what we have found there is that the non-compliance rate is about 48 per cent, so it is similar to prison. But a lot of that is breaches of conditions, so it is not further offending. So what we find is that again the requirement of adequate support, adequately trained people—finding community correction officers, that is difficult. I think one of the problems that we have is the community work. I think the Auditor-General and others found, especially now, with COVID, that a lot of the orders are for community work, and that must be difficult in times when no-one can go out. And it has got to be meaningful work; it has got to be

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237 Natalie Hutchins, Minister for Corrections, Corrections Portfolio, Public Accounts and Estimates Committee, public hearing, Melbourne, 30 June 2021, *Transcript of evidence*, p. 13; Department of Justice and Community Safety, *DJCS Response 2019–20 questionnaire*, submission to Parliament of Victoria, Public accounts and estimates committee, Inquiry into 2019–20 financial and performance outcomes, 2020, p. 173; Department of Justice and Community Safety, *PAEC general questionnaire - Department of Justice and Community Safety*, submission to Parliament of Victoria, Public accounts and estimates committee, Inquiry into the 2018–19 financial and performance outcomes, 2019, p. 204.

238 Victorian Auditor-General, *Managing Community Correction Orders*, pp. vii, ix.

239 Kerry Burns, Chief Executive Officer, Centre Against Violence, public hearing, Melbourne, 30 June 2021, *Transcript of evidence*, p. 28.

240 Victorian Auditor-General, *Managing Community Correction Orders*, p. viii.

> useful work. I think our figures show that the judges are in fact losing confidence in the community correction orders. In fact the numbers are receding, orders are dropping, as the jailed populations are going up. So I think that that requires further investment, better training, more experienced people. I think they are working incredibly hard, but it is not a perfect system by any means.
>
> I think we need to be creative in that area, by the way. I chair the Tasmania Sentencing Advisory Council. We are looking at the introduction of home detention as another non-custodial option. I think we need to be creative about some of the options that we are doing.[241]

Home detention is discussed further in the following Section.

Professor Freiberg further stated that, despite these figures, he 'would rather put [his] money there than in the prisons.' He noted that there are approximately 12,000 people on CCOs and 7,000 in prisons and argued, 'That is where the resourcing should go. Keep them out.'[242]

A key issue for the operation of CCOs is the resourcing provided to effectively oversee and manage them. In 2017, as the Victorian Government was starting to increase funding in this space, the Victorian Auditor-General reported:

> current practices for managing offenders on CCOs are not effective, and much of the effort to fully implement these reforms lies ahead. There is a shortage of adequately trained staff to meet the increase in offenders on CCOs, business processes are inefficient, and the fragmented information management environment impedes timely decision-making and effective coordination.[243]

Corrections Victoria have significantly increased the number of staff working in this space in recent years to address these deficits. However, these staff numbers have had impacts on the management of CCOs. The Victorian Auditor-General found that significant caseloads for case managers impacts the proportion of persons who complete their CCOs, and the ways in which case managers can respond to breaches of conditions.[244]

Youth Junction advocated for an increased focus on community-based sentencing over incarceration. It asserted that community corrections 'provide a cost-effective solution' and alleviate 'some of the economic and logistical pressures of systemic incarceration'. In addition, it recommended the use of long-term contracts with adequate outcome monitoring:

> To embed community based programs, long term contracts need to be embedded and outcomes measured longitudinally, rather than short term projects seeded by small innovation funds. This should be supported by an annual review to Parliament on

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241 Emeritus Professor Arie Freiberg AM, *Transcript of evidence*, p. 30.

242 Ibid.

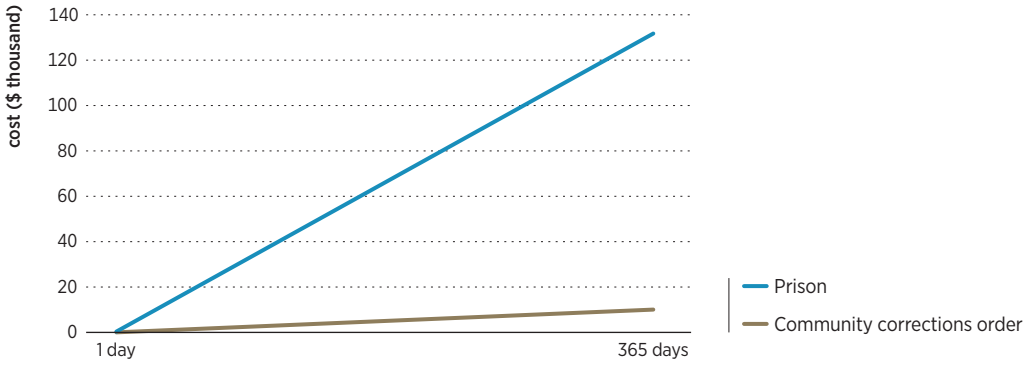
243 Victorian Auditor-General, *Managing Community Correction Orders*, p. viii.

244 Ibid., p. xi.

achievement of these outcomes, and contracted agencies and/or recipients of funding to have their work evaluated against these outcomes.[245]

The Victorian Auditor-General reported that the average cost in 2014–15 to manage someone on a CCO was $27.55 per day (just over $10,000 per year), compared with the cost of incarcerating a person which was $360.91 per day ($131,700 per year).[246] This is demonstrated in Figure 10.7 and Figure 10.8 below.

Figure 10.7 Annual cost of imprisonment vs. cost of community corrections order per person



Source: Legislative Council Legal and Social Issues Committee. Information from Victorian Auditor-General's Office, *Managing Community Correction Orders.*

Figure 10.8 Value for money for imprisonment compared to community corrections orders

Source: Legislative Council Legal and Social Issues Committee. Information from Victorian Auditor-General's Office, *Managing Community Correction Orders.*

In terms of the nature of CCOs, the Committee heard that individuals can receive varying levels of support to comply with their orders. Samantha Sowerwine, Principal Lawyer at Justice Connect Homeless Law, noted that for some individuals, it can be very difficult to comply with the conditions of a CCO without proper supports. She said:

245 The Youth Junction Inc., *Submission 51*, p. 11.

246 Victorian Auditor-General, *Managing Community Correction Orders*, p. vii.

> community correction orders are a key sentencing option that reduces the number of people being sentenced to imprisonment. However, through our work we see how difficult it is for people with complex needs to complete community correction orders. For homeless Victorians a community correction orders regime that is tailored and more specialised would ensure that more people get access to it but also are able to complete them without breaching.[247]

Samantha Sowerwine contended that where the right therapeutic approach is not adopted in corrections models, this negatively impacts both levels of accountability and compliance:

> part of building a system that is really robust is that when you make therapeutic programs effective it actually means that accountability is more likely to be genuine and real, rather than it feeling more like a compliance approach.[248]

The Victorian Auditor-General reported that the Neighbourhood Justice Centre 'provides a highly integrated model' for management of people who have committed an offence, including through the colocation of services, active judicial monitoring and effective integration of support. It stated that while Corrections Victoria has tried to incorporate elements of this model into its own management practices, it has not previously worked strategically with Court Services Victoria to comprehensively adopt this approach.[249] In its response to the Auditor-General's report, the former Department of Justice and Regulation indicated that Corrections Victoria would consider elements of the Neighbourhood Justice Centre model.[250] The Neighbourhood Justice Centre model is discussed further in Section 10.3.5.

Professor Freiberg suggested that there is a need for judicial officers to have additional flexibility in imposing CCOs:

> Perhaps in anticipation of one of the questions about what we might do better, there was a reduction in the combined sentences from two years plus a three-year community correction order to one year, and I do believe that a reversion to that previous combination of a two-year imprisonment and a CCO expands the options that are available to judges, which gives them more flexibility. I know it sounds paradoxical to say, 'Increase the length of imprisonment', but it does encompass a greater range of offences.[251]

In its submission, the Justice Reform Initiative noted that there are fewer sentencing options available to judicial officers since suspended sentences and home detention were phased out, combined with a rise in rates of imprisonment. It stated:

> Judges and magistrates have fewer sentencing options since the abolition of suspended sentences and the abolition of Home Detention. There appears to be a trend to harsher sentencing, coinciding with reduced sentencing options available to the

247 Samantha Sowerwine, *Transcript of evidence*, p. 27.

248 Ibid., p. 30.

249 Victorian Auditor-General, *Managing Community Correction Orders*, pp. ix–xi.

250 Ibid., p. 48.

251 Emeritus Professor Arie Freiberg AM, *Transcript of evidence*, p. 26.

> judiciary. For instance, the use of imprisonment as a sentencing outcome has increased dramatically for both shop theft, and theft from a motor vehicle between 1 July 2016 and 30 June 2019. These are relatively low level offences which would historically have attracted a higher proportion of community-based orders and a lower proportion of prison sentences.[252]

Some stakeholders suggested that there should be more options for community-based sentencing outside of just CCOs. For example, ermha365 stated that there should be additional options that incorporate psychological and psychosocial support, education and vocational counselling, and partnerships with organisations for paid and volunteer work for people with criminal records.[253]

Samantha Sowerwine told the Committee that judicial officers need more sentencing options available to them, as well as related programs:

> But I also think that the reality is that magistrates need more options available to them. There is a training and education component that I think is really important to support magistrates who are dealing with a lot of complex issues coming through the courts and really limited time to deal with them, but we also need to make sure as part of this inquiry we are looking at those broader kinds of issues around what sentencing options are available, what programs are available, because I know that magistrates generally are very keen to avail themselves of those options but sometimes just do not have access to them.[254]

Smart Justice for Women recommended a review of the sentencing hierarchy—including CCOs—to create alternative options for community-based treatment and rehabilitation that are tailored to the needs of women.[255] It submitted:

> The current range of sentencing options under the *Sentencing Act 1991* (Vic) … is not broad enough to address the wide range of circumstances of women who come before the courts. In particular, there is only one community-based sentencing option – the Community Corrections Order (CCO). If the Court will not impose a CCO because a person has breached an earlier CCO, or if Corrections Victoria assess that a person is not suitable for a CCO, the next step 'up' in the 'sentencing hierarchy' is imprisonment. If the Court deems that a CCO is not warranted, the next step 'down' in the sentencing hierarchy is a fine. There is no intermediate sentencing option with a focus on rehabilitation.
>
> It is vitally important that the sentencing regime includes options for community-based treatment and rehabilitation that are better tailored to the individual circumstances of women. These options need to take into account the nexus between trauma, prior victimisation (in particular family violence), homelessness and women's criminalisation.

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252 Justice Reform Initiative, *Submission 103*, p. 5.

253 ermha365, *Submission 84*, p. 7.

254 Samantha Sowerwine, *Transcript of evidence*, p. 32.

255 Smart Justice for Women, *Submission 94*, p. 9.

> It is particularly important to understand the impact that these negative experiences can have on the ability of women engaged in the criminal justice system to comply with the current CCO regime. Otherwise, these women are often being set up to fail.[256]

Smart Justice for Women also advocated for the instigation of breach proceedings to only take place as a last resort, and that a 'more collaborative, problem-solving response' should be adopted which includes options for provision of additional support or review of the conditions of the CCO.[257]

For individuals with an intellectual disability, a court may attach a 'justice plan' as a condition of the CCO—or when releasing a person on adjournment. A justice plan specifies particular treatment services aimed at reducing the risk of the individual reoffending.[258]

Smart Justice for Women raised concerns that justice plans are not adequately flexible in terms of their implementation, compliance and criteria for eligibility. It argued that:

> The current practice requiring a diagnosis of intellectual disability to have been made prior to a person turning 18 is unnecessarily rigid and exclusive. The intersection between mental health, substance use and cognitive impairment must be better understood so that it becomes the foundation for tailoring treatment that is appropriate to the individual, rather than a barrier that excludes people from particular treatment programs.[259]

Victorian Aboriginal Legal Service similarly advocated for amending the Sentencing Act to ensure that individuals with an acquired brain injury and/or intellectual disability—not diagnosed prior to the age of 18—are eligible for a justice plan.[260]

The Committee recognises the significant complexity of the community corrections system, and the wide ranging work undertaken by the Victorian Government and Corrections Victoria in recent years to improve its operation. Nevertheless evidence was received throughout this Inquiry regarding the efficacy and importance of therapeutic options, the need for greater innovation and for connections to be made to other parts of the criminal justice system. The Committee considers this is an area which requires sustained and ongoing development.

In particular, the Committee considers that Corrections Victoria should collaborate with successful models of therapeutic justice, including the Neighbourhood Justice Centre, to continue developing ways in which community corrections can support individuals to address the causes of their offending and comply with the conditions of an order. There are many innovative approaches across Victoria and other Australian jurisdictions which can inform future approaches in this space.

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256 Ibid., p. 18.

257 Ibid.

258 *Sentencing Act 1991* (Vic) s 80.

259 Smart Justice for Women, *Submission 94*, p. 19.

260 Victorian Aboriginal Legal Service, *Submission 139*, p. 26.

While funding for community corrections has increased significantly in recent years, the Committee believes that sustained resourcing underpins the success of the system. Community corrections are demonstrated to be more cost effective than incarceration and can be successful in preventing reoffending or breaches of orders if the right supports are in place.

Lastly, the Committee considers that the Sentencing Act should be amended to provide that people with an acquired brain injury and/or intellectual disability—not diagnosed prior to the age of 18—are eligible for a justice plan.

RECOMMENDATION 69: That the Victorian Government, in relation to community correction orders:

- provide additional resourcing to Corrections Victoria to ensure that its management of individuals on community correction orders is as effective as possible, including through achieving high rates of order completion and allowing for appropriate and timely responses to cases of non-compliance
- collaborate with successful models of therapeutic justice, including the Neighbourhood Justice Centre, to continue developing ways in which community corrections can support individuals to address the causes of their offending and comply with the conditions of an order
- amend the *Sentencing Act 1991* (Vic) to provide that people with an acquired brain injury and/or intellectual disability, not diagnosed prior to the age of 18, are eligible for a justice plan.

Home detention

One non-custodial sentencing alternative raised throughout the Inquiry as a potential option for Victorian sentencing practices is home detention. This sentencing option was available between 2004 and 2011, when it was abolished as part of widespread reforms to the criminal justice system by the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic). Under a home detention order, an individual was required to serve a term of detention, up to a year, in their home in conjunction with electronic monitoring. They were permitted to leave only for agreed reasons.

In their submission, Dr Marietta Martinovic, a Senior Lecturer in Criminology and Justice at RMIT University and Gabriela Franich provided data on the operation of home detention. They stated:

> Although this program was abolished, the results on the whole were positive as from 2003–2009 the daily average number of home detention completion rates averaged at 97%, only dropping to 91.2% in one year (Martinovic, 2014). Martinovic (2014), suggests that the downfall of this program, and the loss of support from policy makers can mainly be attributed to the media's exaggeration of the failures of home detention. Furthermore, the cost benefits were overwhelming as an offender on home detention

> costs around $47 per day (including the technology, supervision and all programs) which is significantly lower than the $187 for someone in prison - which is primarily spent on custodial staff (Audit Office of NSW, 2010).[261]

At a public hearing, Dr Martinovic also spoke about the potential of home detention, explaining that it was likely to increase community safety through reduced reliance on incarceration as a sentencing option, which is inherently criminogenic:

> When we promote things like home detention and more community-based alternatives, I am of the firm belief, backed up by a lot of research done everywhere around the Western world, that the more people you push into prisons, the more crime you are going to have and the more reoffending and recidivism you are going to have; the more people you try and divert into community-based dispositions and the more you, I suppose, prepare them for release by early release, the more likely they are to not reoffend. So at the end of the day we are all on the same page. The page that we in the think tanks are on is not about an easy ride for people in prison. They are all very aware that they have broken the law, and they are very aware that they need to change as people. But how do we make the transition a better one? How do we make it less likely for them to come back into prison and reoffend?[262]

Jesuit Social Services noted that home detention reduces pressures on prison facilities: 'To reduce the strain on the system, staff and infrastructure, alternatives like home detention limit the number of people housed in prison when it is safe and viable for them to be elsewhere.' It explained that home detention orders can be carefully managed:

> Conditions may be attached to any home detention order, in conjunction with targeted and intensive support mechanisms that assist in rehabilitation. Home detention requires careful assessment and screening for appropriate candidates but is a strong option for some cohorts, such as people with drug- related charges and non-violent offending histories who do not pose a risk to community safety. Home detention must be met with increased funding for Community Corrections to support working with people in the community. Further, it must be implemented in a way that does not draw more people into the justice system. [263]

Dr Natalia Antolak-Saper, Fellow at the Australian Centre for Justice Innovation at Monash University, described how non-custodial sentencing options have been utilised around the world in response to COVID-19, including home detention:

> A global analysis of prisoner release in the response to COVID-19 demonstrates that many overseas jurisdictions embraced a range of non-custodial sentencing measures to mitigate the risk that COVID-19 would pose to remandees and prisoners whilst simultaneously mitigating the risks that those offenders would pose in terms of community safety. Typically such measures were limited to non-violent, low-level

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261 Dr Marietta Martinovic and Gabriela Franich, RMIT University, *Submission 115*, p. 7.

262 Dr Marietta Martinovic, Senior Lecturer, Crimonology and Justice, RMIT University, Australian Inside Out Prison Exchange Program Manager, and Australian Prison and Community based Think Tank Leader, public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 13.

263 Jesuit Social Services, *Submission 119*, p. 34.

> offences. Examples include community-based treatment requirements, unpaid employment conditions and vocational programs, problem-solving courts and home detention.[264]

Dr Antolak-Saper also outlined the use of home detention in other Australian jurisdictions:

> So one interest I have had in recent times is really focusing on home detention as an alternative, and one thing I would say with caution here is I know that, for example, in Victoria we do not have this system. They do have a home detention option in New South Wales, the Northern Territory and South Australia. In New South Wales home detention is typically only imposed if the court finds that no other sanction other than imprisonment is appropriate—and again trying to target low-level offences and low risk to the safety of the community. Electronic monitoring here plays a very important role in being able to monitor how offenders stay in the community, and their liberties are restricted to some extent, but at the same time what you can do is allow people to still maintain close connections with employment and maintain relationships with family and allow for offenders to address their rehabilitation and go to programs, and so that technology allows us to of course monitor the person but at the same time allow them to keep existing in the community and divert them from the repercussions that prison would otherwise have.[265]

Dr Antolak-Saper further noted that home detention could potentially be used as a response to individuals who breach bail conditions on a repeat basis. She stated that it could be used as 'a really good middle ground to facilitate bail offenders who may breach conduct conditions' and provide them with an extra 'restriction in terms of their liberty without again sending them to a remand centre and sort of feeding into that criminogenic recidivism process'.[266]

At a public hearing, Professor Freiberg told the Committee that there is a need for more creative sentencing options. He gave the example of Tasmania's Sentencing Advisory Council, which is investigating the introduction of home detention as an additional non-custodial option.[267]

In light of stakeholder calls for additional non-custodial sentencing options, the Committee considers that home detention could play an important intermediate sentencing measure. Evidence indicates that with the support of sophisticated electronic monitoring and related technology, home detention is likely to be successful in terms of completion rates. Further, many jurisdictions have implemented this and similar measures in response to the COVID-19 pandemic, decreasing the reliance on prisons and enabling individuals to retain access to housing and other supports.

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264 Dr Natalia Antolak-Saper, Fellow, Australian Centre for Justice Innovation, Monash University, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 46.

265 Ibid., pp. 47–48.

266 Ibid., p. 48.

267 Emeritus Professor Arie Freiberg AM, *Transcript of evidence*, p. 30.

RECOMMENDATION 70: That the Victorian Government consider amending the *Sentencing Act 1991* (Vic) to provide for courts to impose a sentence of a home detention order.

10.4.4 Considerations in sentencing

The Sentencing Act prescribes several matters that the court should/should not have regard to when sentencing a person.[268] Some stakeholders advocated for these provisions to be amended so that certain matters could be considered during sentencing. This included:

- impacts on parents and their children of being separated due to a parent's incarceration
- consideration of factors affecting Aboriginal and Torres Strait Islander people.

As highlighted in Chapter 11, the varied impacts of incarceration on women include separation from children and the severing of familial bonds. Parental incarceration also has devastating impacts for dependent children. In its submission, Smart Justice for Women noted the significant impacts of parental incarceration on their children:

> Most devastatingly for many women, being remanded in custody results in their children being removed from their care. Most women in Australian prisons have children – with over half having at least one dependent child. Children removed from their mothers on remand are placed in the care of family members, kinship carers or into state care. This is traumatic for mothers and children alike – and for many, sets in motion a damaging trajectory.
>
> An increasing number of children are being removed from the care of Aboriginal and Torres Strait Islander women given that they are over-represented in Victoria's prison system.[269]

Smart Justice for Women recommended 'the inclusion of a specific provision in the Sentencing Act requiring decision-makers to consider the impact of the imposition of a term of imprisonment on dependent children'.[270] It also recommended consideration of a person's caring responsibilities and potential impacts on dependent children.[271]

The Victorian Aboriginal Legal Service similarly asserted that the Sentencing Act should be amended to require courts to consider the best interests of any affected child during sentencing.[272]

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268 *Sentencing Act 1991* (Vic) s 5.

269 Smart Justice for Women, *Submission 94*, p. 14.

270 Ibid., p. 22.

271 Ibid., p. 10.

272 Victorian Aboriginal Legal Service, *Submission 139*, p. 16.

The Committee recognises the often devastating and long-lasting impacts for both parents and their children when they are separated due to a parent's incarceration. These are complex issues. For this reason, on 20 December 2021, this Committee self-referenced an Inquiry into children of imprisoned parents, to explore these matters in more detail.[273]

In its submission, the Aboriginal Justice Caucus advocated for the Sentencing Act to be amended so that 'judicial decision-makers are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander people'.[274] This recommendation was also made by the Victorian Aboriginal Legal Service, who explained:

> Sentencing courts fail to take into account the unique systemic and background factors affecting Aboriginal peoples when making sentencing decisions. This means that sentences are often not appropriate and fail to take into account Aboriginal community-based options which can support rehabilitation and reintegration of the individual.[275]

The Victorian Aboriginal Legal Service asserted that the introduction of this type of consideration in sentencing should be accompanied by a requirement for judicial decision-makers to 'demonstrate the steps taken to discharge their obligation to consider the unique and systemic background factors affecting Aboriginal and Torres Strait Islander peoples'.[276]

Smart Justice for Women also advocated for amending the Sentencing Act to provide for consideration of factors affecting Aboriginal Victorians during sentencing.[277]

In its 2018 report on *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, the Australian Law Reform Commission stated:

> For reasons of fairness, certainty, and continuity in sentencing Aboriginal and Torres Strait Islander offenders, the majority of stakeholders to this Inquiry supported the introduction of provisions requiring sentencing courts to take a two-step approach: first, to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples; and then to proceed to review evidence as to the effect on that particular individual offender.
>
> The ALRC recommends the introduction of such provisions.[278]

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273 For further information about the Inquiry into children of imprisoned parents, see the Legal and Social Issues Committee's website: <https://www.parliament.vic.gov.au/lsic-lc/inquiry/1024>.

274 Aboriginal Justice Caucus, *Submission 106*, p. 6.

275 Victorian Aboriginal Legal Service, *Submission 139*, p. 114.

276 Ibid., p. 19.

277 Smart Justice for Women, *Submission 94*, p. 19.

278 Australian Law Reform Commission, *Pathways to justice — an inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples: Report 133*, Commonwealth Government, Canberra, 2017, pp. 28–29.

The need for reports providing background information in relation to the life history and experiences of Aboriginal Victorians during sentencing was raised by the Victorian Aboriginal Legal Service. It noted that Aboriginal Community Justice Reports are being piloted in conjunction with *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, and advocated for funding to support this project.[279]

The Committee is cognisant of the significant and ongoing overrepresentation of Aboriginal Victorians in the criminal justice system. This overrepresentation largely stems from Victoria's history of colonisation and systemic racism. It considers that the Sentencing Act should be amended to ensure that the unique systemic and background factors affecting Aboriginal Victorians are taken into account by courts during sentencing.

RECOMMENDATION 71: That the Victorian Government amend the *Sentencing Act 1991* (Vic) to require, for the purposes of sentencing, courts to take into consideration the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

The Committee is undertaking an Inquiry into children of imprisoned parents, which will include consideration of dependent children in this context.

10.4.5 Sentencing guidance

The Sentencing Advisory Council is an independent statutory body that undertakes research and consultation on sentencing matters and provides advice to the Victorian Government. It was established in 2004 through amendments to the Sentencing Act, and is made up of members from professional and community backgrounds. Appointments are stipulated across certain areas, including:

- defence law
- prosecution
- academia
- victim of crime support or advocacy
- police.

One of the functions of the Sentencing Advisory Council is to provide the Court of Appeal with its written views on the giving, or review, of a guideline judgment. Guideline judgments are decisions made by the Court of Appeal in accordance with pt 2AA of the Sentencing Act that provide broad sentencing guidance outside of the facts of a case. A guideline judgment can 'apply generally to a particular court or class

279 Victorian Aboriginal Legal Service, *Submission 139*, pp. 116, 20.

of court, to an offence or a penalty or to a particular class of offender'.[280] The first guideline judgment was given by the Court of Appeal in *Boulton & Ors v The Queen* [2014] VSCA 342.[281]

Changes were made to the guideline judgment scheme in 2017 to provide the Attorney-General the power to apply for a guideline judgment without requiring a specific appeal case.[282] In its submission, the Sentencing Advisory Council explained that the amendment is 'intended to overcome the problem, for some offences, of sentencing judges being constrained by inadequate current sentencing practices' as well as the 'Court of Appeal not having the opportunity to provide guidance on such practices, in the absence of a suitable appeal case'. However, these provisions have not been used to date.[283]

The Sentencing Advisory Council has previously made a number of recommendations to enhance the operation of guideline judgments, including in its 2016 report, *Sentencing Guidance in Victoria*. This report recommended the amendment outlined above, and that a guideline judgment should be permitted to include numerical guidance on the appropriate level or range of sentences for an offence or offence category. The Council stated that this latter amendment would 'allow the Court of Appeal to provide guidance on what sentences would be adequate, not simply to declare that sentencing practices are inadequate'.[284]

The Victorian Government subsequently announced in 2017 that it would establish a sentencing guidelines council to develop sentencing guidelines for Victorian courts, although this was not a recommendation of the Sentencing Advisory Council's report. In a media release, the Government stated that this would enable public consultation and community engagement to inform sentencing guidance.[285]

The Attorney-General requested the Sentencing Advisory Council provide advice on the most appropriate structure of such a council, with consideration of similar bodies in the United Kingdom (namely, the Sentencing Council of England and Wales). The Council's subsequent report—*A Sentencing Guidelines Council for Victoria*—outlines the most appropriate features of a sentencing guidelines council (Table 10.11).

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280 Sentencing Advisory Council, *A Sentencing Guidelines Council for Victoria: Report*, Melbourne, 2018, p. viii.

281 Sentencing Advisory Council, *Key Events for Sentencing in Victoria*, 2021, <https://www.sentencingcouncil.vic.gov.au/about-sentencing/key-events-for-sentencing-in-victoria> accessed 27 January 2021.

282 *Sentencing Act 1991* (Vic) s 6ABA.

283 Sentencing Advisory Council, *Submission 17*, p. 5.

284 Ibid.

285 The Hon. Daniel Andrews MLA, *Premier of Victoria, Victorian Community To Have Its Say On Sentencing*, Media Release, Melbourne, 25 May 2017, <https://www.premier.vic.gov.au/victorian-community-have-its-say-sentencing>.

Table 10.11 Sentencing guidelines council, model proposed by Sentencing Advisory Council

Purposes	The purposes of the sentencing guidelines council should be: • to promote consistency and transparency of approach in sentencing while preserving judicial discretion • to promote public confidence in sentencing.
Functions	The functions of the sentencing guidelines council should be to: • develop, issue, monitor and revise sentencing guidelines • consult with the general community, the courts, government departments and other interested persons or bodies when developing or revising sentencing guidelines • perform related functions, such as publishing and publicising sentencing guidelines.
Composition	The sentencing guidelines council should have a minimum of 11 and a maximum of 14 members, comprising the following: • up to four retired judicial officers • up to seven community members, including: – two non-specialist community members – a person with expertise representing the interests of victims of crime – a person with expertise in criminal justice issues affecting Aboriginal and Torres Strait Islander persons, and – three persons with expertise in one or more of the following: ◦ criminal justice issues affecting: children and young people; female offenders; offenders from culturally and linguistically diverse (CALD) communities; and/or offenders with issues relating to disability, substance abuse and/or impaired mental functioning ◦ offender rehabilitation, management and supervision ◦ academic study in the area of criminal law, criminology and/or sentencing ◦ statistical analysis; and/or ◦ the operation of the criminal justice system – a person with experience in policing – a person with expertise as a prosecution lawyer – a person with expertise as a defence lawyer.
Appointment of members	All members should be appointed by the Governor in Council on the recommendation of the Attorney-General. The two non-specialist community members should be appointed by the Governor in Council on the recommendation of the Attorney-General, following an application process.
Initiation of a sentencing guideline	The process of developing a sentencing guideline should be initiated: • on the sentencing guidelines council's own motion; or • at the request of the Attorney-General, provided that: – the sentencing guidelines council is not required to comply with such a request; and – if the sentencing guidelines council does not comply with such a request, it should provide reasons to the Attorney-General.

Consultation	The sentencing guidelines council should be expressly required, in developing a sentencing guideline: • to publish: – a draft sentencing guideline; and – an accompanying sentencing impact assessment that should describe, in general terms, any intended change in sentencing practice as a result of the guideline; and • to consult with: – the courts; – the general community; – government departments; and – any other interested persons or bodies
Application of sentencing guidelines	The *Sentencing Act 1991* (Vic) should specify that courts must follow any relevant sentencing guideline, unless the court is satisfied that it would be contrary to the interests of justice to do so and the court explains its reasoning.

Source: Sentencing Advisory Council, *A Sentencing Guidelines Council for Victoria: Report*, 2018, Melbourne, pp. x–xvii.

Under this model, the Sentencing Advisory Council explained that courts would have to follow any sentencing guidelines issued by the council unless 'doing so would not be in the interests of justice'. It stated that:

> In this way, sentencing guidelines would promote a transparent and consistent decision-making process in sentencing, while also ensuring that judges and magistrates would be able to impose sentences appropriate to all the circumstances.[286]

The Australian Association for Restorative Justice stated that the recommendations of the Sentencing Advisory Council's 2018 report would promote 'more transparent and consistent decision-making processes in sentencing, and sentences appropriate to all circumstances'.[287]

The Victorian Government had previously expressed its intention to introduce legislation to create a sentencing guidelines council in 2018. However, this has not occurred to date.[288] The Government did not address the issue of a sentencing guidelines council in its evidence to the Inquiry.

Given stakeholders concerns about whether sentencing practices in Victorian courts reflect community expectations, a sentencing guidelines council may go some way towards assuaging this issue. As such, the Committee recommends that the Victorian Government introduce legislation to establish a sentencing guidelines council.

FINDING 51: A sentencing guidelines council, with functions to develop sentencing guidelines for Victorian courts, may address some public concerns regarding whether sentencing practices adequately reflect community expectations.

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286 Sentencing Advisory Council, *Submission 17*, p. 6.

287 Australian Association for Restorative Justice, *Submission 63*, p. 3.

288 Sentencing Advisory Council, *Submission 17*, p. 6.

FINDING 52: In establishing a sentencing guidelines council, the voices of victims of crime should be prominent in the council's composition.

RECOMMENDATION 72: That the Victorian Government introduce legislation to establish a sentencing guidelines council. The legislation should consider appropriate features outlined in the Sentencing Advisory Council's *A Sentencing Guidelines Council for Victoria: Report.*

PART E: INCARCERATION AND RECIDIVISM

11 Victoria's prison system and conditions

At a glance

Corrections Victoria, a business unit within the Department of Justice and Community Safety is responsible for the management of both publicly- and privately-operated Victorian prisons. Its work is supported by other areas of the Department.

Key issues

- Incarcerated Victorians have typically experienced multifaceted and complex socio-economic disadvantage and have complex health and wellbeing needs as a result.
- Prison populations have rapidly expanded in recent years. This combined with the introduction of COVID-19 control measures has contributed to more challenging prison conditions.
- Stakeholders to the Inquiry raised several concerns in relation to prison conditions, including:
  - a lack of transparency regarding incarcerated people's access to healthcare commensurate to that enjoyed by the broader Victorian population
  - practices which may be exacerbating existing mental illness and causing new illnesses among people in prison, particularly more vulnerable cohorts such as Aboriginal Victorians
  - inadequate adjustment and support for incarcerated people with disabilities
  - practices which may be traumatising for women who have experienced family violence and/or sexual abuse
  - the use of damaging control measures such as solitary confinement, strip searching and the use of physical constraints.
- Greater independent oversight of Victorian prisons is needed to improve conditions and to address corrupt, opaque, unfair or illegal practices. This could be achieved through the implementation of the international human rights treaty, the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

Findings and recommendations

Finding 53: Multifaceted socioeconomic factors impact individuals entering the criminal justice system. As a result, Victoria's prison system is responsible for the wellbeing and rehabilitation of some of the State's most vulnerable citizens who have complex needs which are challenging to meet.

Finding 54: Expanding prison populations and larger numbers of people being incarcerated on remand are creating a more tense and volatile environment in Victorian prisons and increasing pressure on correctional staff.

Recommendation 73: That the Department of Justice and Community Safety include in its annual reports information outlining all healthcare services offered in all Victorian prisons during the reporting period, and de-identified statistics relating to incarcerated peoples' access to and take up of these services.

Recommendation 74: That the Victorian Government engage with the Commonwealth Government to explore the benefits, challenges, and feasibility of extending access to Medicare and the Pharmaceutical Benefits Scheme to incarcerated Victorians.

Finding 55: Victorian prisons are harming vulnerable people by exacerbating existing mental health conditions and causing new experiences of poor mental health.

Recommendation 75: That the Victorian Government conduct a trial screening program assessing all people entering incarceration—on remand or a custodial sentence—for physical, cognitive and intellectual disability, to inform the provision of reasonable adjustments and support in prison and following release. The trial should:

- involve a sample prison population which is representative of the demographics of people incarcerated in Victoria
- connect people identified with disability during screening to appropriate social supports and inform the implementation of reasonable adjustments within the prison to aid that person to better engage with rehabilitative programs
- connect people identified with disability during screening to appropriate social supports including the National Disability Insurance Scheme prior to release back into the community with follow up after release
- assess how identifying disability upon entry to prison benefits the incarcerated individual, the operation of the prison and society more broadly, including any impacts on recidivism
- determine the costs and resources involved in routinely screening people entering incarceration for a disability
- publish the findings of the trial on the Department of Justice and Community Safety website.

Recommendation 76: That the Victorian Government ensure that all staff working in privately- and publicly-operated prisons undertake training to:

- identify behaviours associated with physical and cognitive disabilities
- manage these behaviours through the provision of appropriate supports, rather than the utilisation of punitive measures.

Recommendation 77: That the Victorian Government establish a mechanism enabling prison staff to refer incarcerated people who exhibit behaviours possibly related to undiagnosed disabilities for professional independent assessment. The outcome of this assessment should inform the implementation of appropriate adjustments or the provision of support for the relevant individual to ensure prison conditions are conducive to rehabilitation.

Finding 56: Ensuring people in incarceration with disabilities have access to a Corrections Independent Support Officer leading up to, and during, a disciplinary hearing is critical to preventing unfair outcomes by making sure they understand their rights and obligations, as well as hearing processes.

Recommendation 78: That the Victorian Government continues work to expand and promote the Corrections Independent Support Officer program to all people in incarceration with diagnosed or suspected disabilities.

Recommendation 79: That the Victorian Government appoint an Aboriginal Social Justice Commissioner—or other oversight mechanism—to monitor the implementation of recommendations made by the Royal Commission into Aboriginal Deaths in Custody and to ensure the criminal justice system responds appropriately to Aboriginal Victorians. This role should include:

- monitoring progress towards the outcomes of Phase 4 of the Victorian Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja*
- identifying and promoting strategies, initiatives and programs aimed at reducing Aboriginal incarceration and deaths in custody, including the possible development of minimum standards for cultural safety across the criminal justice system
- assessing how existing and new justice legislation may impact Aboriginal Victorians and making recommendations to the Victorian Government to improve this legislation
- reviewing the criminal justice system and making recommendations to the Victorian Government to ensure it supports equality, is free from systemic racism and discrimination, and promotes respect for Aboriginal Victorians throughout the community.

Recommendation 80: That the Victorian Government ensure that funding for Aboriginal Wellbeing Officers remains commensurate to the number of Aboriginal Victorians incarcerated on remand or on custodial sentences. This necessitates an immediate increase in these positions to meet the demands of the rapidly increasing prison population.

Recommendation 81: That the Department of Justice and Community Safety review and publicly report on the management of COVID-19 in publicly- and privately operated Victorian prisons with a view to identifying the impact of control measures on:

- prison conditions, the wellbeing of people in incarceration and their families
- people in incarceration's access to rehabilitative programs, health and legal services, and the court system
- application of emergency management days
- staff wellbeing, access to resources and safety.

The review should inform the ongoing management of the COVID-19 pandemic, if required, by identifying how to minimise disruption caused by control measures through:

- examining how other institutions which manage vulnerable people, such as prisons in other jurisdictions, hospitals and nursing homes, manage the risks related to COVID 19 for residents and staff
- identifying how best to ensure that control measures remain proportionate to relevant levels of risk at any time posed by COVID-19 and are balanced with ensuring that prison facilitates the rehabilitation of people in incarceration and reduces recidivism.

Finding 57: The conditions in Victorian prisons can retraumatise incarcerated women by echoing the power dynamics of abusive relationships and separating mothers from dependent children.

Finding 58: Practices such as solitary confinement, strip searching and the use of physical restraints can be highly traumatic and can impede the rehabilitation of people in incarceration.

Recommendation 82: That the Victorian Government review the use of solitary confinement, physical restraints and strip searching in Victorian prisons with a view to introducing policy to regulate the use of these practices:

- in situations where such practices are necessary to maintain the safety of staff or people in incarceration
- as a last resort, where alternative, less restrictive measures have failed
- for strip searching, only where specific intelligence indicates that an individual is trafficking contraband.

Policy should require that such instances are reported to the Secretary of the Department of Justice and Community Safety as soon as practicable.

Finding 59: The implementation of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* will foster better prison conditions by providing ongoing independent oversight of Victorian detention facilities.

Recommendation 83: That the Victorian Government provide a comprehensive update on the implementation of obligations under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* in its jurisdiction to date, as well as a timeframe for full implementation including the appointment of National Preventative Mechanisms. It should further seek to realise full implementation of these obligations as a matter of priority.

11.1 A note on language

The Committee recognises that societal stigma around incarceration is a source of ongoing trauma for people who have experienced prison and can impede their reintegration into the community following release. Evidence to the Inquiry suggests that terms such as 'prisoner', 'inmate', 'convict' or 'offender' can perpetuate this stigma by characterising a person by the fact of their incarceration.[1] Moreover, the Committee heard that such language perpetuates a false dichotomy between people who have been the victim of a crime and those who commit crime.[2] In this Chapter—as well as Chapter 12—the Committee therefore refers to 'people in prison', 'incarcerated people' or a variation thereof, emphasising that the experience of imprisonment doesn't define an individual and is something they can move beyond.

11.2 The Victorian prison system

In Victoria, the Department of Justice and Community Safety (DJCS) is responsible for the management of both publicly- and privately-operated prisons. Corrections Victoria, a business unit of DJCS, undertakes this responsibility on behalf of the Department. Its role is supplemented by Justice Health, a separate business unit responsible for the delivery of health services in prisons.

1 Victorian Aboriginal Legal Service, *Submission 139*, p. 253.

2 Fitzroy Legal Service, *Submission 152*, p. 5.

11.2.1 Purposes of incarceration

In its submission to the Inquiry, the Victorian Government explains that the criminal justice system aims to balance the following objectives:

- denouncing and punishing criminal behaviour
- protecting the community
- preventing further offending through addressing underlying causes and rehabilitating offenders
- providing effective and appropriate outcomes for system participants (including victims of crime)
- ensuring like crimes are treated the same
- promoting community confidence in how the system operates.[3]

In Victoria, custodial sentences form part of achieving these goals. Whilst an undisputedly punitive measure, to ensure long-term community safety, prison conditions should be conducive to rehabilitation. Prisons should also provide opportunities for those who offend to desist from criminal behaviour when they are released. As discussed in Chapter 7, this aligns with the aspirations of victims of crime who overwhelmingly report that they engage with the criminal justice system to ensure that others are not subjected to similar experiences.

11.2.2 Corrections Victoria

Corrections Victoria directly manages publicly operated prisons and administers the contracts for the three privately operated prisons in Victoria. It aims to ensure that prison management balances maintaining community safety with the humane treatment and rehabilitation of people who are incarcerated. It establishes and monitors operational standards for both public and private prisons, develops programs for the management and rehabilitation of incarcerated persons, undertakes business planning and manages prison infrastructure projects.[4]

Corrections Victoria is structured into six operational divisions:

- **Operations division**—manages state-wide prison services and issues
- **Offender management division**—provides rehabilitation programs for people in prison
- **Sentence management division**—manages the movement of people in prison throughout their sentences

3 Victorian Government, *Submission 93*, p. 9.

4 Corrections Victoria, *Prisons: List of prisons in Victoria*, <https://www.corrections.vic.gov.au/prisons> accessed 18 November 2021.

- **Business services division**—undertakes financial reporting, budget management and administration
- **Security and intelligence division**—works with other law enforcement agencies to maintain a safe prison system and provides specialist emergency response as needed
- **Strategic policy and planning division**—oversees governance, policy and strategy.[5]

11.2.3 Justice Health

Justice Health develops the policies and standards for healthcare in Victorian prisons, manages contracts for health service providers and monitors and reviews health service provider performance.[6] In Victoria, health services in prisons are provided by private healthcare providers, including:

- Correct Care Australasia, which provides primary health services at all public prisons
- Forensicare, which provides secondary mental health services at all public prisons
- G4S, which sub-contracts St Vincent's Correctional Health Services to provide primary health services, outpatient mental health services and secondary residential mental health services at Port Phillip Prison
  - St Vincent's Correctional Health Services also provides state-wide secondary inpatient health services at Port Phillip Prison and secondary inpatient services from St Vincent's Hospital in Melbourne
- GEO Group Australia, which provides primary health and mental health services, and alcohol and drug treatment programs, at Fulham Correctional Centre
- Caraniche, which provides alcohol and other drug (AOD) treatment programs at all public prisons.[7]

Justice Health is also responsible for facilitating the 'release of health information to community health care providers, legal representatives and individuals'.[8]

11.2.4 Prisons and correctional facilities

As stated in Chapter 1, there are 11 public and three private prisons across the State, as well as a single transitional centre. These facilities currently accommodate more than 7,000 people being held on remand or whom have been sentenced to a custodial sentence following a conviction.[9]

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5 Corrections Victoria, *Corrections Victoria: Delivering effective correctional services for a safe community*, <https://www.corrections.vic.gov.au/corrections-victoria> accessed 18 November 2021.

6 Corrections Victoria, *Justice Health*, <https://www.corrections.vic.gov.au/justice-health> accessed 22 November 2021.

7 Ibid.

8 Ibid.

9 Independent Broad-based Anti-corruption Commission, *Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara* 2021, p. 6.

The Victorian Government reported that a capital works program is underway to ensure prison infrastructure in Victoria remains fit for purpose:

> Work is underway to develop a long-term vision and strategy for the Victorian prison system. A core component of this work will be network reconfiguration, to ensure the way we use new and existing prison infrastructure, and place people in prison, achieves the aims of safe, secure, humane and respectful containment of people in prison, and supports rehabilitation and reintegration.[10]

The Victorian Government described how it is investing in facilities to improve the capacity and rehabilitative potential of Victorian prisons, including:

- Chisolm Road Prison which will be a new maximum-security prison for men, scheduled for completion in 2022. Chisholm Road will deliver tailored facilities through enhanced design and a modern fit-out that will contribute to improved outcomes, reduced costs and reduce reoffending by better supporting and responding to the evolving needs of people in prison, including those on remand.
- The Prison Infill Expansion Program which will deliver upgrades to existing infrastructure at five Victorian prisons – Barwon Prison, Marngoneet Correctional Centre, Middleton Annex (Loddon Prison), Hopkins Correctional Centre and Metropolitan Remand Centre.
- The Maribyrnong Community Residential Facility which provides short-term accommodation to men exiting the prison system. This facility is aimed at helping residents reintegrate into the community and secure employment and longer-term housing.
- A multi-year expansion program at DPFC [the Dame Phyllis Frost Centre] to increase fit-for-purpose capacity and support the implementation of a trauma-informed approach to support rehabilitation of women in prison, upgrading accommodation, program and educational buildings, including the establishment of an Aboriginal Healing Unit. This also includes the closure of units that are no longer deemed fit-for purpose.
- Work underway to develop a forensic mental health bed expansion strategy to enable the delivery of contemporary models of care in a modern, therapeutic and recovery-focused environment.[11]

There is ongoing and considerable investment in the Victorian prison network, including building new facilities and expanding existing facilities.

11.2.5 Concerns regarding privately-operated prisons

Much of the evidence received by the Committee did not delineate between publicly- and privately-operated prisons. However, those that did delineate raised several concerns in relation to the transparency of private prison operations and their provision

10 Victorian Government, *Submission 93*, p. 65.

11 Ibid.

of a safe and rehabilitative environment for incarcerated people. In presenting these concerns, stakeholders referred to the findings of the 2018 Victorian Auditor-General's Office (VAGO) investigation into the safety and cost effectiveness of private prisons.[12] The findings of this investigation are summarised in Table 11.1.

Table 11.1 Victorian Auditor-General's Office investigation into the safety and cost effectiveness of private prisons

Audit	Findings
Safety and Cost Effectiveness of Private Prisons (2018)	The audit considered two of Victoria's three private prisons: Port Phillip Prison and Fulham Correctional Centre. It examined how well the private prisons were managing safety and security risks and whether they met the state's expectations for service delivery. It also assessed how well state negotiations for new contracts were being managed and whether they achieved value for money. The audit found that privately managed prisons are cost effective and have largely met contracted service and performance requirements. However, prison operators are not always meeting the requirement to run safe and secure prisons, particularly in relation to assaults at both prisons and drug use at Port Phillip. Furthermore, neither operator is investigating serious incidents using methods that effectively identify root causes. Assaults between incarcerated people are increasing across the prison system, as prison numbers and complexity increases.

Source: Victoria Auditor-General's Office, *Safety and Cost Effectiveness of Private Prisons*, 2018.

The Committee heard a range of critiques and observations about the operation of private prisons in Victoria and around Australia, in addition to the findings of the VAGO investigation. Stakeholders:

- questioned whether privately operated prisons are more cost effective than publicly operated prisons, asserting that there is insufficient transparency around contracting arrangements and payments to determine this[13]
- noted that expanding prison populations and longer sentences may increase the profits of private prison operators and questioned their commitment to rehabilitating incarcerated people to reduce recidivism[14]
- claimed that some of the companies operating private prisons in Victoria also operate prisons in the United States of America and undertake lobbying there for policies that drive incarceration. Stakeholders questioned whether this is also occurring in Australia[15]
- suggested that several reports and investigations that were critical of the operation and effectiveness of private prisons have led some Australian states to phase out privately-managed prisons. However, Victoria and New South Wales are yet to follow suit[16]

12 For example see: The Justice Map, *Submission 157 [Attachment 1]*, p. 23; Victorian Aboriginal Legal Service, *Submission 139*, p. 229.

13 The Justice Map, *Submission 157 [Attachment 1]*, pp. 4–5, 22–3.

14 Ibid., p. 5; Jesuit Social Services, *Submission 119*, p. 54; Victorian Aboriginal Legal Service, *Submission 139*, p. 229.

15 The Justice Map, *Submission 157 [Attachment 1]*, pp. 5–6; Jesuit Social Services, *Submission 119*, p. 54.

16 The Justice Map, *Submission 157 [Attachment 1]*, pp. 7–8; Jesuit Social Services, *Submission 119*, p. 54.

- argued that there is a lack of transparency around privately-operated prisons' achievement of key performance indicators and management of incidents. Freedom of information requests to access this information are also constrained.[17]

The Justice Map—a research project mapping Australia's criminal legal system—argued that the 'privatisation of the prison system in Victoria has inserted a profit motive where it does not belong':

> When private corporations take over, they run prison services to extract the most profit possible. They do that by charging Victorians more, providing us with less, and often treating both prison staff and people in prison badly.[18]

It recommended that the Victorian Government 'end private prison management and private prison service contracts'.[19] In addition, Denham Sadler, Senior Editor at the Justice Map, suggested improving the transparency of privately operated prisons by increasing public access to contracts with operators and restricting the use of redaction and commercial in confidence. He also suggested that Victoria establish an independent body to provide oversight, including undertaking inspections, of all Victorian prisons.[20]

The Victorian Aboriginal Legal Service submitted that it is 'deeply concerned about the degree of privatisation in Victoria's prison system'. It suggested that the effect of privatising the operation of prisons and the provision of prison healthcare services has been:

> to weaken accountability, undermine democratic control of the prison system, and put private profits before the wellbeing of people in prison and the integrity of the system. It also puts private profit ahead of rehabilitation and reducing recidivism.[21]

Like the Justice Map, the Victorian Aboriginal Legal Service suggested that greater oversight of all places of detention—including private prisons—is needed. It expressed support for the implementation of the international human rights treaty, the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).[22]

The Committee shares stakeholders' concerns regarding the transparency of privately-operated prisons. As this Chapter discusses, the Victorian prison system is responsible for the wellbeing and rehabilitation of some of the State's most vulnerable people. It is essential that all prisons, whether they are privately- or publicly-operated, provide conditions that meet their needs and provide rehabilitative programs that effectively address the factors underpinning criminal behaviours. Adequate transparency and oversight of all prisons is essential to ensure this is occurring. In the

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17 The Justice Map, *Submission 157 [Attachment 1]*, pp. 22–23; Jesuit Social Services, *Submission 119*, p. 54; Victorian Aboriginal Legal Service, *Submission 139*, p. 229.

18 The Justice Map, *Submission 157*, pp. 16, 26.

19 Ibid., p. 26.

20 Denham Sadler, Senior Editor, The Justice Map, public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 29.

21 Victorian Aboriginal Legal Service, *Submission 139*, p. 228.

22 Ibid., pp. 158, 224.

Committee's view, this is best achieved across the Victorian prison system through the full and timely implementation of OPCAT. The importance of prison oversight and the implementation of OPCAT is explored in greater detail in Section 11.5.

11.3 The complex health and wellbeing profile of people in prison

The factors informing the incarceration of an individual are typically multifaceted.[23] Data on Australian and Victorian prison populations show that most people in prison have experienced disadvantage in one or more of the following forms and that many have complex health and wellbeing needs as a result.

11.3.1 Exposure to violence and other forms of abuse

In its submission, Fitzroy Legal Service explained that a 2015 survey of people in Victorian prisons found that 65% of women and 52% of men had experienced family violence prior to incarceration. Analysis conducted by the Crime Statistics Agency indicated that approximately half of all women entering prison had been recorded as a victim of an offence in the two years prior. It also suggested that research indicated that the real figure is likely to be higher due to underreporting.[24]According to the Centre for Multicultural Youth, young people from migrant and refugee backgrounds engaged in the justice system may have trauma associated with war and/or other adverse experiences.[25]

The Victorian Government submitted that approximately 42% of young people in the youth justice system 'have been exposed to family violence and 53% were a victim of abuse, trauma or neglect as a child'.[26] Among women entering custody on remand, 40% have experienced family violence and many have suffered economic, physical and sexual abuse and trauma.[27]

11.3.2 Mental health challenges

The Justice Map asserted that people in prisons are more likely to be experiencing mental illness than the general population, with some experiences caused by incarceration:

> Victoria's prisons – like other prisons around Australia – are not only disproportionately filled with people who experience mental illness, but are also causing mental illness in

23 Victorian Government, *Submission 93*, p. 9.

24 Fitzroy Legal Service, *Submission 152*, p. 13.

25 Centre for Multicultural Youth, *Submission 95*, p. 4.

26 Victorian Government, *Submission 93*, p. 16.

27 Ibid.

people who did not previously experience it, and exacerbating mental health conditions that were previously manageable.[28]

The Victorian Government stated that 'approximately one third of people in all Victorian prisons have a mental health diagnosis, with depression, drug abuse disorders and anxiety disorders representing almost three quarters of all diagnoses'. It further noted that '72% of Aboriginal men and 92% of Aboriginal women in prison had received a lifetime diagnosis of mental illness'.[29]

Fitzroy Legal Service provided mental health statistics for men and women in prison across Australia. It noted that data from the Australian Institute of Health and Welfare found that approximately 65% of women and 35% of men in prison report a history of mental health issues.[30]

11.3.3 Low education and training attainment

People who are incarcerated typically have lower levels of education and training attainment compared to the general Victorian population. The Victorian Government reported that 53% of Victorians entering prison had achieved year 10 level schooling or less and that Aboriginal people entering prison were much less likely to have completed schooling to year 11 or 12 than non-Aboriginal people entering prison. Almost 70% of young people in detention have been previously suspended or expelled from school.[31]

Fitzroy Legal Service submitted that approximately 56% of people entering prison in Australia had no other formal education beyond their schooling, with only 4.4% having attained a diploma and 1.5% having attained a bachelor's degree. This compares to 31% of the general population aged between 20–64 years old having attained a bachelor's degree or higher.[32]

11.3.4 Poorer general health

According to the Victorian Government, there are higher rates of chronic and communicable disease among people in prison. It noted that 'people in prison are one of the most high-risk and complex populations living with chronic viral hepatitis and are especially vulnerable to the serious health consequences of untreated liver disease'.[33]

Evidence also suggested that incarcerated people suffer from age-related health conditions approximately a decade earlier than the general community due to a range of socioeconomic factors.[34]

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28 The Justice Map, *Submission 157*, p. 9.

29 Victorian Government, *Submission 93*, p. 17.

30 Fitzroy Legal Service, *Submission 152*, p. 14.

31 Victorian Government, *Submission 93*, p. 16.

32 Fitzroy Legal Service, *Submission 152*, p. 13.

33 Victorian Government, *Submission 93*, p. 17.

34 Victorian Aboriginal Legal Service, *Submission 139*, p. 236.

11.3.5 Addiction and drug abuse

The Victorian Government explained that there are higher rates of cigarette smoking, high-risk alcohol consumption and recent illicit and/or injecting drug use among people in prison than the general Victorian population. Incarcerated people are approximately four times more likely to have used illicit drugs in the past year. In addition, multiple chronic physical health conditions are common among people in prison with a history of injecting drug use.[35] The Justice Map provided similar statistics in its submission and noted that 'Methamphetamine was the most commonly used illicit drug, with 43% of people entering prison having used it in the past year.'[36]

Aboriginal Victorians in prison report higher rates of cigarette, alcohol and cannabis use than non-Aboriginal people. Approximately 52% of young people in youth justice facilities have a history of AOD use.[37]

11.3.6 Cognitive or physical disability

The Victorian Government explained that cognitive and physical disabilities are common among people in prison in Victoria. It noted that:

- 42% of people entering prison disclosed 'a chronic condition or disability that affected their participation in day-to-day activities, education, or employment'
- 42% of men and 33% of women in Victorian prisons demonstrated evidence of an acquired brain injury
- 9% (almost one in ten) people in prison have an intellectual disability.[38]

The Office of the Public Advocate (OPA)—a statutory authority with functions to promote the diversity and inclusion of all people, particularly those with a disability or mental illness—provided similar statistics. It noted that people with an intellectual disability are overrepresented in prisons.[39]

11.3.7 Homelessness

According to the Victorian Government, approximately a third of people entering prison said they experienced homelessness in the preceding four weeks and Aboriginal people were more likely to report rough sleeping or staying in short-term emergency accommodation. A quarter of women entering custody on remand were doing so from 'unstable housing', and 21% of young people in the youth justice system reported living in unstable or unsafe housing.[40]

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35 Victorian Government, *Submission 93*, p. 17.

36 The Justice Map, *Submission 157*, p. 9.

37 Victorian Government, *Submission 93*, p. 17.

38 Ibid., p. 18.

39 Office of the Public Advocate, *Submission 153*, p. 14.

40 Victorian Government, *Submission 93*, pp. 18–19.

The Committee heard that incarceration often causes people to lose their existing housing by disrupting government support (for example, through loss of social security payments such as the Disability Support Pension) or causing them to lose their job which enabled them to pay rent. Loss of housing can also occur for incarcerated people as a result of their lease being terminated due to their ongoing absence while in prison.[41]

As a result, the Victorian Government submitted that 'more than half of people due for release expected to be homeless when they left prison, with Aboriginal people more likely planning to stay in emergency accommodation following their release (52 per cent), compared to non-Aboriginal people (40 per cent)'.[42] The Justice Map stated that people exiting prisons are not only more likely to be homeless, they are also less likely to exit homelessness.[43]

The Committee observes that the socioeconomic factors impacting persons entering the criminal justice system are multifaceted and complex. As a result, Victoria's prison system is responsible for the wellbeing and rehabilitation of some of the State's most vulnerable people. Many of these individuals experience complex and interrelated health and wellbeing needs, which are challenging to address.

FINDING 53: Multifaceted socioeconomic factors impact individuals entering the criminal justice system. As a result, Victoria's prison system is responsible for the wellbeing and rehabilitation of some of the State's most vulnerable citizens who have complex needs which are challenging to meet.

11.4 Prison conditions and impacts on incarcerated people

The challenge of meeting the complex health and wellbeing needs of incarcerated people, particularly in the context of rapidly increasing prison populations, was acknowledged by many stakeholders to the Inquiry. For example, the Victorian Aboriginal Legal Service stated:

> It should also be acknowledged that it becomes far more difficult to deliver high-quality healthcare in prisons when the prison population is growing and, as a result of the high proportion of people on remand, has high rates of people moving in and out of custody.[44]

41 Justice Connect, *Submission 158*, p. 38.

42 Victorian Government, *Submission 93*, p. 19.

43 The Justice Map, *Submission 157*, p. 14.

44 Victorian Aboriginal Legal Service, *Submission 139*, p. 217.

The Victorian Government also acknowledged this challenge. However, it expressed commitment to ensuring that:

> imprisonment does not cause further undue harm or disadvantage to people in custody, and that prisons are operated in accordance with international human rights conventions and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[45]

Despite this commitment, the Committee received extensive evidence indicating that the facilities, processes and culture of Victorian prisons may be inadequate to meet the complex health and wellbeing needs of people who are incarcerated. This is particularly urgent in the context of the rapidly increasing prison population over recent years, as highlighted in Chapter 2. The next sections of the report describe stakeholders' observations in relation to prison conditions and discuss their suggestions for improvement.

11.4.1 Rapidly expanding prison populations

The Committee heard that recent growth in the population of Victorian prisons has increased tensions in these environments and is contributing to staffing inadequacies. In a submission to the Inquiry, Jesuit Social Services—a social advocacy and support organisation that operates programs for people involved with the justice system—suggested that 'overcrowding in [Victorian] prisons has resulted in inadequate staffing levels that have had a significant impact on both the treatment and rehabilitation of people in prison, and staff safety'. It asserted that inadequate staffing has increased the risk of 'mistreatment of people in prison' as well as the use of practices such as isolation and restraints to maintain order, and has made staff more vulnerable to burnout.[46]

The group highlighted the importance of maintaining appropriate numbers of suitably qualified staff to facilitate a safe prison environment conducive to rehabilitation. It recommended that the Victorian Government increase staffing levels accordingly to ensure they are commensurate with prison populations and to minimise the use of punitive practices.[47]

Evidence also suggested that the environment in Victorian prisons has become more tense as the proportion of people being detained on remand has increased relative to those serving custodial sentences. Dr Marietta Martinovic, Senior Lecturer in Criminology and Justice at RMIT University, runs three prison-based think tanks which provide opportunities for students within and outside of the Victorian prison system to collaborate on issues relating to crime and justice. Dr Martinovic and fellow academic, Gabriela Franich, made a submission to the Inquiry on behalf of these think tanks which observed that large, transient remand populations in prisons are making the prison environment more volatile:

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45 Victorian Government, *Submission 93*, p. 56.

46 Jesuit Social Services, *Submission 119*, p. 51.

47 Ibid., pp. 51, 3.

> Incarcerated members of the Think Tanks have identified high remand populations as a source of distress, compounding the existing distress of incarceration. Women in the Dame Phyllis Frost Centre Think Tank have explained to us that having many people on remand creates a volatile environment due the transient nature of the prison population. Think tank members have reported being suddenly moved from one unit to another, to accommodate for shifting populations. Volatile and transient prisons breed frustration, often resulting in incidents of aggression.
>
> People on remand often experience high levels of frustration and stress due to sudden separation from family, uncertainty about their future, as well as facing substance withdrawal or a sudden loss of existing mental health support. Furthermore, they may lose their employment and housing. These points are clear in literature on remand and are reflected in our conversations with imprisoned women.[48]

Dr Martinovic and Gabriela Franich called for bail legislation and policy to be reformed. Concerns with the operation of bail in Victoria are explored in detail in Chapter 9.

Similar observations about the impact of larger remand populations in prisons were made by other stakeholders. Patricia Dattilo, who provided a submission in relation to her own experiences, described how her husband is currently incarcerated in Loddon Prison Precinct and previously spent three years in the Marngoneet Correctional Centre. According to Patricia Dattilo, her husband has observed that people being held on remand experience greater levels of uncertainty regarding their circumstances and the future. This is contributing to tension in the prison environment. Her husband also noted that delays in accessing legal services and courts due to the impacts of COVID-19 are contributing to incarcerated peoples' anxiety.

> **Marngoneet mainly housed sentenced people until this year when due to Covid delays, the prison commenced bringing in more prisoners on remand. My husband noticed a change in the atmosphere whereby prisoners were more tense and anxious, mainly because of the level of uncertainty surrounding their circumstances and knowing there were increased delays with the courts due to covid … This seemed to be a common complaint amongst the prisoners which caused them anxiety and sometimes led to bad behaviour within the prison.**
>
> Patricia Dattilo, *Submission 163*, p. 1.

In July 2021, Patricia Dattilo and her husband launched a support service to assist incarcerated people to engage with legal services and allay some of the anxiety associated with being held on remand.[49]

48 Dr Marietta Martinovic and Gabriela Franich, RMIT University, *Submission 115*, pp. 14–15.

49 Patricia Dattilo, *Submission 163*, p. 1.

The Victorian Government acknowledged that larger remand populations may make the prison environment more volatile:

> People on remand and serving short sentences can also be more volatile than people serving longer sentences, as they have less time to adjust to the prison environment. As the proportion of people on remand or serving short sentences increases comparative to people serving longer sentences, the level of instability across the system may also rise.[50]

The impacts of short prison sentences are explored further in Chapter 10.

In its submission, the Victorian Government also agreed that larger prison populations, arising from criminal justice system reform over the last 15 years, has increased the pressure on the Victorian prison system:

> This increased demand has presented operational challenges, impacting the capacity to deliver an effective correctional system.[51]

It recognised that increased demand for prison services due to larger populations has 'constrained access to services in some instances and impacted on system effectiveness'.[52]

The Committee is concerned to hear that expanding prison populations and larger numbers of people being detained on remand are creating a more tense and volatile prison environment and increasing the pressure on correctional staff.

FINDING 54: Expanding prison populations and larger numbers of people being incarcerated on remand are creating a more tense and volatile environment in Victorian prisons and increasing pressure on correctional staff.

11.4.2 Access to healthcare in prison

Standards for the provision of healthcare in Victorian prisons are informed by Australia's international obligations, national and state health and correctional service body guidelines, as well as state legislation.[53] According to Justice Health, people in prison have access to the same standard and quality of healthcare as that available to the general community through the public health system:

50 Victorian Government, *Submission 93*, p. 68.

51 Ibid., p. 12.

52 Ibid., p. 56.

53 For example: The United Nation's Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002), the Royal Australian College of General Practitioners' *Standards for health services in Australian prisons* (2011), the Corrective Services Administrators' Council's *Guiding principles for Corrections in Australia* (2018), Corrections Victoria's *Correctional management Standards for Men' Prisons in Victoria* (2014) and *Standards for the Management of Women Prisoners in Victoria* (2014) and the *Corrections Act 1986* (Vic).

> On entry to prison, a physical and mental health assessment is conducted so that health staff are aware of the prisoner's health and medication needs. A prisoner's physical and mental wellbeing is reviewed by health staff each time they move between prisons.
>
> ...
>
> Qualified doctors, nurses, mental health nurses and other allied health professionals provide on-site health care in every prison.[54]

However, evidence submitted to the Inquiry indicated that it is difficult to verify the quality of healthcare provision in prisons. Cameron Russell, a researcher in criminology and editor of the online Australian Prison Reform Journal, suggested that 'publicly-available information on prisoner health in Victoria is severely limited' as Justice Health 'does not publish statistics on medical staff within corrections'.[55] Likewise, Jesuit Social Services said:

> ensuring that the prison health system provides appropriate and cost-effective healthcare requires accurate information on the amount spent, what services it is being spent on, and the benefits achieved in both the correction system and post-prison.[56]

The Victorian Association for the Care and Resettlement of Offenders (VACRO)—an organisation supporting people in contact with the criminal justice system—observed that private healthcare providers operating in Victorian prisons are reluctant to share information on the needs of incarcerated people with the organisations taking over their care when they re-enter the community:

> Justice Health and its web of private contractors and sub-contractors are not transparent, and information sharing between these organisations and other arms of the system providing support to people incarcerated or released from prison is difficult. We often have no understanding of the health needs of our participants when they come into our programs, which impacts our ability to make appropriate referrals to community supports. It also means we can't tailor our case management support to their specific needs.[57]

Furthermore, the Committee received evidence indicating that people in prison may not be able to access healthcare of an equivalent standard to that available to the general population. The Victorian Aboriginal Legal Service claimed that the privatisation of healthcare services in the prison system has made continuity of care very difficult, particularly where people move through different facilities:

> In Victoria, healthcare is managed by the Department of Justice and Community Safety, and service delivery is contracted to six private providers. These providers also subcontract some services. The effect is a patchwork system where continuity of care is very hard to provide, particularly since people in prison may move between

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54 Corrections Victoria, *Health care*, <https://www.corrections.vic.gov.au/prisons/health-care> accessed 22 November 2021.

55 Cameron Russell, *Submission 79*, pp. 1, 3.

56 Jesuit Social Services, *Submission 119*, p. 43.

57 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 28.

> facilities, and the reliability and quality of services is highly inconsistent. Reducing the quality of health services and the possibility for people in prison to receive consistent, comprehensive care further contributes to poor prison conditions, undermining rehabilitation and increasing the risk of reoffending.[58]

VACRO reported that its incarcerated clients 'rarely get to see a doctor, and mainly deal with nurses or other healthcare practitioners'.[59] Likewise, Cameron Russell claimed that the attendance of medical professional in prisons is typically inadequate, meaning that incarcerated people are often triaged when seeking care:

> the doctor for a prison is typically available one day each week, so only the worst cases can be examined each week. The remainder are turned away. When prisoners are turned away multiple times, some will become violent and others will give up, going undiagnosed and untreated. The disease or injury may then become far more serious, requiring greater medical attention and sometimes contributing to the death rate.[60]

Since 1980, the Australian Institute of Criminology has monitored the extent and nature of deaths in Australian prisons, youth justice custodial precincts and police custody as part of its National Deaths in Custody Program. In 2019–20 there were 89 deaths in prison nationally, 13 of which occurred in Victorian prisons. Of these deceased incarcerated Victorians, 12 were non-Indigenous and one was an Aboriginal person. This translates to a total death rate in Victorian prisons of approximately 0.18% (which is lower than New South Wales, the Northern Territory and South Australia) and an Aboriginal death rate of approximately 0.14% (which is equal to or higher than all other states, except New South Wales). There were six less deaths in Victorian prisons in 2019–20 compared to the previous year.[61]

The Women's Leadership Group—a group of women with lived experience of criminalisation and incarceration—provided firsthand accounts of prison conditions in its submission to the Inquiry. Box 11.1 outlines the challenges faced by one woman—named Whitney—in attempting to access healthcare in a Victorian Prison.

58 Victorian Aboriginal Legal Service, *Submission 139*, p. 231.

59 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 28.

60 Cameron Russell, *Submission 79*, p. 3.

61 Laura Doherty and Tom Sullivan, *Statistical Report 36: Deaths in custody in Australia 2019-20*, report prepared by Australian Institute of Criminology, 2021, pp. 1, 3, 27–28.

BOX 11.1: Whitney's experience of health care in prison

The Women's Leadership Group submitted that the women it interviewed said that prison interfered with, and denied them, access to their health rights. For one interviewee, Whitney, this involved the confiscation of her medication when she was taken into police custody and inaccessibility to a doctor at the Dame Phyllis Frost Centre despite chronic health issues including depression, diabetes, sleep apnoea and blood pressure concerns. Whitney reported:

> A lot of work needs to be done at Dame Phyllis Frost in terms of medical care … waiting times, being taken off your medication with no explanation … you know, medications that you shouldn't stop suddenly.

Whitney also described struggling to get access to health information and assistance from prison staff and medical officers. She claimed she was prevented from taking her medication for 11 days:

> They just kept saying come back tomorrow, come back tomorrow … at the time, I didn't know I had any rights, I didn't even know I had healthcare rights.

Whitney also felt that the medical staff in prison treated her poorly:

> The doctor himself, he made me cry … I told him the medications I was on but couldn't remember the doses and he just kept raising his voice at me, harping on me, "what doses? what doses?" and I gave him my doctor's contact information and he said, "right, I'll contact your doctor". I found out afterwards from my doctor when I got out, the prison never contacted him.

Source: Women's Leadership Group, *Submission 154*, p. 13.

Similar claims were made by the Victorian Alcohol and Drug Association, the peak body representing AOD services in Victoria. The Association informed the Committee that 'a lack of integrity in the correctional system and an opaque approach to public transparency' is enabling poor healthcare practices which inhibit incarcerated peoples' prospects for rehabilitation. For example, it claimed that opioid replacement therapy is being poorly implemented, with people in prison either being denied or delayed access to treatment or having their dose 'arbitrarily reduced'. This is forcing them into 'unsupported withdrawal' which can exacerbate underlying health conditions. The Association contended that these poor practices may be used as a punitive measure. It suggested these practices may result from deficiencies in prison health services, or may be informed by an 'ideological belief that a good is achieved through titrating the dose as a cost saving reduction in administrative burden to the prison'.[62]

Similarly, Fitzroy Legal Service claimed that many of its clients 'report that they are not able to access in prison the medical treatment they need to manage their drug dependence':

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62 Victorian Alcohol and Drug Association, *Submission 128*, p. 10.

> Most commonly, our clients report that they are forced to go 'cold turkey' when first taken into custody. We have also heard extremely concerning reports from clients having their pharmacotherapy treatment terminated without their consent and for disciplinary reasons. Both these scenarios are medically dangerous. Where a person is experiencing drug dependence, the unsupervised and immediate withdrawal of the substance that they are dependent on—including alcohol and prescribed substances—poses significant risks to their health and can be fatal.[63]

Several stakeholders were also critical of denying incarcerated people access to Medicare and Pharmaceutical Benefits Scheme (PBS) subsidies and limiting access to the National Disability Insurance Scheme (NDIS). Incarcerated Australians are currently excluded from accessing Medicare and PBS subsidies under s 19(2) of the *Health Insurance Act 1973* (Cth).

Jesuit Social Services posited that enabling incarcerated people to access these health schemes would broaden the range of health services they can access and facilitate continuity of care for people entering and existing prison. It recommended that the government grant people in prison access to Medicare for these reasons.[64]

Fitzroy Legal Service also commented on how providing people in prison access to Medicare and the PBS would support healthcare continuity throughout incarceration and following release:

> This would significantly promote links between people in prison and community-based healthcare providers and in turn improve throughcare, which is widely recognised as 'a best practice approach to working with [people in prison] to reduce recidivism, improve health outcomes, and assist community integration'.[65]

The Victorian Aboriginal Legal Service argued that people—particularly Aboriginal people—in prisons require access to Medicare and PBS subsidies to provide the resources needed to access healthcare of the same standard as that enjoyed by the general population. It explained that access to these schemes is particularly important for Aboriginal Victorians:

> there are a number of specific items in the Medicare Benefits Schedule which support enhanced screenings, assessments and health promotion activities for Aboriginal people. These streams of Medicare funding are critical to the operation of Aboriginal health services. Access to Medicare funding for people in prison would enable the expansion of in-reach care in prisons by Aboriginal health services. It would also bring funding arrangements in line with those for people in the community.[66]

The Victorian Government acknowledged that broadening these schemes to people in prison is 'an area for exploration' which may 'enable greater access to key services and improve the continuity of care'. It noted that this would allow incarcerated people to

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63 Fitzroy Legal Service, *Submission 152*, p. 17.

64 Jesuit Social Services, *Submission 119*, p. 44.

65 Fitzroy Legal Service, *Submission 152*, p. 18.

66 Victorian Aboriginal Legal Service, *Submission 139*, p. 218.

access services—like bowel cancer screening—Aboriginal chronic care and expensive medication.[67]

Several Inquiry stakeholders questioned the appropriateness of utilising private providers or Corrections Victoria staff to deliver healthcare services in Victorian prisons. For example, Fitzroy Legal Service implied that requiring Corrections Victoria staff to deliver healthcare in prisons is a conflict of interest and that public health authorities should be responsible for these services:

> health care in prison should be provided by public health authorities, rather than Corrections Victoria … This would significantly promote links between people in prison and community-based healthcare providers and in turn improve throughcare … It would also mean that the system that criminalises drug use—the corrections system—is not also responsible for treating the very health condition for which it administers punishment.[68]

The Victorian Aboriginal Legal Service argued that engaging private healthcare providers to service prisons is atypical of practices in other Australian states and 'falls short of international human rights standards'.[69] It recommended that the Victorian Government end the provision of healthcare in prison by private providers.[70]

The Committee notes the *Basic Principles for the Treatment of Prisoners*—adopted by the United Nations General Assembly in 1990—provide that persons in prison should 'have access to the health services available in [their] country without discrimination on the grounds of their legal situation'.[71] It also notes Australia's legal obligations under the International Covenant on Civil and Political Rights, which provide that incarcerated persons shall be treated with respect for the dignity of the person.[72]

The Committee considers access to healthcare of equivalent quality to that provided to the general Victorian community facilitates the human rights of incarcerated people. It is very concerned by reports that Victorians in prison are not able to access an appropriately qualified medical professional when they need one, or that they are being denied pharmacotherapy treatment essential to their rehabilitation on ideological or punitive grounds.

While the Victorian Government can outsource its responsibility to provide healthcare, this does not abdicate it of its obligations to ensure the level of care—and quality of services provided—are appropriate and of a high standard. The Committee would like to see greater transparency around the types of healthcare services offered in each prison (whether public or private), and data around how incarcerated people are accessing these services as well as any unmet demand.

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67 Victorian Government, *Submission 93*, p. 57.

68 Fitzroy Legal Service, *Submission 152*, p. 18.

69 Victorian Aboriginal Legal Service, *Submission 139*, p. 217.

70 Ibid., p. 231.

71 *Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UN GAOR, 45th sess, 68th plen mtg, Suppl. no. 49, UN Doc A/RES/45/111 (adopted 14 December 1990) p. 200.

72 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 10(1).

RECOMMENDATION 73: That the Department of Justice and Community Safety include in its annual reports information outlining all healthcare services offered in all Victorian prisons during the reporting period, and de-identified statistics relating to incarcerated peoples' access to and take up of these services.

The Committee notes that stakeholders—including the Victorian Government—observed that enabling incarcerated people to access Medicare and the PBS would broaden the range of health services available to them and facilitate continuity of care for people entering and exiting prison. It urges the Victorian Government to explore this possibility with the Commonwealth Government, which administers these schemes.

RECOMMENDATION 74: That the Victorian Government engage with the Commonwealth Government to explore the benefits, challenges, and feasibility of extending access to Medicare and the Pharmaceutical Benefits Scheme to incarcerated Victorians.

11.4.3 Prison conditions and mental illness

Evidence received by the Committee suggested that conditions in Victorian prisons may be exacerbating existing mental illness and causing new illnesses among people in prison, particularly more vulnerable Aboriginal Victorians.

Ermha365—a complex mental health and disability service provider—argued in its submission that prolonged incarceration of people with mental illness is rarely clinically justified. It warned that prolonged detention can cause trauma resulting in 'further poor mental health outcomes and challenging behaviour patterns [which] may further compromise a person's ability to engage with and benefit from support upon release'.[73]

> **O began using drugs as a teenager, and was exposed to their parent's drug use from an early age. O has been supported by the Fitzroy Legal Service drug outreach lawyer program in relation to several matters over a long period of time. O's offending has been limited to low-level offending, that is always related to their drug use. O has worked with drug treatment and support and mental health services over the years, and has also been supported by a pharmacotherapy program. However, O has faced enormous challenges managing their daily heroin use, as it is a means of self-medicating in response to a traumatic life event. O has experienced three periods of imprisonment, which resulted in serious mental health issues and subsequently, increased their heroin use. Fitzroy Legal Service's drug outreach lawyer program supported O in receiving a good legal outcome for their most recent matters, but noted the significant strain that legal proceedings had on O's mental health and wellbeing.**
>
> Fitzroy Legal Service, *Submission 152*, p. 37

73 ermha365, *Submission 84*, p. 5.

Similarly, the Justice Map asserted that prisons may be 'controlling, oppressive, and punitive institutional environments [which] worsen mental health for all people, particularly those who have suffered from past traumas'. It stated:

> Practices such as use of isolation, restricting visits from family and friends, overcrowding, poor access to health services and programs, and negative interactions with correctional officers have a significant impact upon mental health.
>
> The psychiatric impacts of prison are particularly acute for Aboriginal and Torres Strait Islander people. For example, Aboriginal women in prison are hospitalised for mental illness at triple the rate of Aboriginal women in the community.[74]

The Justice Map implied that people with mental illnesses which involve drug dependency are poorly managed in the prison system, leading to more instances of disciplinary action against them, such as segregation from the general prison population.[75]

The Victorian Aboriginal Legal Service asserted that there is 'a lack of sustainably resourced, culturally appropriate health services and programs to meet the social and emotional wellbeing needs of Aboriginal people in prison'. It called for the Victorian Aboriginal Community Controlled Health Organisation to be resourced to develop culturally safe programs and for people in prison to have greater access to trauma-informed forensic medical health services. It also recommended the recruitment, training and accreditation of more qualified Aboriginal and Torres Strait Islander psychologists, psychiatrists, counsellors, social workers and other mental health professionals.[76]

FINDING 55: Victorian prisons are harming vulnerable people by exacerbating existing mental health conditions and causing new experiences of poor mental health.

11

11.4.4 Support for people with disability

The Committee received evidence that Victorian prisons may not be meeting the needs of incarcerated people with disabilities. For example, the Office of the Public Advocate drew the Committee's attention to the findings of an Australian Human Rights Commission review which examined people with disabilities' experience of the criminal justice system across Australia. The review found that appropriate 'support, adjustments and aids may not be provided to prisoners with disabilities so that they can meet basic human needs and participate in prison life'.[77]

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74 The Justice Map, *Submission 157*, p. 9.

75 Ibid.

76 Victorian Aboriginal Legal Service, *Submission 139*, p. 222.

77 Office of the Public Advocate, *Submission 153*, p. 12.

VALID—an advocacy group for people with disabilities—made a submission to the Inquiry which incorporated the views of a working group of people with disability who have had contact with the justice system. It suggested that there was unanimous agreement that 'the right disability support' is not provided in Victoria's prisons:

> Members of the group unanimously agreed that they are not given the right disability support. They said that the support they are given are usually focused on ideas of risk and paternalistic assumptions about their needs. Group members felt that the criminal justice system does not play any rehabilitative role. When asked about the programs and therapeutic supports available inside prison, group members said that they find them ineffectual, coercive, and frustrating. They all said that they have completed programs in prison to be made eligible for parole, or even out of boredom, but that lack of individualised support had meant that the programs felt like "a joke."[78]

Even more concerningly, Emily Piggott, Advocacy Coordinator at VALID, said incarcerated Victorians with intellectual disabilities do not feel safe in custody:

> People with intellectual disability tell us that when they are in custody in Victoria they do not have access to safety. Instead they report that what they experience is abuse, neglect, violence, exploitation, bullying and torture.[79]

Amaze Autism Connect—a community organisation run by people with autism and their families—noted that Victorian prison conditions can be especially challenging for people with cognitive disabilities, or who are neurodiverse, such as people with autism:

> Among autistic people, sensory sensitivities can contribute to overwhelm and meltdown, with the resulting behaviour being misunderstood as defiant or aggressive. Crowds and harsh lighting can impact daily functions and contribute to overwhelm. Autistic people may also be more vulnerable to experiencing bullying, exploitation, social isolation and abuse in prison.[80]

The Office of the Public Advocate also argued that disability-related behaviours are often misunderstood as criminogenic in Victorian prisons, leading them to be managed through disciplinary measures, 'rather than recognised as a characteristic of a cognitive impairment that might require therapeutic support'.[81] It highlighted a Victorian Ombudsman investigation into prison disciplinary proceedings which raised several concerns with the treatment of people with a cognitive disability. The Victorian Ombudsman found that people with disabilities are overrepresented in prison disciplinary processes and have limited access to independent support.[82]

Incarcerated people with disabilities who are subjected to a disciplinary hearing are entitled to access a Corrections Independent Support Officer (CISO) to assist them during a disciplinary hearing. A CISO is an experienced volunteer equipped to help

78 VALID, *Submission 156*, pp. 17–18.

79 Emily Piggott, Advocacy Coordinator, VALID, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 52.

80 Amaze Autism Connect, *Submission 114*, p. 14.

81 Office of the Public Advocate, *Submission 153*, pp. 16–17.

82 Ibid., p. 32.

people with disabilities through the disciplinary proceedings by explaining their rights and checking that they understand the hearing process. The Office of the Public Advocate, which provides CISO support, said that it can 'prevent unfair outcomes for [people in prison] with intellectual disability, that may have the potential to adversely affect [their] prospects of obtaining parole'.[83] It was concerned that few incarcerated people are engaging a CISO, and many are allegedly refusing this independent support throughout disciplinary hearings:

> While the CISO program provides services to all Victorian prisons, in the 2020-21 financial year OPA [Office of the Public Advocate] only attended hearings at four Victorian prisons, including at Port Philip Prison and the Metropolitan Remand Centre. OPA is not aware if prisoners with intellectual disability at other prisons are offered the support of a CISO when attending disciplinary hearings.
>
> OPA holds concern regarding how the CISO program and the benefits of engagement with a CISO is offered to prisoners with intellectual disability. Prisons frequently advise the program that an individual prisoner has declined the support of a CISO, however it is never made clear why a person has declined a CISO and if the benefits of such have been explained to them in a way that they can make an informed decision, or indeed if they have made the decision free from external influence.[84]

The Office of the Public Advocate made the following recommendations to the Victorian Government to address its concerns:

- That the CISO program be expanded to enable people with disabilities who are subject to a disciplinary process to access independent support prior to their hearing, to ensure those with intellectual disabilities are informed of their rights and options prior to proceedings commencing.
- That funding of the CISO program be increased to ensure it can continue to meet demand.
- That an internal review mechanism be introduced for prison disciplinary hearings to mitigate the risk of unfair outcomes.[85]

The Victorian Government asserted that all incarcerated people with a disability are informed of the CISO program and that it is promoting and extending the support offered:

> All prison general managers must ensure people with an intellectual disability have access to a CISO and must invite the CISO to the disciplinary hearing where the person has consented. Staff must also arrange for the CISO to be available at the hearing, prior to confirming the hearing date. Work is underway to promote the CISO program and ensure every person who is entitled to use it knows about it and to seek an extension of the program to cover all cognitive impairments.[86]

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83 Ibid., p. 30.

84 Ibid., p. 33.

85 Ibid., p. 35.

86 Victorian Government, *Submission 93*, pp. 75–76.

Amaze Autism Connect argued that training for prison staff around identifying and managing disabilities, such as autism, is also important. It noted that more punitive measures are sometimes taken when 'positive behaviour support plans' are not properly implemented or adhered to:

> Prison staff without a good understanding of autism (or adequate autism training) are unable to adequately recognise and support the needs of autistic people.[87]

The Office of the Public Advocate believed that Corrections Victoria only offers specialist disability training to prison staff in select roles, such as disability portfolio holders. It argued that it is essential that all staff working in the justice field undertake appropriate training to improve communication with people with disability—including cognitive disabilities—to ensure staff understand how to make appropriate adjustments. It recommended that the Victorian Government provide funding to support the provision of this training:

> The Victorian Government should fund mandatory disability awareness training for all justice staff to enable them to fulfil their obligations under the United Nations' Convention on the Rights of Persons with Disabilities. The training should be developed in consultation with people with disability.[88]

The Office of the Public Advocate and Amaze Autism Connect both pointed out that people entering the Victorian prison system are not routinely screened for disability, or for their eligibility to access disability support through the NDIS. They suggested that this can result in those individuals with disabilities missing out on appropriate in-prison supports and transitional services.[89] Moreover, the Office of the Public Advocate suggested that planning for disability support services could be improved through greater data collection on the rates and needs of people with disability in Victorian prisons.[90]

The Victorian Government acknowledged this gap in care and transitional planning, but said it would require 'considerable resourcing' to routinely screen and diagnose disabilities amongst people in prison:

> the government recognises that an area of focus should be establishing processes to systematically identify people with disability, especially cognitive disability. Systemic screening and diagnosis would need to encompass a whole-of system approach, using a consistent mechanism such as a screening tool to identify people with disability subject to community-based dispositions. This systemic change would require considerable resourcing to implement as it involves introducing additional disability-specific screening processes and diagnoses by psychologists and neuropsychologists.[91]

87 Amaze Autism Connect, *Submission 114*, p. 14.

88 Office of the Public Advocate, *Submission 153*, pp. 46–47.

89 Amaze Autism Connect, *Submission 114*, p. 14; Office of the Public Advocate, *Submission 153*, pp. 34–35.

90 Office of the Public Advocate, *Submission 153*, pp. 12–13.

91 Victorian Government, *Submission 93*, p. 78.

The Committee is concerned by reports that people with physical and cognitive disabilities are not being adequately supported in Victorian prisons. It is unacceptable that disability-related behaviours are regularly misidentified as criminal behaviours. As discussed in Section 11.4.8, subjecting incarcerated people to unnecessary and inappropriate restrictive and punitive measures makes it more difficult for them to constructively engage with rehabilitative programs and reintegrate into the community upon their release. Instead, the Committee would like to see the Victorian prison system pursue initiatives to better identify people entering the prison system with disabilities, equip staff to appropriately respond, and ensure that those who are subjected to disciplinary hearings are adequately supported.

The Committee does not accept the Victorian Government's assertion that it is prohibitively resource-intensive to screen every person entering the Victorian prison system—on remand or a custodial sentence—for physical and cognitive disabilities. The Committee believes a trial screening program is necessary to determine the costs involved and assess the benefits for the welfare of incarcerated people and their prospects for successful rehabilitation and reintegration into the community. It may be that providing a more supportive prison environment, that encompasses reasonable adjustments to accommodate cognitive, intellectual, or physical disability enables incarcerated people to better engage with rehabilitative programs and reduces recidivism upon their release.

RECOMMENDATION 75: That the Victorian Government conduct a trial screening program assessing all people entering incarceration—on remand or a custodial sentence—for physical, cognitive and intellectual disability, to inform the provision of reasonable adjustments and support in prison and following release. The trial should:

- involve a sample prison population which is representative of the demographics of people incarcerated in Victoria
- connect people identified with disability during screening to appropriate social supports and inform the implementation of reasonable adjustments within the prison to aid that person to better engage with rehabilitative programs
- connect people identified with disability during screening to appropriate social supports including the National Disability Insurance Scheme prior to release back into the community with follow up after release
- assess how identifying disability upon entry to prison benefits the incarcerated individual, the operation of the prison and society more broadly, including any impacts on recidivism
- determine the costs and resources involved in routinely screening people entering incarceration for a disability
- publish the findings of the trial on the Department of Justice and Community Safety website.

While this trial is underway the Committee believes that a two-pronged approach, incorporating improved training for all corrections staff and the establishment of a referral or other screening mechanism for incarcerated people with suspected disabilities, will help to ensure that those who require adjustments or additional support are identified.

RECOMMENDATION 76: That the Victorian Government ensure that all staff working in privately- and publicly-operated prisons undertake training to:

- identify behaviours associated with physical and cognitive disabilities
- manage these behaviours through the provision of appropriate supports, rather than the utilisation of punitive measures.

RECOMMENDATION 77: That the Victorian Government establish a mechanism enabling prison staff to refer incarcerated people who exhibit behaviours possibly related to undiagnosed disabilities for professional independent assessment. The outcome of this assessment should inform the implementation of appropriate adjustments or the provision of support for the relevant individual to ensure prison conditions are conducive to rehabilitation.

The Committee believes that the implementation of these two recommendations will go a long way towards improving prison conditions for incarcerated people with disabilities. However, it acknowledges that there are still likely to be instances where people with disabilities are subjected to inappropriate disciplinary hearings. In these instances, both the Office of the Public Advocate and the Victorian Government acknowledge that the CISO program is key to ensuring that proceedings are understood by all parties and result in a fair hearing.

FINDING 56: Ensuring people in incarceration with disabilities have access to a Corrections Independent Support Officer leading up to, and during, a disciplinary hearing is critical to preventing unfair outcomes by making sure they understand their rights and obligations, as well as hearing processes.

RECOMMENDATION 78: That the Victorian Government continues work to expand and promote the Corrections Independent Support Officer program to all people in incarceration with diagnosed or suspected disabilities.

11.4.5 Physical and cultural safety of Aboriginal Victorians

Victorian Aboriginal organisations which contributed to the Inquiry highlighted how a history of colonisation and systemic racism places Aboriginal people at greater risk of interaction with the criminal justice system. They pointed out that incarceration can be particularly damaging to Aboriginal Victorians and specific supports are required to

ensure custodial environments are physically and culturally safe, uphold human rights and reduce reoffending.[92]

> **[Imprisonment of Indigenous women] has exploded. It's exploded because of our high visibility, because of racist policing. Racist policing, racist court systems … the entire system is stacked against us from the word go. Of course, that becomes our children as well … It's a pipeline to prison. We know that and we've known that for years, yet we continue with these same policies that ensure First Nations people, especially women and children, are trapped in the system for the entirety of their lifetime.**
>
> Formerly incarcerated Yuin woman and member of the Homes Not Prisons Steering Group, Homes Not Prisons, *Submission 148*, p. 5.

The Victorian Aboriginal Child Care Agency—the largest provider of Aboriginal child and family services in Victoria—asserted that 'systemic racism and bias disproportionately impact on Aboriginal children and young people at all stages of the justice system'. It suggested that it is placing young people 'at greater risk of having contact with the system as well as creating additional barriers to successfully transitioning back into community with sufficient supports after leaving custody'.[93]

The Victorian Aboriginal Legal Service asserted that 'today's legal system and institutions are built on Australia's violent colonial history, and they are shaped by that past'. It called for 'systemic racism' in the criminal justice system to be addressed and emphasised the importance of ensuring that where people are incarcerated, prison conditions support rehabilitation.[94] The Legal Service informed the Committee that in its view, 'the excessive force and the inappropriate use of restraints are widespread practices throughout the Victorian prison system' and that 'Aboriginal people are disproportionately subjected to violence in prison'. It stated:

> In Victoria, the only investigation that examined and quantified this disproportionality was undertaken by the Commission for Children and Young People's analysis of the youth prison system, which found that "Aboriginal children and young people were alarmingly overrepresented in relation to injury as a result of a serious assault in custody"; and that force and restraints were used against Aboriginal children in youth prisons more than twice a day in 2018 and 2019. Investigations of adult prisons in other states have made similar findings. In WA, force was used against Aboriginal people more frequently than against non-Aboriginal people. Notably, the disproportionality was even more acute for Aboriginal women; while force was used against incarcerated women overall less often than against men, this was not the case for Aboriginal women.[95]

The Legal Service advocated for significant legislative reform to address this issue, including raising the legal threshold for the use of force and restraints in prisons.[96]

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92 For example: Djirra, *Submission 138*, pp. 4–5; Victorian Aboriginal Legal Service, *Submission 139*, pp. 8, 195–196; Victorian Aboriginal Community Service Association, *Submission 81*, pp. 4–5.

93 Victorian Aboriginal Child Care Agency, *Submission 121*, p. 12.

94 Victorian Aboriginal Community Service Association, *Submission 81*, pp. 8, 10.

95 Victorian Aboriginal Legal Service, *Submission 139*, p. 206.

96 Ibid., p. 207.

It also joined other organisations in observing that 2021 marks the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody. It advocated for the implementation of the remaining unenacted recommendations and the appointment of an Aboriginal Social Justice Commissioner to oversee this process:

> The Victorian Government should establish an independent, statutory office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. This office should be properly funded and report directly to the Parliament. The mandate of the Commissioner should include monitoring the implementation of RCIADIC [Royal Commission into Aboriginal Deaths in Custody] recommendations, as well as recommendations from coronial inquests into Aboriginal deaths in custody.[97]

The Victorian Aboriginal Community Services Association Ltd made a similar recommendation. It noted that Victorian Aboriginal groups have campaigned for the appointment of a Commissioner for a long time and that this is now urgently needed to provide 'oversight and monitoring, accountability and access to a culturally safe justice system'.[98]

The Aboriginal Justice Caucus posited that the appointment of a Commissioner is necessary to provide the independent oversight of Aboriginal justice outcomes, which the system currently lacks. It envisioned that a Commissioner would 'ensure greater accountability for improving justice outcomes, through the provision of services that protect and uphold Aboriginal human, civil, legal, and cultural rights'. It said a Commissioner would be responsible for:

- Monitor[ing] implementation of the Royal Commission into Aboriginal Deaths in Custody
- Improv[ing] justice services and outcomes for the Aboriginal community
- Respond[ing] to justice services and outcomes for the Aboriginal community
- Assess[ing] the potential impacts of Aboriginal people of existing and new justice legislation
- Conduct[ing] systemic discrimination investigations and independent reviews to further equality and strengthen human rights protections for Aboriginal people
- Prevent[ing] and address[ing] discrimination, unconscious bias, vilification toward Aboriginal people through education and engagement with communities, employers, government and the Victorian public
- Advocat[ing] for greater respect for Aboriginal rights and equality
- Support[ing] Aboriginal people and communities when things go wrong, or human rights are at risk by helping to resolve discrimination complaints and interviewing in court cases[99]

97 Ibid., p. 50.

98 Victorian Aboriginal Community Service Association, *Submission 81*, p. 6.

99 Aboriginal Justice Caucus, *Submission 106*, p. 12.

The Aboriginal Justice Caucus suggested that a Commissioner could be established by amending the *Equal Opportunity Act 2010* (Vic) and that these changes could be accompanied by the amendment of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to establish Aboriginal self-determination as a protected right.[100] The Caucus affirmed that it will continue to advocate for the appointment of a Commissioner 'until this goal is achieved'.[101]

Djirra—an Aboriginal Community Controlled Organisation which provides legal services and social support programs—informed the Committee that it has 'directly appealed to the Victorian Attorney-General for an immediate commitment to establish the Commissioner role with adequate resources' and similar responsibilities.[102] It argued that a Commissioner is necessary now more than ever as 'deaths in custody continue to rise, with at least 474 deaths in custody since the original report'. It also noted that Aboriginal women's contact with the criminal justice system has rapidly increased since the Royal Commission and must be 'urgently addressed'. [103]

The Victorian Aboriginal Child Care Agency advocated for the introduction of minimum standards for cultural safety to be implemented across the justice system and other sectors including 'childcare and family welfare, health, housing and education'. It suggested that these standards should encompass a cultural safety framework that recognises the 'cultural resilience and resistance of Aboriginal communities and that of the ongoing processes of colonisation'. It noted that it should be involved in the development of the standards, especially as they relate to Aboriginal children and young people.[104]

The Committee also received evidence that the physical and cultural wellbeing of Aboriginal people in custody could also be improved through initiatives such as the introduction of minimum standards for cultural safety and the appointment of more Aboriginal Wellbeing Officers (AWOs) in Victorian prisons. AWOs provide incarcerated Aboriginal people with 'ongoing welfare, advocacy and support', including assistance with transitional arrangements for re-entering the community.

The Aboriginal Justice Caucus felt that Aboriginal Community Controlled Organisations should lead initiatives aimed at improving the social and emotional wellbeing of Aboriginal people in Victoria, both in the community and within the criminal justice system.[105] It recognised the important role played by AWOs. However, the Caucus noted that the expansion of prison populations has outpaced the recruitment of additional AWOs, requiring them to individually support 'a growing number of people with their cultural, social and wellbeing needs'.[106] The Caucus felt that more AWOs need to be

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100 Ibid., p. 13.

101 Ibid., p. 12.

102 Djirra, *Submission 138*, p. 14.

103 Ibid.

104 Victorian Aboriginal Child Care Agency, *Submission 121*, p. 15.

105 Aboriginal Justice Caucus, *Submission 106*, p. 10.

106 Ibid., p. 11.

recruited and that their renumeration should be adjusted to better align with the pressures and challenges of the role:

> The AJC [Aboriginal Justice Caucus] is increasingly concerned about the limited numbers of AWOs, which has been attributed to a lack of recruitment and retention. AWO's must be provided with support in order to engage in meaningful and culturally safe employment. In addition, the AJC believe that the current [Victorian Public Service] classification does not reflect the personal, cultural and community pressures that is faced by an Aboriginal person in the role of an AWO. These roles must be made more desirable through meeting opportunities for career progression and appropriate remuneration that reflects the heavy cultural load of the AWO.[107]

In its submission, the Victorian Government acknowledged that the negative consequences of Australia's history of colonisation are far-reaching and ongoing:

> The exercise of power and control by European settlers resulted in ongoing dispossession of land, disruption of culture and kinship systems, removal of children, racism, social exclusion, institutionalisation and entrenched poverty for Aboriginal people. The consequences of colonisation are far-reaching and intergenerational, continuing to occur in Aboriginal peoples' interactions with the criminal justice system. This includes the destabilisation of Aboriginal communities and perpetual cycles of family violence and intergenerational trauma. Increasing Aboriginal over-representation in Victoria's criminal justice institutions has the potential, in the absence of more appropriate responses, to further perpetuate social and economic exclusion, and compound losses of culture, family and purpose, for a growing number of Aboriginal people.[108]

This history is also acknowledged in *Burra Lotjpa Dunguludja* (Senior Leaders Talking Strong), phase four of the Victorian Aboriginal Justice Agreement which was signed in August 2018. Iterations of this agreement have been in place since 2000 and commit the Victorian Government to partnering with Aboriginal communities to improve Aboriginal justice outcomes, family and community safety.[109] An important goal of the agreement is that 'the needs of Aboriginal people are met through a more culturally-informed and safe [justice] system'. The Agreement seeks to achieve this goal by increasing Aboriginal Victorians' access to justice programs and services which are more culturally safe, and trauma informed.[110] It asserts that 'good access to culturally-appropriate service responses for Aboriginal people is required to improve justice outcomes':

> The importance of cultural safety in the provision of services to Aboriginal people cannot be underestimated. A culturally-safe system is one in which people feel safe, where there is no challenge or need for the denial of their identity, and where their needs are met. A culturally-responsive system is one in which non-Aboriginal people

107 Ibid.

108 Victorian Government, *Submission 93*, pp. 69–70.

109 Ibid., p. 71.

110 *Burra Lotjpa Dunguludja (Senior Leaders Talking Strong): Victorian Aboriginal Justice Agreement Phase 4: A partnership between the Victorian Government and Aboriginal Community*, August 2018, pp. 32–33.

take responsibility to understand the importance of culture, country and community to Aboriginal health, wellbeing and safety, by working with Aboriginal communities to design and deliver culturally-responsive services.[111]

Under the Agreement, the Victoria Government also committed to the Royal Commission into Aboriginal Deaths in Custody's principle, that incarceration must be used as a sanction of last resort.[112] It acknowledged this commitment in its submission to the Inquiry and noted that the implementation of the Royal Commission recommendations remains ongoing, most recently exemplified by legislative reform introducing a spent convictions scheme and decriminalising public drunkenness. It did not acknowledge calls for the establishment of an Aboriginal Social Justice Commissioner.[113]

The Victorian Government also submitted that the 2021–22 State Budget funded programs aimed at reducing the overrepresentation of Aboriginal people in the Victorian justice system and preventing Aboriginal deaths in custody. Programs related to Victorian prisons included:

- continuing delivery of in-prison rehabilitative programs, for example:
  - the Wadamba Prison to Work Program, which empowers Aboriginal people incarcerated on remand to transition to sustainable and meaningful employment
  - the Torch In-Prison Art Program, aims to address recidivism by increasing the confidence of incarcerated Aboriginal people through participation in the arts
- increasing the number of Aboriginal Wellbeing Officers within prisons
- establishing a 20-bed Aboriginal Healing Unit for Aboriginal women in the Dame Phyllis Frost Centre.[114]

The Committee notes that these programs may not yet have been fully implemented. For example in relation to expanding the number of AWOs within Victorian prisons.

The Committee also acknowledges the intergenerational impact of Australia's history of colonisation and systemic racism, specifically how it places Aboriginal Victorians at greater risk of interaction with the criminal justice system and incarceration in Victorian prisons. It recognises that self-determination is key to addressing the intergenerational impacts of colonialism. As such, the Committee accepts evidence from Victorian Aboriginal organisations that the establishment of an Aboriginal Social Justice Commissioner may improve outcomes for incarcerated Aboriginal Victorians, and those who interact with the criminal justice system more broadly.

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111 Ibid., p. 46.

112 Ibid., p. 54.

113 Victorian Government, *Submission 93*, pp. 70–71.

114 Ibid., p. 69.

RECOMMENDATION 79: That the Victorian Government appoint an Aboriginal Social Justice Commissioner—or other oversight mechanism—to monitor the implementation of recommendations made by the Royal Commission into Aboriginal Deaths in Custody and to ensure the criminal justice system responds appropriately to Aboriginal Victorians. This role should include:

- monitoring progress towards the outcomes of Phase 4 of the Victorian Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja*
- identifying and promoting strategies, initiatives and programs aimed at reducing Aboriginal incarceration and deaths in custody, including the possible development of minimum standards for cultural safety across the criminal justice system
- assessing how existing and new justice legislation may impact Aboriginal Victorians and making recommendations to the Victorian Government to improve this legislation
- reviewing the criminal justice system and making recommendations to the Victorian Government to ensure it supports equality, is free from systemic racism and discrimination, and promotes respect for Aboriginal Victorians throughout the community.

The Committee believes that conditions in Victorian prisons could also be improved through greater resourcing for AWOs. It notes that this was also recognised by the Victorian Government.

RECOMMENDATION 80: That the Victorian Government ensure that funding for Aboriginal Wellbeing Officers remains commensurate to the number of Aboriginal Victorians incarcerated on remand or on custodial sentences. This necessitates an immediate increase in these positions to meet the demands of the rapidly increasing prison population.

11.4.6 COVID-19 control measures

In response to the COVID-19 pandemic, the Victorian Government implemented a range of measures to protect the health and wellbeing of people incarcerated and working in prisons, and to stop the transmission of the virus within corrections facilities.[115] At the time of writing, these measures remained in place.[116] A selection of these measures are outlined in Table 11.2.

115 Ibid., p. 12.

116 Corrections Victoria, *Our response to COVID-19*, <https://www.corrections.vic.gov.au/covid19#:~:text=As%20of%2023%20January%202022,testing%20takes%20place%20as%20required.> accessed 31 January 2022.

Table 11.2 Corrections Victoria COVID-19 prevention and control measures for prisons

Admission procedures and prevention measures within prisons	New prisoners are tested and spend 14 days in quarantine, regardless of COVID-19 risk. This is not required of incarcerated people transferring between prisons. Staff and visitors are temperature checked prior to entering a facility. Anyone who presents with any COVID-19 symptoms or risk factors is turned away. Anyone entering a prison including staff, service providers, visitors and contractors must wear a face mask at all times. Physical distancing measures, higher hygiene standards and use of personal protective equipment are in place.
Quarantine arrangements	Movement in prison may be limited while contact tracing is underway. Incarcerated people in quarantine are supported with access to phone calls, video-based visits, books, education material, printed exercise routines and televisions. Prison and health staff, including Aboriginal Liaison Officers and specialist mental health services, continue to regularly check-in and monitor the health and wellbeing of all people in prison.
Personal protective equipment	Staff and visitors are required to wear a face mask and eye protection while on site. Face masks are mandatory for incarcerated people who have a suspected or confirmed case of COVID-19. Marks are also available to the broader prison population.
In-person personal visits	In-person personal visits to all Victorian prisons are currently suspended. Visitors are unable to drop off property, including money, to people in prisons. Property can be posted to prisons and money can be sent via money order, cheque or online transfer.
Professional contact with people in prison	Incarcerated people can access professional services through phone and video calls. (However, there is significant demand for phone and video calls and Corrections Victoria is continually reviewing the most appropriate use of the available devices.)
Prisoner health and support	Health and other support services are operating across the prison system. Incarcerated people who feel stressed by the COVID-19 situation continue to have access to a range of mental health supports. They are also encouraged to exercise and eat a healthy diet.
Vaccinations	All prison staff working in correctional facilities in Victoria must have received two doses of a COVID-19 vaccine by 26 November 2021. Corrections Victoria is offering incarcerated people vaccinations onsite. The vaccination program is focusing on the facilities that accept new arrivals, where predominantly unvaccinated people are entering the prison system from the community every day.

Source: Corrections Victoria, *Our response to COVID-19*, <https://www.corrections.vic.gov.au/covid19#how-we-are-responding-to-covid19> accessed 25 November 2021.

At a public hearing, Larissa Strong, Acting Commissioner of Corrections Victoria, informed the Committee that the COVID-19 control measures implemented in prisons—particularly mandatory quarantine—had prevented widespread outbreaks from occurring:

> we have had 170 COVID-positive prisoners in the prison system. They are all pretty much new entrants that have come in within the first two weeks and been picked up as part of our protective quarantine system, so it has been an ongoing challenge and the system has really managed that well in terms of no widespread outbreaks anywhere within the prison system.[117]

117 Larissa Strong, Acting Commissioner, Corrections Victoria, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 13.

Rebecca Falkingham, Secretary of DJCS, said that the control measures adopted in Victorian prisons were informed by experiences of prisons in international jurisdictions:

> We were lucky that we learned from international experiences. We have all seen the awful stories of how COVID ripped through prison systems internationally, and we were determined to make sure that, touch wood, did not happen in our state and ensure that we worked really closely with the Department of Health to make sure we got the best PPE, the best social distancing, the best arrangements in relation to our vaccination program … we obviously now have no staff working within the corrections or youth justice systems that are not fully vaccinated. We also have really high rates of prisoner vaccination now as well, as well as introducing rapid antigen testing across a number of our prisons at the moment…[118]

On its website, Corrections Victoria provides up-to-date information about the percentage of incarcerated people who are fully vaccinated and the number of active COVID-19 cases in the Victorian prison system. As of 6 February 2022, 81% of prisoners were fully vaccinated and there were 84 active cases of COVID-19 among the general prison population and 17 active cases among incarcerated people in prison quarantine. This includes 5 active cases in incarcerated Aboriginal Victorians.[119] Both, Jesuit Social Services[120] and the Victorian Aboriginal Legal Service felt that transparency in relation to vaccination rates could be improved. The Victorian Aboriginal Legal Service considered that the vaccination rate among Aboriginal people in prison is 'significantly' lower than that of the general prison population, although this figure is not publicly available. It argued that improving vaccination rates is 'essential' and advocated for Aboriginal Community Controlled Organisations to have access to prisons to assist with addressing vaccine hesitancy.[121]

Legal service providers and organisations which gave evidence to the Inquiry also raised several concerns with the prison procedures adopted to manage the risks associated with COVID-19. The Committee heard that mandatory quarantine upon entry to prison is having a particularly detrimental impact. Stakeholders submitted that:

- Quarantine is preventing incarcerated people from accessing health and rehabilitation services, contacting legal representation, other professions and family.[122]
- Quarantine conditions are similar to solitary confinement with little to no access to time outside, opportunities to exercise or to interact with other people. This is worsening the mental health outcomes of already vulnerable people, particularly Aboriginal Victorians.[123]

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118 Rebecca Falkingham, Secretary, Department of Justice and Community Safety, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, pp. 12–13.

119 See: Corrections Victoria, *Our response to Covid 19*, <https://www.corrections.vic.gov.au/covid19#how-we-are-responding-to-covid19> accessed 25 November 2021.

120 Jesuit Social Services, *Submission 119*, p. 48.

121 Victorian Aboriginal Legal Service, *Submission 139*, p. 198.

122 Law Institute of Victoria, *Submission 112*, pp. 12-4; Victorian Alcohol and Drug Association, *Submission 128*, p. 9; Djirra, *Submission 138*, p. 18.

123 Law Institute of Victoria, *Submission 112*, pp. 12-5; Victorian Aboriginal Legal Service, *Submission 139*, p. 197.

- Limited access to video conferencing for people being held in quarantine means some people being held on remand are required to appear in person at court, which resets their mandatory quarantine, leading to longer periods under isolation and stressful conditions.[124]

Both, the Victorian Aboriginal Legal Service and Fitzroy Legal Service noted that the requirement to quarantine for 14 days upon entering prison has remained static throughout the pandemic. This is despite fluctuations in infection levels and the severity of protective measures in the general community.[125] The Victorian Aboriginal Legal Service pointed out that less restrictive protective measures have been adopted to manage the risk of COVID-19 in youth detention settings, such as imposing isolation only until a negative test result has been received. It asserted that there is no reason a similar approach could not be adopted in adult prisons, particularly if prison staff and incarcerated people were required to undertake regular COVID-19 tests as a preventative measure to reduce the likelihood of an outbreak. It informed the Committee that staff in prisons in the United Kingdom have been subjected to preventative routine testing since November 2020. The Victorian Aboriginal Legal Service noted that this practice is standard across other Victorian institutions which accommodate vulnerable people, such as hospitals and nursing homes.[126]

The Law Institute of Victoria, Jesuit Social Services and Liberty Victoria all advocated for incarcerated people who are particularly vulnerable to COVID-19—but who pose no immediate risk to the community—to be released from prison.[127] Liberty Victoria noted that people incarcerated in Victoria generally have a higher prevalence of pre-existing health conditions. It suggested that this combined with the closed prison environment makes people in prison particularly vulnerable to COVID-19. It argued that preventative measures—such as quarantine and lockdowns—which are aimed at preventing outbreaks are impeding access to education and rehabilitative services. It therefore advocated to release people who pose little risk to the community so that they can access rehabilitative services and protect their health, namely:

- elderly and immunosuppressed people
- people who have committed non-violent offences
- women eligible for release or who are pregnant
- young people with secure accommodation and supports in the community
- Aboriginal people
- people who are—or who soon will be—eligible for parole
- people being detained on remand who are unlikely to receive a custodial sentence exceeding 6 months.[128]

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124 Law Institute of Victoria, *Submission 112*, pp. 12–13.

125 Victorian Aboriginal Legal Service, *Submission 139*, p. 198; Fitzroy Legal Service, *Submission 152*, p. 20.

126 Victorian Aboriginal Legal Service, *Submission 139*, p. 198.

127 Jesuit Social Services, *Submission 119*, p. 47; Law Institute of Victoria, *Submission 112*, p. 16; Liberty Victoria, *Submission 140*, p. 28.

128 Liberty Victoria, *Submission 140*, p. 28.

Jesuit Social Services called on the Victorian Government to release low risk offenders, people on remand, Aboriginal people and incarcerated people with chronic health conditions back into the community. It argued that incarcerated people are among those most at risk of contracting COVID-19 and suggested that releasing 'vulnerable groups will protect the health and well-being of all people connected with the justice system, as well as the broader community'.[129]

The Law Institute of Victoria recommended that a review of quarantine procedures, facilities and conditions be undertaken and suggested that people in prison at particular risk of adverse outcomes in relation to COVID-19 should be released on 'administrative leave permits'. Section 57A of the *Corrections Act 1986* (Vic) enables the Secretary of DJCS to grant administrative leave permits to incarcerated people for purposes such as protecting them while they give evidence during a legal proceeding, to visit a seriously ill family member or friend, or to attend a funeral. The Institute suggested that this could be expanded to permit 'elderly people, people with chronic health conditions, disabilities and mental health conditions' and Aboriginal Victorians to go on administrative leave to better protect them from COVID-19.[130]

The Law Institute of Victoria and the Victorian Aboriginal Legal Service also provided evidence in relation to the application of 'emergency management days' (EMDs) arising from COVID-19 measures. An EMD is a day deducted from a custodial sentence in recognition of an incarcerated person's good behaviour while suffering service disruption or deprivation during their detention. The rules relating to EMDs are set out in s 58E(1) of the *Corrections Act 1986* (Vic) and Regulation 100 of the *Corrections Regulations 2019* (Vic). DJCS has issued the following guidance to people in Victorian prisons regarding EMDs arising from COVID-19 measures:

> If you have suffered disruption or deprivation due to the response to COVID-19, you will be automatically considered for EMDs, unless you have demonstrated poor behaviour, in which case you will need to apply. Disruption or deprivation includes restrictive regimes because of COVID-19 or having your out-of-cell time significantly restricted due to being placed in a protective quarantine unit for 14 days on reception.[131]

Stakeholders noted that DJCS has advised that as of 28 July 2021, people being held on remand are only eligible for EMDs after they have received their sentence. Whereas, previously they were eligible for EMDs prior to receiving their sentence and had any EMD earned applied to any sentence handed down following conviction.[132]

Both, the Law Institute of Victoria and the Victorian Aboriginal Legal Service suggested that DJCS' policy on EMDs lacks transparency and is confusing for people in incarceration. The Victorian Aboriginal Legal Service noted that DJCS guidance assures people in incarceration that those who exhibit good behaviour will automatically be considered for EMDs but fails to describe the process by which they will be

129 Jesuit Social Services, *Submission 119*, p. 47.

130 Law Institute of Victoria, *Submission 112*, p. 16.

131 Department of Justice and Community Safety, *Emergency Management Days - COVID-19*, 20 April 2020, p. 1.

132 Law Institute of Victoria, *Submission 112*, p. 16; Victorian Aboriginal Legal Service, *Submission 139*, p. 201.

considered.[133] The Law Institute of Victoria asserted that prison staff are not adequately informed of EMD policy and different information is provided to people in incarceration across facilities. It is unclear how the policy should be applied, as what constitutes 'poor behaviour' is not well defined.[134]

The Committee appreciates that the Victorian prison system—like the broader community—has had to restrict personal freedoms and adopt tough practices to control the spread of COVID-19. These measures have been necessary to protect the health of incarcerated people, their families, prison staff and the legal, health and other professionals that regularly attend these facilities. However, it is critical that these measures remain proportionate to the level of risk at any time and the consequences of infection. In addition, they should remain balanced with a continued focus on facilitating rehabilitation and reducing recidivism.

The Committee notes that stakeholders were critical of the use of quarantine and isolation in Victorian prisons and proposed several alternative control measures, including regular testing and the release of some people in incarceration back into the community. The Committee believes that such proposals require more detailed consideration if they are to be adopted. It also feels that a more general review of the Victorian prison system's response to the COVID-19 pandemic is merited, as we enter the third year of the pandemic, to ensure that control measures remain proportionate to relevant levels of risk at any time and reflect current best practice.

RECOMMENDATION 81: That the Department of Justice and Community Safety review and publicly report on the management of COVID-19 in publicly- and privately-operated Victorian prisons with a view to identifying the impact of control measures on:

- prison conditions, the wellbeing of people in incarceration and their families
- people in incarceration's access to rehabilitative programs, health and legal services, and the court system
- application of emergency management days
- staff wellbeing, access to resources and safety.

The review should inform the ongoing management of the COVID-19 pandemic, if required, by identifying how to minimise disruption caused by control measures through:

- examining how other institutions which manage vulnerable people, such as prisons in other jurisdictions, hospitals and nursing homes, manage the risks related to COVID-19 for residents and staff
- identifying how best to ensure that control measures remain proportionate to relevant levels of risk at any time posed by COVID-19 and are balanced with ensuring that prison facilitates the rehabilitation of people in incarceration and reduces recidivism.

133 Victorian Aboriginal Legal Service, *Submission 139*, pp. 201–202.

134 Law Institute of Victoria, *Submission 112*, pp. 16–17.

11.4.7 Impact of prison on women and their children

As explored in Chapter 2, there has been a significant increase in the number of women incarcerated in Victoria in recent years. Many more women are being detained on remand, and for those serving custodial sentences, offences for which they have been convicted are typically low-level, non-violent and result in short custodial sentences.[135] In response, the Victorian Government has developed a *Women's Diversion and Rehabilitation Strategy* to improve outcomes and reduce the number of women in prison. It is focused on improving the quality of engagement with women held on remand—or serving a sentence—and increasing their access to rehabilitation and therapeutic services.[136]

Evidence presented to the Inquiry indicated that women in prison are a particularly vulnerable cohort. The Women and Mentoring program explained that of the women in prison who have been referred to its program:

- 88% have experienced or are experiencing family violence
- 95% had one or more diagnosed mental illnesses, with two thirds reporting that it impacted their daily life
- 69% indicated that they had an acquired brain injury, disability or physical illness
- 50% were staying in insecure or unsafe accommodation, or were homeless
- 42% reported ongoing and problematic alcohol and/or other drug use
- 93% reported financial hardship, with 50% earning low incomes and 29% experiencing difficulties paying fines.[137]

> **I was in a pretty horrific family violence relationship for about 6 years. When we separated he kidnapped my daughter and that sent me down a path of homelessness and really heavy drug addiction. I think that my way of surviving and protecting myself was to surround myself with people that I wouldn't have usually surrounded myself with, and got involved with a bit of criminal activity. After 12 months of homelessness I ended up being arrested, I'd been arrested multiple times, I got chucked in Dame Phyllis Frost women's prison. That for me, and for many women, was very scary. I was a first-timer, I was withdrawing from drugs, I received no medical care … and I was chucked by myself in a cell in the middle of the night … I was released into an unsafe situation with my violent ex-partner's father. After about a week I put myself back on the street because it was much safer.**
>
> Claudia, formerly incarcerated woman and member of the Homes Not Prisons Steering Group, Homes Not Prisons, *Submission 148*, p. 7.

The Centre for Excellence and Family Welfare likewise asserted that mental illness, family violence, drug use and housing instability are 'key characteristics' of women's

135 Centre for Excellence in Child and Family Welfare, *Submission 127*, p. 1; Good Shepherd Australia New Zealand, *Submission 116*, p. 7.

136 Victorian Government, *Submission 93*, p. 74.

137 Women and Mentoring, *Submission 120*, p. 2.

lives prior to being incarcerated.[138] Good Shepard Australia New Zealand—which delivers psychoeducation, risk assessment and safety planning services to women in prison—submitted that incarcerated Aboriginal women are particularly vulnerable and that incarceration endangers their lives and wellbeing. It asserted that imprisonment 'compounds near universal experiences of family and/or sexual violence, and continues a colonial legacy of dislocating First Nations families by separating mothers and children, placing young children in a prison environment, or triggering child removal'.[139]

The Committee heard that the facilities, practices and culture of Victorian prisons can compound with these vulnerabilities, making incarceration a deeply traumatising experience for some women. At a public hearing, Amy, a mother and former employee within the criminal justice system, provided a first-hand account of her experience of being incarcerated due to family violence.

> **Firstly, we know that the overwhelming majority of women in prison have experienced childhood trauma and family violence as adults. Prison replicates the exact dynamics of an abusive relationship and consequently inflicts the same powerlessness, harm and trauma. It takes away all of your freedom and autonomy. It tells you what you can wear, what you can do and when you can do it, what you can eat and when, and when you can see or speak to your family and friends. Prison robs you of your fundamental rights, such as access to legal representation and basic medical and health care.**
>
> **Prison isolates you from the world. Prison quite literally reduces you to a number and places you in a concrete cage where strangers are suddenly entitled to search your belongings and subject you to an invasive strip search at any given moment. In order to have contact with visitors you must strip naked and change your clothes in front of an officer. Women are compelled to choose between seeing their children, friends and family or this degrading treatment, which in almost any other scenario would constitute a sex crime.**
>
> **We are routinely sending already traumatised women into a place that reproduces their trauma day in and day out with the expectation that they will somehow come out changed or rehabilitated. How can we expect people born into intergenerational poverty, who are entrenched in cycles of disadvantage, who have complex mental health or substance abuse problems to even survive this system, let alone come out better? How can we expect this system to somehow reform people when it is a struggle to even survive it? And, quite frankly, the number of Aboriginal deaths in custody alone shows that some people simply do not.**
>
> **Every day this state funnels broken women into a system, takes what little dignity, hope, family relationships and material possessions they have left and releases them into society a short time later hopelessly destroyed. This is what the system does in the name of community safety and rehabilitation. Even brief periods of imprisonment, and I dare say especially brief periods of imprisonment, are enough to ruin a person's life and change the trajectory of their children's lives.**
>
> Amy, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 3.

138 Centre for Excellence in Child and Family Welfare, *Submission 127*, p. 2.

139 Good Shepherd Australia New Zealand, *Submission 116*, p. 7.

The Women's Leadership Group characterised incarceration in Victoria as 'state sanctioned violence'. Its interviews with women with lived experience of Victorian prisons 'identified that prison guards embraced tactics of punishment, control and psychological violence'.[140] The Group noted that:

> all the women interviewed wanted the committee to be aware of their treatment within Victoria's prison system. All of the women interviewed identified specific experiences of violence, abuse of power and punishment within the prison system.[141]

Excerpts from the Women's Leadership Group interviews are shared in Box 11.2.

BOX 11.2: Incarcerated women's experiences of Victorian prison conditions

The Women's Leadership Group submitted that while most of the women it interviewed acknowledged that 'a small number of prison officers' were respectful and treated them well, 'overwhelmingly women experienced punishment, psychological violence, and abuses of power at the hands of prison officers'.

Cyndi described prison officers' treatment of women as abusive and controlling:

> When you go into jail, and you (have) experienced domestic violence, all it takes … is a male officer having a bad day and speaking down to you, like how does that make you feel when you've just spent your whole life being spoken down to and controlled? … they go to work and treat the women like crap.

Joan spoke about abuses of power in the form of sexual relationships between prison officers and incarcerated women:

> I have personally seen male officers having sexual relationships with female inmates…
>
> Having people working in those positions of power, that can't maintain professional boundaries and using that power to disempower people is fucking disgusting, its criminal … and it's happened on multiple fucking occasions.

Whitney and Joan described the impact that prison had on their identity and sense of self. Whitney said:

> The other thing is your loss of identity when you go in … you're transformed into feeling like you're nothing…
>
> The minute they shut that cell door, … that for me was my transformation from mum, from trusted employee, hard-working person, into somebody who was not worth a pinch of shit.

Joan said:

> The system just crushes your self-esteem, they just push you down and down, until you feel voiceless. And finding my voice again after going through 8 years of being in the system, I'm still silenced some of the time.

(Continued)

BOX 11.2: Continued

Whitney identified that even short periods of incarceration are extremely impactful for women:

> The stress of the prison and the pains of imprisonment as they are quite often referred to, have long-term psychological impacts when you come out of prison. And that, even four months (of incarceration) was enough to make it difficult to integrate back into my family, because I was full of shame still. Even though my family was supportive, you know, there's still that self-stigma that you have.

Source: Women's Leadership Group, *Submission 154*, pp. 8, 10, 16.

Good Shepherd Australia and New Zealand also provided examples of how prison can contribute to an incarcerated woman's trauma:

> a woman might be triggered by the locking of a cell door where they have previously been locked in a room by an abusive partner, or … a woman could be continually re traumatised by an ID photo taken on reception that reveals physical abuse.[142]

Women and Mentoring asserted that detaining women, 'even for a short time, contribute[s] to loss of housing, employment, connection to children and family'.[143] It argued that prison has a negative impact on women, does not reduce recidivism and compounds the challenges they face when they are released.[144]

Most of the women in Australian prisons are mothers, with 85% having been pregnant at some point in their lives and 54% having at least one dependent child. Approximately 80% of Aboriginal women in prisons are mothers.[145] The Committee heard that the impact of maternal incarceration on both the mother and child can be extremely damaging with long-lasting repercussions for both parties. For mothers, separation from their children due to incarceration is often permanent and can result in feelings of hopelessness that contribute to reoffending. Fitzroy Legal Service observed that it has worked with numerous women who have had their children removed from their care due to their incarceration. It asserted that it is very difficult for women to maintain a connection with their children from prison and regain care of their children following release. This has devasting impacts on women in incarceration's wellbeing:

> maintaining contact with children is a huge challenge for every woman with children who contacts her from prison. The impact of this has universally been described as devastating and often precipitates a spiral of shame, trauma and drug use that is invariably criminalised. It often takes people years for people to regain care of their children and typically involves protracted legal intervention by child protection.[146]

142 Good Shepherd Australia New Zealand, *Submission 116*, pp. 9–10.

143 Women and Mentoring, *Submission 120*, p. 3.

144 Ibid., p. 4.

145 Smart Justice for Women, *Submission 94*, p. 22.

146 Fitzroy Legal Service, *Submission 152*, p. 22.

A lawyer interviewed as part of a research project conducted by Fitzroy Legal Service in conjunction with two universities, described a similar trajectory among women separated from their children by incarceration:

> The brutality of the separation of mothers from their children is pretty stark. That impact isn't just felt during the duration of the remand. The consequences of children being removed from their mothers while in remand in custody keeps going and has long, long, long remedy times attached to it. Or wildly significant interventions that are required to try and claw back the children. What that means is there's hopelessness that sets in, and when there's hopelessness there's self-medication. There's self-medication, there's drug and alcohol. When there's drug and alcohol, there's homelessness and fracture and offending and we go back in. It's an absolute disaster.[147]

Amy described the impact that 120 days of imprisonment had on her relationship with her children and how it contributed to her losing custody of her youngest child.

> **I have rebuilt my life, and I have a lot to be grateful for. However, there are other aspects of my life—some of the most important—that have been destroyed beyond repair. I will never again have custody of my youngest child. He is now four years old, has been diagnosed with autism and is completely non-verbal. Being denied bail, not being able to meet that impossible threshold of compelling reasons and being imprisoned for 120 days was enough to irreparably sever the bond I had with my baby and destroy any chance I had of ever regaining primary care of him. 120 days in jail meant that the first 17 months of his life in my primary care essentially counted for nothing in the eyes of the law and child protection. DHS [Department of Health and Human Services] did not believe nor were they ever interested in my version of events. A guilty plea was the beginning and end of their investigation. Even now that I have rebuilt my life to the best of my ability and I have secure stable housing, employment and sole custody of my daughter, the best I can hope for is to one day attain equal shared care of my baby through family law proceedings.**
>
> Amy, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, pp. 2–3.

The impact of maternal incarceration is also devastating for children and repercussions can flow through to the broader community, particularly in the case of Aboriginal women. As Smart Justice for Women explained, women are 'overwhelmingly the primary carers of children, as well as carers for the sick and elderly in their community' and the consequences of incarcerating women, even for short periods of time, ripple throughout 'families and communities and have long-term effects'.[148]

The trauma experienced by children who are separated from a mother who is incarcerated was evidenced by many stakeholders to the Inquiry. Amy informed the Committee that she believed that her separation from her son who has autism, contributed to his developmental delays:

147 Ibid.

148 Smart Justice for Women, *Submission 94*, p. 22.

> My 17-month-old baby was taken away from his mum one night and never returned. The extent of the damage from that separation and trauma can never truly be known, I suppose. However, given that he is now four years old and he is completely non-verbal, with no method of communication, I believe that demonstrates some indication of the extent of the harm he endured by being abruptly separated from me, a separation solidified by a series of determinations by police, child protection and courts, meaning that he will never return to my fulltime care. The trauma he suffered in 2019 impacts him to this day and by all accounts will impact him for the rest of his life.[149]

Amy argued that the criminal justice system should work at keeping families together.

Other submitters to the Inquiry also described the repercussions for children whose parents—typically mothers—have been incarcerated. The Committee heard that these children are more likely to:

- have disrupted education or decreased educational attainment[150]
- have poor health, including mental health, developmental delays and display anti-social behaviours[151]
- experience unstable housing or financial hardship[152]
- be placed under child protection[153]
- enter the criminal justice system themselves.[154]

Smart Justice for Women characterised the intergenerational impact of maternal incarceration as 'immense' and argued that the rights and best interests of children need to be considered when women come into contact with the criminal justice system.[155] It advocated for legislative reform requiring courts to consider the impact of maternal incarceration on any dependent children in the formulation of sentencing for an offence.[156] Broader consideration of the impact of sentencing on families and stakeholder recommendations for improving this process are described in Chapter 10.

Mallee Family Care submitted that harm to families caused by the incarceration of mothers could be reduced by establishing mechanisms to support children exposed to the criminal justice system early. It also advocated for custodial sentences for mothers with dependent children to be avoided wherever possible.[157]

149 Amy, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 4.

150 Smart Justice for Women, *Submission 94*, p. 22; Mallee Family Care, *Submission 126*, p. 5.

151 Smart Justice for Women, *Submission 94*, p. 22; Mallee Family Care, *Submission 126*, p. 5; Fitzroy Legal Service, *Submission 152*, p. 23.

152 Smart Justice for Women, *Submission 94*, p. 22; Mallee Family Care, *Submission 126*, p. 5.

153 Smart Justice for Women, *Submission 94*, p. 22; Victorian Aboriginal Legal Service, *Submission 139*, p. 61.

154 Smart Justice for Women, *Submission 94*, p. 22; Mallee Family Care, *Submission 126*, p. 5; Fitzroy Legal Service, *Submission 152*, p. 23.

155 Smart Justice for Women, *Submission 94*, p. 5.

156 Ibid., pp. 22–23.

157 Mallee Family Care, *Submission 126*, p. 5.

The Centre for Excellence in Child and Family Welfare advocated for strategies which:

> embed the perspectives of women and children with lived experience of maternal incarceration and … focus on the end-to-end approach that recognises and seeks to address the challenges at each point of a woman's journey through the system.[158]

The Centre for Excellence in Child and Family Welfare recommended that:

> the Committee consider the need for further research into the impact on children of maternal incarceration to build a more robust evidence base than currently exists, reflective of contemporary best practice.[159]

The Victorian Aboriginal Child Care Agency highlighted the importance of ensuring women who are pregnant when they enter prison are able to maintain a connection with their baby, arguing that this is beneficial for the social and emotional wellbeing of both mother and child. It drew the Committee's attention to the Living with Mum Program offered in the Dame Phyllis Frost Centre and Tarrengower Prison. This program enables women serving custodial sentences to have their baby or young child live with them in a cottage style unit and provides education to enhance their parenting skills and confidence.[160] However, the Agency noted that access to this program is limited. It also emphasised that that it is vital that mothers and their children are linked into relevant support services following their departure from prison, to avoid further contact with the justice system.[161]

It was suggested to the Committee that legislated timeframes for the reunification of families, following the placement of children in out-of-home care, are unrealistic for families with incarcerated mothers, particularly for Aboriginal families.

In 2016, amendments to the *Children, Youth and Families Act 2005* (Vic) came into effect which introduced a 12-month limit on the timeframe for achieving reunification of children in out-of-home care with their parents. An additional 12 months can be granted by the Children's Court of Victoria in certain circumstances if family reunification is likely to be achieved in that timeframe. The amendments—known as the 'permanency amendments' and enacted by the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic)—sought to ensure that decisions relating to the care of vulnerable children are made in a timely manner and to promote the permanency of care arrangements.[162]

Djirra noted that it has been advocating against the 12- and 24-month timeframes for family reunification since they came into effect in 2016. It posited that these rigid

158 Centre for Excellence in Child and Family Welfare, *Submission 127*, p. 4.

159 Ibid., p. 5.

160 Corrections Victoria, *Pregnancy and childcare*, <https://www.corrections.vic.gov.au/prisons/going-to-prison/pregnancy-and-childcare> accessed 30 November 2021.

161 Victorian Aboriginal Child Care Agency, *Submission 121*, p. 8.

162 Commission for Children and Young People, *'…safe and wanted…': Inquiry into the implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*, report for Victorian Government, 2017, pp. 12–13.

timeframes are at odds with the reality that 'deep-seated intergenerational trauma cannot be resolved quickly in accordance with arbitrary and abbreviated timelines' and does not consider inadequate support services. It reflected that the timeframes were contributing to the stress experienced by Aboriginal women who are incarcerated:

> It is unrealistic and stressful for Aboriginal and Torres Strait Islander mothers, who are recovering from their own trauma related to experiences of family violence and incarceration, to achieve reunification within these timeframes. This is particularly the case if they are not provided with adequate and culturally appropriate support.
>
> For Aboriginal and Torres Strait Islander women who are on remand or serving a custodial sentence, this timeframe does not recognise the experience of women who may not be able to address protective concerns to resume care of their children in this period.[163]

Djirra acknowledged that the timeframes for family reunification were recently extended in recognition of the ongoing disruption to services and delays in the criminal justice system caused by the COVID-19 pandemic.[164] However, it 'strongly urged' the Victorian Government to permanently further extend timeframes. It also advocated for investment in specialist Aboriginal community controlled organisations to provide culturally safe support to women to assist them to achieve family reunification within realistic timeframes.[165]

It is clear to the Committee that conditions in Victorian prisons are not meeting the complex needs of women who are incarcerated. Incarceration, by definition, involves the removal of personal freedoms which can echo the power dynamics of abusive relationships and exacerbate the trauma of the many women in prison who have experienced family violence, sexual or other forms of abuse. Evidence suggested that it often results in the permanent separation of mothers from their dependent children, resulting in a myriad of negative consequences for both.

FINDING 57: The conditions in Victorian prisons can retraumatise incarcerated women by echoing the power dynamics of abusive relationships and separating mothers from dependent children.

The Committee believes that the serious negative impacts of parental incarceration on their children merits further detailed consideration. That is why on 20 December 2021, it resolved to inquire into and report, by 1 July 2022, on the adequacy of policies and services to assist the children of imprisoned parents in Victoria, with particular reference to:

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163 Djirra, *Submission 138*, p. 17.

164 Section 7 of the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020*, No. 27 of 2020 (Vic) provides that a court may extend the period in which family reunification must be achieved beyond 24 months if it is satisfied that the progress of a parent towards reunification has been impeded due to the COVID-19 pandemic.

165 Djirra, *Submission 138*, p. 18.

(a) the social, emotional and health impacts on affected children;

(b) what policies exist and what services are available, including consideration of those in other jurisdictions;

(c) how effective these services are, including—

(i) consideration of evaluation of work already done in this area; and

(ii) identifying areas for improvement.

In light of this impending Inquiry, the Committee refrains from making any recommendations aimed at addressing the impacts of parental incarceration in this report.

11.4.8 Solitary confinement, strip searching and other traumatic prison practices

Many submitters asserted that prison can exacerbate pre-existing or cause new trauma and mental health issues through practices such as solitary confinement, strip searching and the use of physical constraints.

Liberty Victoria posited that 'incarceration exacerbates trauma and the issues that lead people to offend.' It claimed that 'many prisoners face mistreatment, including being subject to harmful, unnecessary and degrading practices like routine strip searching and solitary confinement.' It argued that some practices—such as solitary confinement—can inhibit the positive impact of rehabilitative programs:

> Security regimes in prisons, such as solitary confinement, have a significant adverse effect on the rehabilitation and reintegration of prisoners. Where prisoners are placed in solitary confinement, or 'lockdown', they are unable to participate in rehabilitation programs. This means that the rehabilitative element of their incarceration is delayed or deferred and further, may adversely impact prospects for such prisoners being granted supervision on parole.[166]

Homes Not Prisons observed that 'prisons are places of surveillance and control' which can unintentionally recreate the power dynamics of an abusive relationship and be retraumatising for incarcerated people who have experienced family violence. It suggested that practices such as 'strip-searching, physical restraint, chemical restraint, and solitary confinement', which are highly invasive, can be triggering for incarcerated people and should be abandoned.[167] It argued that solitary confinement is particularly damaging and can have long-term negative effects on people in incarceration:

> The use of enforced isolation conflicts with recovery-oriented and trauma-informed practice … The impacts of solitary confinement are well documented and include panic

166 Liberty Victoria, *Submission 140*, pp. 27, 30.

167 Homes Not Prisons, *Submission 148*, p. 7.

> attacks, chronic depression, paranoia and psychosis. These are long-term effects of dehumanising treatment.[168]

Fitzroy Legal Service pointed out that 'a significant proportion' of men and women in incarceration have experienced sexual assault or abuse. It argued that 'subjecting anyone, and particularly people with histories of trauma and abuse, to strip searching is cruel, profoundly harmful and re-traumatising'.[169]

The Legal Service observed that solitary confinement is also a common and damaging practice in Victorian prisons which undermines community safety and is contrary to the rehabilitation of people in incarceration:

> Swathes of research and the experiences of our clients establish beyond a doubt that solitary confinement is extraordinarily damaging to a person's health, both mental and physical. These impacts can emerge early in any period of confinement, can be long-lasting and are likely to worsen the longer a person is in solitary confinement. These impacts can include: anxiety, depression, paranoia, psychosis, post-traumatic stress disorder and a significantly higher risk of self-harm and suicide. Solitary confinement is particularly harmful for people who have a pre-existing mental illness or cognitive impairment.[170]

The Human Rights Law Centre also argued that solitary confinement is a harmful practice which contributes to reoffending:

> Use of this harmful practice does nothing to address the underlying causes of 'challenging' behaviour and can even exacerbate those behaviours as a person's mental and physical health deteriorate.
>
> Most people in prison will be released and will spend the rest of their lives as our neighbours, in our communities. 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.[171]

Fitzroy Legal Service suggested that solitary confinement is especially damaging for parents in incarceration, who cannot maintain contact with their children, and for Aboriginal people, who are denied contact with their culture and community. It also observed that people in incarceration with mental illness or physical disabilities are more likely to be subjected to solitary confinement as part of behaviour management, despite this practice being 'more harmful for this cohort of people'.[172]

The Victorian Aboriginal Legal Service also told the Committee that prison can be 'deeply traumatising' and suggested that 'these harms are particularly acute for people already marginalised or living with a history of trauma, such as Aboriginal people,

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168 Ibid., p. 20.

169 Fitzroy Legal Service, *Submission 152*, p. 21.

170 Ibid., pp. 19–20.

171 Human Rights Law Centre, *Submission 58*, p. 17.

172 Fitzroy Legal Service, *Submission 152*, pp. 19–20.

those living [with] disability or mental illness and victim-survivors of family violence'. It argued that harsher prison conditions prevent people from responding to rehabilitative programs and addressing the factors underpinning their criminal behaviours:

> Inducing this kind of trauma directly conflicts with the therapeutic approach to rehabilitation and social integration which is needed to address the underlying causes of offending for most people held in Victorian prisons. International evidence has shown that, because of this traumatising effect and the lost opportunity for productive rehabilitation that results, harsher prison conditions tend to raise reoffending rates.[173]

Evidence submitted to the Inquiry suggested that practices such as solitary confinement and physical constraint are routinely used in Victorian prisons as behaviour management and risk reduction tools. Fitzroy Legal Service suggested that the use of solitary confinement has increased in recent years as part of Victorian prisons' response to controlling the spread of COVID-19.[174]

Strip searching is conducted to try and prevent contraband—such as drugs—from entering the prison system.[175] However, it is difficult to determine the prevalence of these practices as the *Corrections Act 1986* (Vic) only requires Victorian prisons to report the 'use of force to compel a prisoner to obey an order'. It makes no reference to the use of solitary confinement or strip searching.[176]

Both Jesuit Social Services and the Victorian Aboriginal Legal Service were critical of the lack of transparency and reporting surrounding these practices.[177] The Victorian Aboriginal Legal Service said that 'whilst the use of force and restraints in prisons may sometimes be necessary', it is currently underreported and the lack of transparency increases the potential that these practices may be misused:

> the fact that prisons are closed environments where a severe power imbalance exists between detained people and staff means that there is a high potential for force to be used excessively and in inappropriate situations. Such abuses can have extremely harmful consequences.[178]

The Victorian Aboriginal Legal Service argued that 'cultural problem[s] in Victorian prisons that [afford] minimal accountability for abuses, including misuse of restraints and force' cannot be overcome without legislative reform. It recommended legislating to prohibit the use of physical and chemical restraints and force, except where authorisation is explicitly granted. It argued that the use of restraint or force 'must only be permissible when necessary, to prevent an imminent and serious threat of injury to

173 Victorian Aboriginal Legal Service, *Submission 139*, pp. 195–196.

174 Human Rights Law Centre, *Submission 58*, p. 17; Fitzroy Legal Service, *Submission 152*, pp. 20–21; Jesuit Social Services, *Submission 119*, p. 51.

175 Ibid.

176 *Corrections Act 1986* (Vic) s 23.

177 Jesuit Social Services, *Submission 119*, p. 51.

178 Victorian Aboriginal Legal Service, *Submission 139*, pp. 204, 6.

the incarcerated person or others' and only ever as a last resort. It recommended that the 'decision to use physical restraints must be made by more than one person, and must be authorised by senior management' and be used for 'no longer than is strictly necessary'. It also argued that people in incarceration should be under observation while they are restrained.[179]

In relation to strip searching, the Victorian Aboriginal Legal Service observed that Victoria currently permits this practice:

> when there is a belief based on reasonable grounds that the search is necessary for the security or good order of the prison, or the safety or welfare of any incarcerated person, or that the incarcerated person being searched is hiding something that may pose a risk.[180]

It noted that this threshold is lower than other Australian states, such as New South Wales and the Australian Capital Territory.[181] It recommended legislating to raise the threshold to enable it only as 'a last resort' performed after pat searches, metal detectors and increased surveillance, or in response to specific intelligence that an person in incarceration is hiding something. The Legal Service also recommended that prison staff be required to consider the potential of strip searching to re-traumatise a person before they proceed.[182]

Jesuit Social Services made similar recommendations in relation to the use of solitary confinement. It argued that 'there must be strict limits on the use of isolation' and that it should never be used for the sole purpose of punishment. It recommended that solitary confinement should only be used for the shortest necessary period—as a last resort—to protect incarcerated people or staff:

> Jesuit Social Services accepts that there may be limited circumstances where separation is necessary for the protection of the young adult or others. Such separation should only be used in a situation where a person might reasonably be expected to cause serious physical harm to themselves or others, and where other de-escalation interventions have not been effective. In de-escalating situations where, physical harm to self or others is not a concern, staff should not rely on separation as a solution and instead be adequately trained in and employ restorative interventions. Separation should be for the minimum amount of time necessary, and subject to daily review. The person affected should also be informed of the reasons for the separation and the expected length of time it will be used. Prison operators should record the use of separation and the relevant data must be made public to ensure accountability and adherence to guidelines.[183]

179 Ibid., pp. 207–209.

180 Ibid., p. 212.

181 Ibid., p. 212.

182 Ibid., p. 214.

183 Jesuit Social Services, *Submission 119*, p. 53.

Liberty Victoria argued that the 'use of solitary confinement should be abolished in all but the most exceptional cases' and should never be used on children.[184] The Human Rights Law Centre submitted that solitary confinement is 'cruel' and should be 'banned in law'.[185]

Fitzroy Legal Service recommended that the Victorian Government legislate to 'prohibit routine strip searching' and to 'require that the least restrictive measures be used to detect drugs and other contraband'.[186] It urged the Victorian Government to 'legislate to ban solitary confinement' and to 'require that managing COVID-19 in prisons be achieved through the least restrictive means'.[187]

The Committee agrees that subjecting anyone, particularly vulnerable people with histories of trauma and abuse, to punitive measures such as solitary confinement, strip searching and the use of physical restraints, can be highly traumatic. The Committee notes that evidence suggested that such practices impede the potential rehabilitation of people in incarceration and makes reoffending more likely.

FINDING 58: Practices such as solitary confinement, strip searching and the use of physical restraints can be highly traumatic and can impede the rehabilitation of people in incarceration.

However, the Committee concedes that such practices may be necessary in extremely limited situations as a last resort for maintaining a safe prison environment. For example, the Committee notes that early indications appear to show that drug use in prisons declined because of visitor restrictions imposed to control the spread of COVID-19.[188] The Committee acknowledges that the limited use of strip-searching—in cases where intelligence indicates that contraband is being smuggled into prison—may be necessary to prevent the renewed entry of drugs into prisons when COVID-19 control measures are wound back.

The Committee believes that practices such as solitary confinement, strip-searching and the use of physical restraints should only be used in exceptional circumstances, and be reported and subjected to additional scrutiny if occurring regularly.

184 Liberty Victoria, *Submission 140*, p. 27.

185 Human Rights Law Centre, *Submission 58*, p. 17.

186 Fitzroy Legal Service, *Submission 152*, p. 21.

187 Ibid., p. 20.

188 Emily McPherson, 'Drug use drops sharply in Victorian prisons during COVID-19 visitor ban', *9 News*, 9 September 2020, <https://www.9news.com.au/national/prisons-victoria-drugs-in-victorian-jails-plummets-after-covid19-visitor-ban/af1af894-cdd9-4172-80a8-cd70f3e6c791> accessed 9 February 2022.

RECOMMENDATION 82: That the Victorian Government review the use of solitary confinement, physical restraints and strip searching in Victorian prisons with a view to introducing policy to regulate the use of these practices:

- in situations where such practices are necessary to maintain the safety of staff or people in incarceration
- as a last resort, where alternative, less restrictive measures have failed
- for strip searching, only where specific intelligence indicates that an individual is trafficking contraband.

Policy should require that such instances are reported to the Secretary of the Department of Justice and Community Safety as soon as practicable.

The Committee notes that the implementation of OPCAT is also critical to increasing transparency of prison conditions and addressing problematic practices.

11.5 Need for greater oversight and transparency

In recent years there have been several inquiries, reviews and reports examining conditions in Victorian prisons that identified instances of corruption, as well as opaque, unfair or illegal practices.

In 2017, the Independent Broad-based Anti-corruption Commission (IBAC) issued a report on corruption risks within the corrections sector. It found that the Victorian prison system—like others around Australia—is exposed to corruption and integrity issues that are not present in the broader public sector. It identified that:

> the provision of contraband, inappropriate relationships, excessive use of force and inappropriate access to information are risks that are created or increased by the specific nature of the correctional environment.[189]

Since that report, IBAC completed several investigations into specific allegations of corrupt conduct in the Victorian prison system. In June 2021, it published a *Special report on corrections* which described the findings of four of those investigations: operations Rous, Caparra, Nisidia and Molara. The findings of these investigations are summarised in Table 11.3.

189 Independent Broad-based Anti-corruption Commission, *Corruption risks associated with the corrections sector*, 2017, p. 3.

Table 11.3 Findings of the Independent Broad-based Anti-corruption Commission's *Special report on corrections*

Operation	Investigation and findings
Rous	Investigated allegations of assault by officers at Port Phillip Prison against three prisoners. IBAC substantiated the allegations in two of the three cases, however the evidence was not sufficient to pursue criminal prosecution. IBAC identified systemic issues and risks related to the use of force, strip searching, use of body-worn cameras (BWCs), and how the incidents were reported and investigated in the prison.
Nisidia	Investigated allegations of corrupt conduct by a welfare officer at Loddon Prison Precinct. IBAC found the welfare officer had arranged for contraband to be trafficked into the prison and unlawfully received bribes from incarcerated peoples' family members. IBAC identified systemic issues and risks with the detection of trafficking activity and the supervision of welfare officers. The welfare officer pleaded guilty to one count of bribery and one count of misconduct in public office and was sentenced to 15 months' imprisonment, reduced to 13 months on appeal.
Molara	Investigated allegations that a corrections officer at Dhurringile Prison had introduced contraband into the facility in exchange for payments from incarcerated peoples' families, and had maintained inappropriate relationships with incarcerated people and their associates. IBAC substantiated these allegations and identified systemic issues and risks related to the detection of smuggling activity, declarable associations and conflicts of interest. The corrections officer pleaded guilty to one consolidated count of bribery and one count of misconduct in public office and was sentenced to six months' imprisonment with a 12-month corrections order.
Caparra	Investigated allegations that a property officer at the Melbourne Assessment Prison failed to disclose associations with current and former incarcerated people and misused Corrections Victoria databases. IBAC substantiated these allegations, however, the evidence was not sufficient to pursue criminal prosecution. IBAC identified systemic issues and risks related to vetting of corrections employees and misuse of information.

Source: Independent Broad-based Anti-corruption Commission, *Summary: Special report on corrections*, p. 1.

IBAC acknowledged that Corrections Victoria responded to these investigations by 'taking steps to reduce the number of corruption risks particularly those related to human rights and use of [body worn cameras] and CCTV'. However, it identified a 'critical need to do more' to ensure that rehabilitation initiatives in prisons are not compromised by corruption and unfair practices:

> One of the most important and challenging areas of focus is the need to address ongoing problematic workplace culture issues and practices that discourage the reporting of suspected corrupt conduct. DJCS and Corrections Victoria have a vital role to play to ensure that corrupt conduct is detected and prevented.
>
> Preventing corruption is essential to achieving Corrections Victoria's aims of rehabilitating offenders and keeping Victoria safe. Where corrections staff fail to act with integrity by smuggling contraband, misusing information, covering up wrongdoing and failing to uphold human rights, these aims are compromised.[190]

IBAC made three recommendations to the Victorian Government to address these concerns, including:

- a review of training, policies, systems and practices
- the introduction of a statutory obligation to report corruption

190 Independent Broad-based Anti-corruption Commission, *Special report on corrections*, p. 96.

- measures to embed a culture of integrity.[191]

The Victorian Ombudsman has also examined conditions in the Victorian prison system in recent years, including the transparency and fairness of some prison processes and how prisons safeguard the rights of people with disabilities who are incarcerated. The findings of these investigations are summarised in Table 11.4.

Table 11.4 Recent Victorian Ombudsman investigations into the Victorian prison system

Investigation	Findings
Investigation into the rehabilitation and reintegration of prisoners in Victoria (2015)	Investigated the effectiveness of rehabilitation and transition services in Victorian prisons to determine whether they reduce recidivism, whether there are any prison cohorts that are not adequately supported and to assess the impact of expanding prison populations. It found that: • There are significant delays in being screened for and accessing rehabilitation programs and that people detained on remand have limited access to them. • transitional support for people released back into the community with alcohol and other drug abuse issues is inadequate. • Demand for specialised mental health placements in prisons outweighs the number of beds across the system. • Support for Aboriginal people in some prisons was inadequate. • There is no consistent process to identify, assess or support people with cognitive impairment in prison. • Specialised services for young adult males are good, but access is limited and there is no equivalent service for women. • Likewise, transitional support for incarcerated people re-entering the community is good, but access is limited. The Victorian Ombudsman made 25 recommendations to improve rehabilitation and reintegration services.
Investigation into good practice when conducting prison disciplinary hearings (2021)	Investigated whether prison disciplinary hearings were being conducted in accordance with best practice to ensure they are fair, observe good decision-making principles and meet legislative and policy requirements. It found that: • While many of the disciplinary hearings reviewed contained examples of good practice, unfair practices were also identified. • It was evident that prisons struggle to ensure people with a disability are independently supported through disciplinary processes. • Processes for calling witnesses and documenting proceedings are poor. This may be undermining the fairness of disciplinary processes as the lack of written reasons for hearing outcomes and limited avenues for review may increase the risk of unfair decision making. • There is a lack of oversight and transparency of prison disciplinary processes and little independence. The Victorian Ombudsman made six recommendations to improve disciplinary processes.

Source: Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, 2015; Victorian Ombudsman, *Investigation into good practice when conducting prison disciplinary hearings*, 2021.

In June 2021, the Victorian Government responded to the findings of IBAC and the Victorian Ombudsman by appointing an independent panel to undertake a Cultural Review of the Adult Custodial Corrections System. The Review is examining culture,

191 Ibid., p. 97.

safety, inclusion and integrity within both public and private adult Victorian prisons to identify how best to ensure conditions:

- safeguard the wellbeing and safety of prison staff
- maintain the safety of people in custody.[192]

The Review is expected to report its findings to the Minister for Corrections by mid-2022.[193]

Many stakeholders expressed concern in relation to the findings of these reviews and argued that greater independent oversight of Victorian prisons is needed to improve conditions and to address corrupt, opaque, unfair or illegal practices. The Victorian Alcohol and Drug Association echoed IBAC's finding that a lack of integrity within prisons is adversely impacting the rehabilitation and reintegration prospects of people who are incarcerated. It felt that corruption within Victorian prisons is endemic and is enabled by 'systemic flaws generated through an absence of meaningful oversight and public disclosure'.[194]

Likewise, Liberty Victoria said that 'preventing corruption and increasing oversight and transparency within Victorian prisons is essential to achieving rehabilitation of offenders, reducing recidivism and the criminogenic effect of incarceration, and keeping all Victorians safe'. It urged the Committee to consider the findings of IBAC and the Victorian Ombudsman.[195] Fitzroy Legal Service argued that 'improving conditions in detention and eliminating harmful, degrading and abusive practices in prisons requires independent oversight of the conduct of prison authorities'.[196]

The Justice Map claimed that most other states have an independent body to report on prisons and suggested that the Western Australian Office of the Inspector of Custodial Services is 'seen as the model for scrutinising the operations of prisons'. It outlined the strengths of the Office, including that its oversight powers include privately-operated prisons:

> The office reports directly to Parliament and has its own funding and statute, in contrast to some of the other inspectors in other states.
>
> It has been highly influential across its 20 years of existence, with the state government accepting around 80 percent of its recommendations, and a recent report leading to a privately-managed prison being returned to public hands.
>
> The OICS [Office of the Inspector of Custodial Services] has a legislative requirement to inspect every prison, youth detention centre and court custody centre in WA at least

192 Victorian Government, *Cultural Review of the Adult Custodial Corrections System*, <https://www.correctionsreview.vic.gov.au> accessed 30 November 2021.

193 Ibid.

194 Victorian Alcohol and Drug Association, *Submission 128*, pp. 9–10.

195 Liberty Victoria, *Submission 140*, p. 30.

196 Fitzroy Legal Service, *Submission 152*, p. 23.

once every three years. It also completes a number of reviews into specific issues and incidents and runs the prison visitor scheme.[197]

Like other organisations which contributed to the Committee's Inquiry, the Justice Map also suggested that the implementation of OPCAT will improve transparency of prison conditions and assist in addressing problematic practices.[198]

OPCAT is an international human rights treaty aimed at preventing cruel, inhuman or degrading treatment or punishment and torture in situations of detention and incarceration. It was ratified by Australia in December 2017.[199]

State parties to OPCAT—such as Australia—agreed to establish an independent National Preventative Mechanism (NPM) to provide oversight of places of detention and incarceration within their jurisdictions. They also agreed to enable the United Nations Subcommittee on the Prevention of Torture to undertake international inspections of these facilities.[200]

The Australian Government has been working with state and territory governments to implement OPCAT by January 2022. It intends to establish NPMs through a network of Commonwealth, state and territory bodies responsible for inspecting places of detention. The network will be facilitated by the Office of the Commonwealth Ombudsman, acting as both national NPM Coordinator and as the NPM body for Commonwealth places of detention.[201] Under this approach, the Victorian Government—like other state and territory governments—was required to nominate one or more NPMs to monitor places of detention and incarceration within its jurisdiction.[202] It allocated $500,000 to support the implementation of OPCAT in its 2021–22 State Budget.[203] However, at the time of writing this report, the Victorian Government had not yet nominated NPMs.

Several legal organisations made submissions to the Inquiry urging the Victorian Government to implement OPCAT within its jurisdiction and nominate NPMs.

Smart Justice for Young People submitted that properly implementing OPCAT will 'improve conditions in prisons and other places of detention, and … prevent ill-treatment of children in detention'. It called for NPMs to be 'urgently established' and stressed that their oversight responsibilities must encompass 'all places where children and young people may be deprived of their liberty including secure care and

197 The Justice Map, *Submission 157 [Attachment 1]*, pp. 24, 6-7.

198 Ibid., pp. 29–31.

199 Australian Human Rights Commission, *OPCAT: Optional Protocol to the Convention against Torture* 2020, <https://humanrights.gov.au/our-work/rights-and-freedoms/projects/opcat-optional-protocol-convention-against-torture> accessed 1 December 2021.

200 Ibid.

201 Attorney-General's Department, *Recommendation 17: United Nations human rights recommendations database* <https://www.ag.gov.au/recommendations/recommendation-17> accessed 1 December 2021.

202 Commonwealth Ombudsman Michael Manthorpe PSM, 'The implementation of OPCAT in Australia and the challenges for detention inspections in a COVID-19 world', speech delivered at 10th Annual Prisons Conference, Aerial UTS Function Centre, Sydney, 15 June 2021.

203 Department of Justice and Community Safety, *Budget Paper 3*, 2021, p. 88.

police cells'. It also argued that NPMs must be equipped with the expertise to work with vulnerable children and young people.[204]

Fitzroy Legal Service argued that implementing OPCAT would achieve independent oversight of conditions in Victorian prisons. It recommended that the Victorian Government consult with 'civil society, including Aboriginal and Torres Strait Islander organisations' to 'urgently establish and adequately resource' NPMs.[205] It also cautioned that the implementation of OPCAT alone cannot resolve all problematic prison conditions and practices. It argued that 'any oversight mechanism must be accompanied by sustained and adequate investment in community based, non-government services, including community legal centres and Aboriginal controlled organisations, to conduct advocacy on behalf of people in prison'. Fitzroy Legal Service stated:

> OPCAT alone isn't enough. FLS [Fitzroy Legal Service] knows first-hand the importance of civil society playing a role in advocating for the rights of people in prison and ensuring they are not mistreated. Problems often arise that require urgent attention – for example, a person's health condition is not being properly treated, or they have been inappropriately placed in solitary [confinement] … We receive an enormous number of enquiries and know that we can't and don't reach most people who need our assistance.[206]

Jesuit Social Services also recommended the urgent implementation of OPCAT to improve the accountability and oversight of Victorian prisons. However, it too cautioned that implementing OPCAT alone cannot address all issues in the criminal justice system and advocated for 'more transformative change … that keeps people out of prison and removes the imperative for new or expanded prisons'.[207]

The Human Rights Law Centre counselled the Victorian Government to establish and resource NPMs 'to prevent mistreatment behind bars'. It argued that 'OPCAT-compliant inspections of places of detention would help shine a light on practices behind bars that undermine people's ability to address the causes of their offending'. It also encouraged the Government to conduct 'transparent, inclusive and robust consultations' with civil society and Aboriginal controlled groups to inform this work'.[208]

The Victorian Aboriginal Legal Service and the Aboriginal Justice Caucus expressed a similar position on the implementation of OPCAT. The Caucus submitted that the Victorian Government's most recent budget allocation for the implementation of OPCAT is insufficient and called on it to establish and properly resource NPMs:

> The AJC [Aboriginal Justice Caucus] recommends that the Government must urgently undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community, its representative bodies and ACCOs [Aboriginal Community Controlled

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204 Smart Justice for Young People, *Submission 88*, p. 17.

205 Fitzroy Legal Service, *Submission 152*, p. 24.

206 Ibid.

207 Jesuit Social Services, *Submission 119*, p. 55.

208 Human Rights Law Centre, *Submission 58*, p. 19.

> Organisations] in the implementation of OPCAT in a culturally appropriate way. The operations, policies, frameworks and governance of the designated and independent detention oversight bodies under OPCAT (National Preventative Mechanisms) must be culturally appropriate and safe for Aboriginal people.[209]

The Victorian Aboriginal Legal Service said it has 'repeatedly called for the Victorian Government to take steps' to implement OPCAT and characterised the budget allocation for implementation as 'woefully inadequate'.[210] It also emphasised that any NPM must be 'culturally appropriate and safe for Aboriginal people' and recommended that the Victorian Government consult the Aboriginal community and its representative bodies on how best to achieve this. It called on the Victorian Government to provide an update on progress towards its implementation of OPCAT.[211]

In a response to a question on notice, DJCS reaffirmed the Victorian Government's support for the principles of OPCAT and suggested that 'robust oversight regimes [are] already in place to ensure that people in detention are protected against torture and other cruel inhuman, or degrading treatment or punishment'. It asserted that additional Commonwealth funding is required to implement OPCAT in Victoria:

> The Commonwealth's ratification of OPCAT imposes additional and separate obligations on states and territories. Victoria has been consistent in its position that a sufficient and ongoing funding commitment from the Commonwealth is essential to implement and deliver on these obligations into the future. The absence of this has significantly hampered our ability to progress the necessary preparatory work and consultation.
>
> On 18 October 2021, the Victorian and NSW Attorneys-General wrote jointly to the Commonwealth, explaining that Victoria and NSW would be unable to take steps to implement OPCAT, in the absence of an accompanying sufficient and ongoing funding commitment from the Commonwealth.[212]

The Committee acknowledges the important oversight and investigatory work pursued by IBAC and the Victorian Ombudsman. Their reports into corruption, rehabilitative programs and disciplinary proceedings have increased the transparency of prison operations, and exposed unfair and illegal practices in recent years. Their recommendations have been generally accepted by the Victorian Government and have driven significant improvements.

However, in the Committee's view, the evidence canvassed throughout this Inquiry clearly illustrates that there is potential to provide more systematic oversight of Victorian prisons. Rapidly expanding prison populations, cohorts of people who are incarcerated that complex and differing needs, and a global pandemic have made it more difficult to maintain adequate prison conditions which enable rehabilitation. It is unclear whether the healthcare provided to prisoners is of an equivalent standard

209 Aboriginal Justice Caucus, *Submission 106*, p. 12.

210 Victorian Aboriginal Legal Service, *Submission 139*, pp. 223–224.

211 Ibid., p. 224.

212 Department of Justice and Community Safety, response to questions on notice, p 3.

to that available to the general community. More women are being incarcerated and the negative consequences are flowing through to their dependent children and the broader community. Incarcerated people with disabilities are not being identified, are missing out on key support, and are being subjected to unnecessary disciplinary hearings. Further—and crucially—Aboriginal people are continuing to die in custody in Victorian detention facilities despite the work of the Royal Commission into Aboriginal Deaths in Custody.

The Committee notes that, to its credit, the Victorian Government remains steadfast in its commitment to ensuring that prison conditions do not further harm or disadvantage people in custody, and that prisons are operated in accordance with international human rights standards and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[213] The Committee is of the view that facilitating human rights-based outcomes requires the timely implementation of *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and the establishment of Victorian-based National Preventative Mechanisms, in order to provide the ongoing independent oversight needed to drive steady improvement.

FINDING 59: The implementation of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* will foster better prison conditions by providing ongoing independent oversight of Victorian detention facilities.

The Committee acknowledges that the Victorian Government—like other state and territory governments—is seeking additional resources from the Commonwealth to support the implementation of OPCAT. The Committee encourages the Government to continue to advocate for these resources but urges it to nevertheless pursue implementation of these obligations as soon as possible.

RECOMMENDATION 83: That the Victorian Government provide a comprehensive update on the implementation of obligations under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* in its jurisdiction to date, as well as a timeframe for full implementation including the appointment of National Preventative Mechanisms. It should further seek to realise full implementation of these obligations as a matter of priority.

213 Victorian Government, *Submission 93*, p. 56.

12 Prison supports and rehabilitation

At a glance

Depending on conditions, prison can be criminogenic—that is, it can encourage further offending—or it can be rehabilitative and reduce recidivism rates. Incarcerated people in Victoria have access to a range of support services, therapeutic programs and work experience opportunities that seek to address the factors underpinning criminal behaviour and enhance characteristics which support dissidence from further offending.

Key issues

- Access to rehabilitative programs is being constrained by sentencing practices for people held on extended remand, inadequate resources and COVID-19 restrictions.
- Corrections Victoria's strategic plan is outdated, and its offender management framework has not been refreshed in over five years.
- Greater access to technology, including the internet can expand the rehabilitative and educational programs incarcerated people can access and better prepare them for life in the community.
- Planning to support incarcerated people's transition back into the community must commence early and facilitate a seamless shift from prison-based to community-based support and therapeutic services.
- Access to the National Disability Insurance Scheme and social housing is critical for incarcerated people re-entering the community with disabilities or who are at risk of homelessness.
- Several reviews and investigations have made a plethora of recommendations to improve youth custodial precincts in recent years.

Findings and recommendations

Finding 60: Prison conditions which are targeted at identifying and addressing disability, mental health, trauma and other significant challenges faced by incarcerated people can provide an important opportunity to address criminal behaviours and reduce the risk of reoffending. Prison conditions which are punitive, normalise violence and reduce the socioeconomic resources of incarcerated people can be criminogenic and increase rates of recidivism.

Finding 61: Recidivism rates suggest that our current punitive approach to criminal behaviour is not reducing crime or improving community safety.

Finding 62: The Department of Justice and Community Safety's strategic plan for the management of prisons, *Corrections Victoria Strategic Plan 2015–2018*, is more than three years out of date and its *Offender Management Framework* has not been refreshed since 2016

Recommendation 84: That the Department of Justice and Community Safety update and modernise its *Corrections Victoria Strategic Plan 2015–2018* and its *Offender Management Framework*. In undertaking this work, the Department should consider the principles for effective rehabilitative programs outlined in Table 12.1 of this report.

Recommendation 85: That the Department of Justice and Community Safety ensure that all incarcerated people—whether held on remand or serving a custodial sentence—in both publicly- and privately-operated prisons, have access to forensic rehabilitation programs and supports which are aimed at addressing the factors underpinning their criminal behaviours.

Recommendation 86: That the Victorian Government provide additional funding for rehabilitative programs and supports in public and private prisons. Funding should be scaled up in line with growth in prison populations, to ensure all who wish to access these services are able to.

Recommendation 87: That the Victorian Government provide funding to facilitate the expansion of online rehabilitative programs and support services to increase their accessibility to a broader range of incarcerated people.

Finding 63: Supporting incarcerated people to arrange continuing mental health services following their release from prison can help make reintegration into the community less stressful and reduce instances of further offending.

Recommendation 88: That the Victorian Government substantially increase funding to ensure that resourcing for services which treat alcohol and other drug use issues in Victorian prisons and the community is commensurate with demand for these services. Funding should also be provided to enhance connections between prison based and community-based services to facilitate seamless throughcare for incarcerated people re-entering the community.

Recommendation 89: That the Department of Justice and Community Safety strengthen transitional support planning for incarcerated people in both publicly- and privately-operated prisons to ensure continuity of service with regard to mental health and alcohol and other drug treatment following release for those who require it. The Department should engage incarcerated people in transitional planning to ensure that the service meets their needs and that they are familiar with how to access it prior to their release.

Finding 64: Education, training and work experience opportunities in prisons can support incarcerated people to reintegrate into the community, gain employment and refrain from reoffending following their release.

Finding 65: Greater access to technology, including the internet, will expand the education and rehabilitative programs accessible to incarcerated people and support them to develop the digital literacy essential to contemporary life and successful reintegration into the community.

Recommendation 90: That the Department of Justice and Community Safety conduct consultation—with public and private prison operators, incarcerated and formerly incarcerated people, education providers, rehabilitative program providers, Victorian Aboriginal organisations and victims of crime, at a minimum—with a view to developing and implementing a digital access policy for Victorian prisons. The policy should establish minimum standards for access to technology and the internet for incarcerated people, and outline security measures to ensure access is utilised ethically, responsibly, in a manner which aligns with community expectations, and which maintains community safety.

Finding 66: The period immediately following an incarcerated person's release back into the community can be challenging and dangerous, particularly for people with alcohol and other drug use issues. The risk of relapse, overdose and death is heightened during this period.

Finding 67: Appropriate and timely transitional support for incarcerated people exiting Victorian prisons can reduce adverse health outcomes (such as death) following release, facilitate successful reintegration into the community and reduce recidivism.

Recommendation 91: That the Victorian Government increase funding and other resources available to:

- Corrections Victoria, to support comprehensive pre-release planning for all incarcerated people prior to their reintegration back into the community
- community-based services—that provide mental health, alcohol and other drug treatment, disability support, education and training, and culturally appropriate support—to assist people exiting prison to reintegrate back into the community.

Recommendation 92: That the Victorian Government work with the Commonwealth Government to:

- clarify and resolve definitional issues within the Applied Principles and Tables of Support which are inhibiting National Disability Insurance Scheme funding for incarcerated people with disabilities
- ensure that National Disability Insurance Scheme plans for incarcerated people with disabilities can be finalised without the need for a confirmed release date.

Finding 68: Safe, secure, long-term accommodation enables people being released from prison to seek education or employment, rebuild connections with family and community, and engage with therapeutic services addressing criminal behaviours. It is also known to reduce re-offending.

Recommendation 93: That the Victorian Government respond to the Legislative Council Legal and Social Issues Committee's Inquiry into homelessness in Victoria as soon as possible and explain why this response was not made within the six months provided for by the Legislative Council Standing Orders.

Recommendation 94: That the Victorian Government provide a detailed update on the measures it has taken towards implementing the 39 recommendations it accepted in full or in principle which were made by the Legislative Council Committee on Legal and Social Issues as part of its Inquiry into Youth Justice Centres in Victoria. This implementation update should be provided within six months of this report being tabled.

Recommendation 95: That the Victorian Government provide a detailed update on the measures it has taken towards implementing the recommendations it accepted in full or in principle which were made in the following reports:

- the *Ogloff-Armytage Youth Justice Review and Strategy: Meeting needs and reducing offending* (2016)
- the *Victorian Auditor-General's Office's Managing Rehabilitation Services in Youth Detention* (2018).

This implementation update should be provided within six months of this report being tabled.

12.1 Incarceration and recidivism

As Chapter 11 describes, the Victorian prison environment can be challenging and can exacerbate the physical and emotional vulnerability of incarcerated people. Stakeholders suggested that as a result, imprisonment is not effective in reducing recidivism in and of itself.[1] The Australian Community Support Organisation—which provides mental health, disability support, housing and employment services to people at risk of entering, or who have already entered, the justice system—undertook a literature review on the factors informing recidivism. It found that punitive or 'discipline-based interventions such as incarceration are not effective at reducing recidivism except for incapacitating those in custody for a short time'.[2] The Justice Reform Initiative also asserted that punishment or the threat of punishment does not shift criminal behaviour or reduce recidivism.[3]

The Sentencing Advisory Council provided data relating to recidivism which illustrated that many people who enter Victorian prisons commit further offences following their release. Its 2015 report, *Reoffending following sentence in Victoria: A statistical overview*

1 For example, see: Law Institute of Victoria, *Submission 112*, p. 58. Justice Reform Initiative, *Submission 103*, p. 4.

2 Australian Community Support Organisation, *Submission 91*, pp. 2, 14.

3 Justice Reform Initiative, *Submission 103*, p. 3.

found that in the 10 years to June 2014, just under half of people who committed offences went on to commit further offences (approximately 44%). Its research also indicated that:

- nearly half (47%) of reoffending occurred within the first two years following the initial sentence
- males had a higher reoffending rate (47%) than females (36%)
- offenders aged 10 to 17 years had a higher reoffending rate (64%) than older offenders (44%)
- traffic offences, including drink driving, were by far the most common offence category in the first and second sentencing event in the study (comprising 42% of offending in each event)
- the likelihood of offenders receiving imprisonment was more than four times greater on their tenth offending episode (37%) than in their first offending episode in the study period (7%)
- the majority (61%) of reoffenders committed different offences in their first and second episodes
- the offence most likely to be repeated was traffic offences (at a rate of 63%) while sexual offences (10%) and arson and property offences (9%) were the least likely to be repeated.[4]

Stakeholders to the Inquiry—including the Victorian Government—generally agreed that the challenging conditions in Victorian prisons can actually be 'criminogenic', that is, they can reinforce criminal behaviour, promote reoffending and increase recidivism.[5] For example, the Justice Reform Initiative asserted:

> Prison is itself criminogenic. That is, any time in prison increases rather than reduces the likelihood of future imprisonment. Recidivism rates around Australia (and in Victoria) show very clearly that prison doesn't work to reduce re-offending. In Victoria, 44% of people will return to prison within two years following release.[6]

Justice Action likewise stated that 'prisons are criminogenic as they connect networks of offenders, isolate them from their loved ones and the community, and diminish employment prospects'. It noted that this 'is particularly damaging given the high proportion of the prison population that are unsentenced'.[7]

The Centre for Innovate Justice at RMIT made a similar claim in its submission to the Inquiry:

4 Sentencing Advisory Council, *Submission 17*, p. 5.

5 For example: Dr Diana Johns, *Submission 104*, p. 4; Justice Reform Initiative, *Submission 103*, pp. 4, 6; Victorian Government, *Submission 93*, p. 11.

6 Justice Reform Initiative, *Submission 103*, p. 4.

7 Justice Action, *Submission 102*, p. 10.

> a significant body of literature which suggests that criminal justice involvement for less serious offenders is itself criminogenic, and that the social exclusion, stigmatisation, anti-social influences and trauma resulting from imprisonment encourages and reinforces offending behaviour.[8]

Dr Diana Johns, Senior Lecturer in Criminology at the University of Melbourne, argued that incarceration contributes to recidivism by creating the 'causes and conditions for further offending' through the normalisation of violence and by reducing the social and economic resources of those detained:

> **Normalised violence** is often part of prison life, part of a culture that fosters, promulgates and 'hothouses' toxic forms of masculinity and norms such as homophobia, misogyny, domination and retributive violence. These can become the 'cultural tools' that people use to survive life in prison, and that can be difficult to leave behind when they return to the community.
>
> **The serial depletion of resources** refers to the whittling away of social, economic, cultural and community resources that accompanies and accumulates with every term of repeat imprisonment, resources that people need to survive and thrive in the community. This is one of the main ways in which prison itself is criminogenic and increases reoffending risks.[9]

Dr Karen Gelb has been involved in criminal justice system research for 15 years. She similarly suggested that the criminogenic effects of incarceration arise from its potential to be traumatic and its disruptive impact on people's lives and social connections:

> Imprisonment has been postulated to exert a criminogenic effect in a number of ways, particularly as it stigmatises and labels people who have been incarcerated, making it more difficult for them to find employment or stable accommodation upon release or to regain pro-social relationships. It breaks up families, increases the risk of reoffending by disrupting pro-social support systems and exposes people to criminal networks that operate in any prison system. A conviction can also exacerbate family violence and mental health or other health problems. Any time spent in custody – even a short period on remand – can be traumatic and disruptive; remand increases the likelihood of a sentence of imprisonment being imposed and ultimately increases the risk of reoffending.[10]

The Justice Reform Initiative likewise asserted that prison fails to rehabilitate criminal behaviour because 'almost everybody who goes to prison gets out in a state that is worse than what it was when they were first incarcerated'.[11]

8 Centre for Innovative Justice, *Submission 82*, p. 1.

9 Dr Diana Johns, *Submission 104*, p. 4.

10 Dr Karen Gelb, Director, Karen Gelb Consulting, *Submission 70*, p. 2.

11 Justice Reform Initiative, *Submission 103*, p. 4.

> **Locking people up isn't the solution and it doesn't fix any problems, and prisons are actually not set up to stop cycles of addiction, they're not set up to stop cycles of violence. If anything, they create more of that in people, they create more fear, they create more trauma and then they just push people back into society and say – "deal with it"**
>
> Joan, Womens Leadership Group, *Submission 154*, p. 7.

George Selvanera, Acting Chief Executive Officer of the Victorian Aboriginal Legal Service, implied that the criminogenic nature of prisons is understandable, given the complex and often intergenerational trauma informing the criminal behaviours of incarcerated people:

> we know that prisons themselves are a criminogenic factor, so you are more likely to go to prison again if you have been to prison. Prisons … are not working. It is not to blame them in some senses, because it is expecting them to solve a whole range of intergenerational disadvantages and intergenerational trauma and to kind of live I guess to some extent with the consequences of whatever the laws are that put people into prison to start with.[12]

The Victorian Government said that incarceration can be criminogenic because it 'can entrench and exacerbate socioeconomic and health issues, causing trauma, instability and disconnection from society'. However, it also suggested that prison can be an 'opportunity for intervention'.[13] The Committee heard evidence corroborating this point throughout the Inquiry. Prison environments which promote physical and emotional wellbeing and facilitate access to appropriate rehabilitative programs can support incarcerated people to address criminal behaviours and avoid further contact with the criminal justice system. The Australian Community Support Organisation explained:

> Prison design, organisational context and general environment is generally not therapeutic, but more related to supervision and security … Prisons that incorporate a more therapeutic focus, implemented in staff capability building, organisational structure, core correctional practices that promote procedural justice and level of collaboration with other agencies, may improve therapeutic outcomes and reduce recidivism.[14]

While the Australian Community Support Organisation argued that incarceration should be viewed as 'a last resort in addressing offending behaviour', it acknowledged that custody also presents an opportunity to engage with vulnerable people and begin addressing the factors underpinning their risk of further contact with the justice system.[15]

12 George Selvanera, Acting Chief Executive Officer, Victorian Aboriginal Legal Service, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 34.

13 Victorian Government, *Submission 93*, p. 44.

14 Australian Community Support Organisation, *Submission 91*, p. 17.

15 Ibid.

Guy Coffey, a clinical psychologist, drew on his experience providing psychological assessments of people who have offended for Victorian courts. He noted that custody can be used to ensure vulnerable people get access to the services they need to address criminal behaviours:

> Many offenders enter the criminal justice system having never had their developmental disorders, learning difficulties, substance addictions and mental illnesses properly identified or treated. Contact with the criminal justice system should be seen as an opportunity to ensure the medical, psychological and psychosocial needs of the prisoner are comprehensively identified and a detailed treatment plan is devised. The treatment plan should identify the different stages of treatment required - what is to be delivered in custody and what post-release. Community services should be involved at an early stage in treatment planning and should engage the prisoner well prior to their release.[16]

The Prison Network has been supporting women and their families to navigate the Victorian prison system for over 75 years. It noted that:

> at its best, incarceration provides a space away from some of the challenges of life in the community (such as homelessness, active addiction, family violence settings etc.) for women to consider the possibility of change and engage in a rehabilitative process.[17]

However, it tempered this evidence by acknowledging that 'research indicates that for those who report cessation or reduction of AOD use while in prison … this is typically an interruption of use rather than a long-term change'.[18]

The Justice Reform Initiative reiterated that people do not change criminal behaviours because of punishment or the threat of punishment, but rather as a result of 'support, care and connection'. It asserted that this support is currently provided in a haphazard way. It further argued that all incarcerated people 'require access to meaningful support, drug and alcohol treatment, mental health support, disability specific support, education, and connection with community when released' if custody is going to shift their behaviours.[19]

The Australian Psychological Society recommended that Victoria ensure that 'rehabilitation, rather than punishment, is central to correctional practices'. It suggested that:

> trauma informed and culturally safe approaches should be embedded within correctional practices and policies to increase the potential for prisons to be rehabilitative.[20]

16 Guy Coffey, *Submission 149*, p. 10.

17 Prison Network, *Submission 142*, p. 2.

18 Ibid.

19 Justice Reform Initiative, *Submission 103*, p. 3.

20 Australian Psychological Society, *Submission 90*, p. 8.

The Committee acknowledges that the nature of conditions in Victorian prisons determines how and in what way incarceration provides opportunities for rehabilitation. These opportunities are critical in reducing risks of recidivism.

FINDING 60: Prison conditions which are targeted at identifying and addressing disability, mental health, trauma and other significant challenges faced by incarcerated people can provide an important opportunity to address criminal behaviours and reduce the risk of reoffending. Prison conditions which are punitive, normalise violence and reduce the socioeconomic resources of incarcerated people can be criminogenic and increase rates of recidivism.

FINDING 61: Recidivism rates suggest that our current punitive approach to criminal behaviour is not reducing crime or improving community safety.

The remainder of this Chapter examines the prison conditions, services and programs needed to address the causes of criminal behaviour and reduce the recidivism rates of incarcerated people. It also outlines how supporting incarcerated people to reintegrate back into the community can further reduce risk of reoffending.

It is important to note that incarceration is only one of many pathways to support opportunities for rehabilitation. Other pathways, such as through early intervention measures, alternative sentencing schemes and diversionary measures, are explored in Part B and Part D of this report.

12.2 Principles informing effective rehabilitation and support programs

Inquiry stakeholders outlined seven general principles critical to delivering effective rehabilitative programs in Victorian prisons. These are outlined in Table 12.1.

Table 12.1 Principles of effective rehabilitative programs

Principle	Description
Early screening to identify social, legal, health and forensic challenges which require intervention and strengths which could be leveraged	Effective interventions require the social, legal, health and forensic challenges; and the strengths of individuals to be assessed immediately following their incarceration. This will inform their access to appropriate multi-disciplinary services and rehabilitative programs, education and training as soon as possible and ensure the best possible leveraging of their time in custody to address criminal behaviours and enhance protective factors.
Tailored to individual needs	Effective interventions are proportionate to an individual's risk of reoffending, address the unique factors underpinning their criminal behaviours, and are tailored to their strengths and motivations. This principle is reflected in the risk, needs, 'responsivity' approach and recognises that broad interventions or one-size-fits-all approaches do not reduce recidivism. Tailoring interventions to individual needs also involves ensuring that rehabilitative services and programs deliver information and engage with people in a manner they can understand and connect with. This is particularly important when addressing criminal behaviours of people with cognitive impairments and other disabilities—a significant cohort of incarcerated people.
Leverage individual strengths	Effective interventions encompass more than just targeting the factors underpinning criminal behaviours, they also leverage individuals' strengths to increase their resilience to offending. For example, education and training to gain secure employment in an area of interest.
Voluntary participation	Effective interventions require voluntary participation from incarcerated individuals. Rehabilitative programs which operate on carceral logic, that threaten to punish people for non-participation, are unlikely to be effective.
Culturally appropriate	Effective interventions are culturally appropriate and safe as they are designed and delivered with input from the communities which incarcerated people may belong to. For example, culturally and linguistically diverse communities, Aboriginal Victorians, and LGBTQIA+ communities.
Promote connection to family and community	Emerging evidence indicates that interventions which involve the families and communities of people who have offended may be particularly effective at addressing the criminal behaviours of people at highest risk of reoffending.
Integrated case management and throughcare	Effective interventions connect individuals with specialised services and programs that meet their individual needs. They continue to support them from incarceration on remand or conviction all the way through to their release and reintegration back into the community.

Source: Australian Community Support Organisation, *Submission 91*, pp. 15–17; Australian Psychological Society, *Submission 90*, pp. 7, 9; Victorian Aboriginal Legal Service, *Submission 139*, pp. 179–180, 193–194; Victorian Aboriginal Child Care Agency, *Submission 121*, p. 9; Jesuit Social Services, *Submission 119*, p. 42; VALID, *Submission 156*, pp. 23–24.

In addition to these principles, Julie Edwards, Chief Executive Officer of Jesuit Social Services, noted the importance of evaluating the efficacy of programs aimed at reducing recidivism. While not speaking specifically in relation to rehabilitation programs being delivered in prisons (as opposed to a community setting), Julie Edwards said funding for rehabilitation programs should be informed by an evaluation of their outcomes.[21]

21 Julie Edwards, Chief Executive Officer, Jesuit Social Services, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 22.

In contrast to the detailed principles for successful rehabilitation outlined by stakeholders to the Inquiry, Corrections Victoria's most recent strategic plan (2015–2018) outlines five principles and five strategic priorities underpinning the management of prisons, including just two aimed specifically at reducing recidivism:

- **Principle 2:** Corrections Victoria will deliver programs and services that effect positive behaviour change to reduce reoffending and further harm to the community.
- **Strategic priority 2:** Delivering integrated rehabilitation and reintegration programs that reduce the likelihood of reoffending and support community safety.[22]

The strategic plan acknowledges that:

> a correctional system that is serious about reducing reoffending and the impact of crime on the community must commit to the delivery of programs and services that will affect the right change in our prisoners and offenders'.[23]

While Corrections Victoria does not commit to specific programs and services within the plan, it does aim to provide:

- integrated offender management which ensures the complex needs of incarcerated people are addressed throughout their sentence, from entering custody to re-entering the community
- services to support incarcerated people to transition back into the community, including accommodation and programs to assist with reconnecting to family, accessing education and gaining employment
- access to rehabilitative programs for people incarcerated on a short-term basis
- programs targeting people identified as being at risk of committing family violence to address these behaviours
- education, employment and training programs to support incarcerated people to join the workforce upon release
- improve access to, and increase the participation of, Aboriginal people in rehabilitative and support programs, as provided for under the Aboriginal Justice Agreement
- tailored support and rehabilitative programs for different cohorts, such as persons who have committed sex offences, women, young adults and aging persons.[24]

22 Department of Justice and Regulations, *Corrections Victoria*, 2015, pp. 7, 14.

23 Ibid., p. 7.

24 Ibid., pp. 14–15.

Corrections Victoria's strategic plan is complemented by an *Offender Management Framework* which outlines a 'risk, needs, responsivity' approach to addressing rehabilitative requirements of incarcerated people. This involves:

- targeting intervention to people at a higher risk of reoffending (compared to all people who have committed similar offences)
- targeting interventions to the factors underpinning criminal behaviours (such as substance abuse or pro-offending attitudes)
- providing access to rehabilitative programs in a form that incarcerated people will respond to.

This approach is explained further in Figure 12.1.

Figure 12.1 Corrections Victoria's 'risk, needs, responsivity' approach to managing incarcerated people

Note: Responsivity is split into ensuring that programs meet the internal (or psychological) characteristics and the external (or prison) conditions of incarcerated people.

Source: Corrections Victoria, *Offender Management Framework-Achieving the balance*, June 2016, p. 15.

The Committee received mixed evidence regarding Corrections Victoria's approach to providing rehabilitative and support programs to incarcerated people, particularly to its application of a risk, needs, responsivity approach. The Australian Community Support Organisation supported Corrections Victoria's approach, asserting that 'interventions that are flexible and responsive to the specific strengths of individuals and proportionate to their level of risk and need are most effective'. It noted that this approach requires assertive case management which assists people to access multi-disciplinary services, and which is responsive to the unique needs of different cohorts, for example, women or Aboriginal Victorians.[25]

25 Australian Community Support Organisation, *Submission 91*, p. 16.

The Australian Psychological Society acknowledged similar approaches have been adopted across Australian jurisdictions and are informed by studies showing that 'a minority of high-risk people who offend commit the majority of crimes'. However, it also suggested that this approach means that 'a majority of both violent and non-violent offenders do not receive offence-specific intervention'. It argued that prisons should deliver offence-specific interventions to address the criminal behaviours of people at moderate or lower risk of offending:

> The impact of reducing recidivism for offenders, victims, their families and the community is significant and while intervention with higher risk violent offenders is important, so too is delivering a range of moderate and high-risk interventions to all offenders. Interventions need to focus on assessed level of risk, individual requirements, and consideration of responsivity factors, irrespective of offence type.[26]

The Society believed that:

> funding should be delivered, as a matter of urgency, to provide a suite of behaviour programs targeting all offending cohorts assessed as being at moderate or high risk of reoffending.[27]

The Committee acknowledges that the principles of effective rehabilitative programs, as outlined by stakeholders to the Inquiry, are informed by considerable expertise and direct experience with Victoria's prison system. It also notes evidence that ongoing funding for the delivery of rehabilitation programs should be informed by program evaluations demonstrating their efficacy. Moreover, it notes that the Department of Justice and Community Safety's (DJCS) strategic plan for the management of prisons is more than three years out of date and its *Offender Management Framework* has not been refreshed since 2016.

FINDING 62: The Department of Justice and Community Safety's strategic plan for the management of prisons, *Corrections Victoria Strategic Plan 2015–2018,* is more than three years out of date and its *Offender Management Framework* has not been refreshed since 2016.

The Committee would like to see DJCS' commitment to rehabilitating incarcerated people reflected in a current strategic plan and offender management framework.

RECOMMENDATION 84: That the Department of Justice and Community Safety update and modernise its *Corrections Victoria Strategic Plan 2015–2018* and its *Offender Management Framework*. In undertaking this work, the Department should consider the principles for effective rehabilitative programs outlined in Table 12.1 of this report.

26 Australian Psychological Society, *Submission 90*, p. 7.

27 Ibid.

12.3 Access to rehabilitative programs and services

The Committee received evidence suggesting that not all people incarcerated in Victorian prisons are able to access the rehabilitative programs and services they need to address criminal behaviour and reduce the likelihood of further offending. In particular, stakeholders suggested that:

- rehabilitative programs are not available to people detained on remand
- long periods spent on remand are resulting in 'time served' sentences and shorter sentences, which limit access to rehabilitative programs post-conviction[28]
- resourcing for rehabilitative programs is not keeping pace with increasing prison populations and access to these programs is becoming further limited as a result
- COVID-19 restrictions have further reduced the provision of rehabilitative programs and services and incarcerated people's ability to access them.

> **Magistrates will refuse bail and use imprisonment as a way to 'rescue' women from a domestic violence situation, or drug addiction, homelessness, alcohol use … any of these things can be a reason that a magistrate will remand an Aboriginal woman into the prison system … [and, in my experience] you need to be sentenced for at least twelve months to access any of the services, which are totally inadequate anyhow.**
>
> Formerly incarcerated Yuin woman and member of the Homes Not Prisons Steering Group, Homes Not Prisons, *Submission 148*, p. 14.

As previously noted, a large proportion of people incarcerated in Victorian prisons are being detained on remand. Many stakeholders—including the Victorian Government—observed that it is very difficult for people incarcerated on remand to access rehabilitative programs for several reasons. The Victorian Government suggested that people detained on remand cannot access programs focused on offending behaviours as they have not yet been convicted of an offence, and are presumed innocent of such offending behaviours until they are proven guilty. However, it explained that these people do have access to 'a range of education, life skills, health, and reintegration-focused programs and services'.[29] For example, the ATLAS Remand Program seeks to ease the transition into incarceration and help people detained on remand to build critical skills to help them to successfully reintegrate into the community post-release. The program encompasses eight, two-hour voluntary psycho-educational sessions completed within the first eight weeks of incarceration.[30]

The Law Institute of Victoria expressed concern that people detained on remand have limited access to rehabilitative programs and services which address their criminal

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28 The Sentencing Advisory Council's 2020 report, *Time Served Prison Sentences*, found that Victoria's remand population is contributing to an increase in prison sentences, particularly time served and shorter prison sentences. It noted that between 2011–12 and 2017–18, the number of time served prison sentences imposed by Victorian courts each year rose 643%, from 246 to 1,828. Time served sentences now account for 20% of all prison sentences imposed, whereas previously it was 5%. Moreover, 96% of time served prison sentences were less than six months in length.

29 Victorian Government, *Submission 93*, p. 58.

30 Ibid., p. 69.

behaviour. Moreover, it suggested that access to general therapeutic services is also limited for this cohort, as:

- there are 'significant delays' in assessing people detained on remand to determine their rehabilitative needs
- demand for these services currently outstrips availability.[31]

The Institute noted that many people first receive a mental health diagnosis upon encountering the criminal justice system and 'appropriately diagnosing and equipping individuals with the tools to manage their diagnosis could significantly reduce recidivist reoffending' if they are convicted. It recommended 'substantially' increasing funding for these assessment services to ensure they happen soon after entry to prison. It also called for greater funding for therapeutic treatment and behaviour modification programs to ensure that they are readily accessible to people detained on remand who wish to access them.[32]

Guy Coffey, a clinical psychologist who assesses young people as part of court processes, made similar points in his submission. He said that general treatment for conditions such as mental illness and substance abuse for people being held on remand is inadequate. He argued that this represents a wasted opportunity to address behavioural and other issues:

> While it may be the case that more services will become available once the offender is sentenced, remand can last for months or years and the offender may be released soon after sentencing due to time served. Providing inadequate treatment during remand is a wasted opportunity to improve the person's well-being and reduce the likelihood of recidivism.[33]

Guy Coffey felt that treatment plans should be designed for all people detained on remand and 'implemented as soon as the person is receptive to receiving assistance':

> In my experience many prisoners want treatment. Those pleading guilty or considering that course, who, in other circumstances may have been reluctant to receive assistance, may be motivated to receive treatment as a means to demonstrate that they have commenced their rehabilitation.
>
> Such assistance while on remand may significantly benefit the person's psychological well-being and is likely to make recidivism much less likely. Mental illness and substance abuse are often strongly related to the probability of reoffending.[34]

The ability of people incarcerated on remand to access rehabilitative services in prison is further restricted by increases in time served and short sentences for those who are eventually convicted. A time served sentence is where the length of imprisonment ordered by a court is equal to the amount of time that a person has already spent

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31 Law Institute of Victoria, *Submission 112*, p. 11.

32 Ibid.

33 Guy Coffey, *Submission 149*, pp. 1–2.

34 Ibid., p. 2.

in custody on remand. This means they are released immediately, or shortly after conviction, for an offence in recognition of the time they already spent in prison on remand. As people held on remand are unable to access many rehabilitation services and programs, these types of sentences thwart the important rehabilitative aims of receiving a prison sentence and do little to address the risk of recidivism.[35] The Sentencing Advisory Council described how a time served sentence may undermine the rehabilitative aims of incarceration:

> the limited opportunities for someone sentenced to a time served prison sentence to make transitional arrangements for their release (e.g. housing, employment, transport);
>
> - the limited opportunities for the criminal justice system to provide targeted programs addressing offending behaviour to someone held on remand, given that they are presumed innocent until proven guilty;
> - the extent to which a time served prison sentence is capable of achieving key sentencing purposes such as rehabilitation or community protection; and
> - whether the increasing likelihood of receiving a time served prison sentence might inappropriately encourage some people on remand to plead guilty in the hope of being released earlier than if they proceeded to trial.[36]

The Victorian Government acknowledged that short sentences are also making it difficult for people to meaningfully engage with rehabilitative programs in prisons.[37] The impacts of short sentences and time served sentences are discussed in more detail in Chapter 10.

The Committee heard that even where people are convicted and sentenced to longer periods in prison, it can be difficult to access rehabilitative programs as the provision of these services have not kept pace with rapid growth in prison populations.

> **It wasn't about bettering my life, it was just about taking my freedom, saying you're a bad person, we're going to take your freedom, we're not going to do anything about how we prepare you for society when you get out , we're going to treat you like shit and send you back out there, and hope society does the same thing … because that's what you deserve … and that's the message.**
>
> Joan, Women's Leadership Group, *Submission 154*, p. 7

Liberty Victoria said that 'it is vital that resourcing for rehabilitation and reintegration services increases proportionately to the prison population':

> If an offender could potentially benefit from transition services, offence-specific rehabilitation programs or educational opportunities, any failure to provide those services is an indictment on the system. Additionally, regard must be had to the

35 Victorian Government, *Submission 93*, p. 68.

36 Sentencing Advisory Council, *Submission 17*, p. 4.

37 Victorian Government, *Submission 93*, p. 68.

> particular characteristics of vulnerable prisoners, notably women and Aboriginal and Torres Strait Islander prisoners.[38]

The Victorian Aboriginal Legal Service asserted that it is particularly difficult for Aboriginal Victorians to access culturally appropriate rehabilitative services because the programs provided by Aboriginal Community Controlled Organisations are underfunded. It recommended 'significantly' increasing funding for rehabilitation in prisons, including culturally safe programs and support provided by Aboriginal organisations.[39]

COVID-19 has also disrupted the provision of rehabilitative programs in Victorian prisons.

The Victorian Aboriginal Legal Service told the Committee that, during the past 18 months, in-person visit restrictions have curtailed face-to-face programs or resulted in their suspension. It argued that rehabilitative programs and services should not be suspended unless absolutely necessary and, in the meantime, parole applications should not penalise incarcerated people for failing to complete programs.[40]

The Victorian Association for the Care and Resettlement of Offenders (VACRO) submitted that limited access to rehabilitative programs and services during the COVID-19 pandemic has been exacerbated by rules restricting incarcerated peoples' internet usage.[41] It argued that permitting broader access to the internet would expand access to rehabilitative programs:

> We know that many programs, including some of our own, have long waiting lists. With better internet access, programs could become more available and efficient. For example, we have recently expanded our family counselling services to the Beechworth Prison using a highly skilled family counsellor based in Melbourne. This approach will enable us to keep working with participants and their families when the participant is moved to another prison. We are also currently designing new electronic documents and applications that would greatly improve some of our in-prison programs, which are overly reliant on pen and paper for documenting sessions with participants.[42]

The Association recommended that Corrections Victoria conduct consultation to develop a 'strategy for allowing safe access to digital services in Victorian prisons'. It also argued that rehabilitation service providers be permitted to bring

38 Liberty Victoria, *Submission 140*, p. 27.

39 Victorian Aboriginal Legal Service, *Submission 139*, pp. 193–195.

40 Ibid., p. 193.

41 The Committee received correspondence from the family of an incarcerated person expressing concern regarding the impact of COVID-19 restrictions on the wellbeing of people in prison and the adequacy of supports provided throughout the pandemic. The family queried whether DJCS had reflected on pandemic measures and identified learnings to inform their ongoing management of the pandemic and any future pandemics.

42 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 31.

internet-capable electronic devices into prisons to strengthen program delivery and build incarcerated peoples' skills in accessing online services.[43]

Justice Action also advocated for increasing incarcerated people's access to technology, suggesting that it will expand opportunities to participate in education, counselling and legal services. It argued that the rehabilitative potential of services such as online counselling is profound:

> Online counselling provides prisoners with external counsellors, through which prisoners can engage in Cognitive Behavioural Therapy (CBT). This form of therapy facilitates positive and long-term changes to offenders' behaviour, and is more effective online than face-to-face. Online counselling encourages the empowerment and self-management of prisoners, and provides stable counselling throughout the sentence and after the release.[44]

The Committee heard that poor access to rehabilitative programs can have particularly devastating consequences for incarcerated people who are not Australian citizens, such as permanent residents or refugees living in Victoria on protection visas. In Australia, any person who is not a citizen, regardless of how long they have resided here, can have their temporary or permanent visa cancelled or refused on character grounds under s 501 of the *Migration Act 1958* (Cth) (Migration Act). When a person's visa is cancelled they 'no longer have lawful status in Australia' and must be held in immigration detention until they can be removed from Australia under, ss 189 and 198 of the Migration Act'.[45]

Liberty Victoria asserted that failing to complete rehabilitation programs whilst in prison can form the basis of a visa cancellation on character grounds, regardless of the factors informing the failure to complete these programs:

> In our experience, the failure to undertake such rehabilitative programs can often be relied upon by a Minister and their delegates as a reason to deny the person a visa to live in the community.[46]

Liberty Victoria noted that visa cancellation can have very real 'human consequences' including:

> permanent separation of families, permanent separation of children from their parents, disruption of communities, detention in remote locations, mental anguish, and removal to a country a person has no connection with other than birth.[47]

Guy Coffey shared a client's story which illustrated the serious consequences which an inability to access rehabilitative programs for criminal behaviours can have on non-residents who are incarcerated for criminal offences.

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43 Ibid., pp. 30–31.

44 Justice Action, *Submission 102*, pp. 14–15.

45 Liberty Victoria, *Submission 140*, pp. 30–33.

46 Ibid., p. 37.

47 Ibid., p. 32.

A child asylum seeker arrives in Australia with his family. He had lived for years in the midst of a civil war and was profoundly traumatised. He suffers from complex PTSD that includes severe dissociative symptoms, unstable mood, intense labile emotion in response to stressors and periodic self-harm and suicidality.

When 16 years old he is charged with a serious offence. His bridging visa is cancelled and he is remanded in a youth justice centre. An application for bail is not a viable option because if successful it would lead to him being detained in immigration detention—without a bridging visa his detention is mandatory. While remanded he receives psychological counselling, pharmacotherapy and psychiatric review but no specialist services for his complex needs are available. During remand he is physically and sexually assaulted.

The Children's Court sentences him to a term of detention in a youth justice centre. The Court finds that the offending occurred in the context of severe mental health problems and that a rehabilitative disposition including extended specialised psychological treatment is appropriate. He serves a term in a youth justice centre during which he receives further counselling, support and pharmacotherapy which he finds helpful but which are not specialised interventions tailored to his specific needs.

Upon the expiration of his sentence he is placed in immigration detention. He is found to be a refugee but a protection visa is refused on character grounds. His emotional lability, severe dissociative symptoms and periodic self-harm are difficult for the immigration centres to manage. He is also vulnerable to mistreatment by older detainees. He is moved between detention centres, including for an extended period in another state and away from his family. On a number of occasions he is held in seclusion rooms as an attempt to contain his agitated and disruptive behaviour. He is held in protection units to remove him from other detainees who pose a risk to him. He receives psychiatric reviews and some intermittent counselling while in immigration detention but no treatment specific to his needs. He alleges that he has been physically and sexually assaulted several times. His protection visa application remains on foot.

He is now a young adult held in indefinite immigration detention. Of the nearly eight years since arriving in Australia as a traumatised child asylum seeker he has spent about six and a half years in immigration detention or youth justice detention (the majority in immigration detention) and one year in the community.

Guy Coffey, *Submission 149*, pp. 13–14.

The Committee was disappointed to learn that people incarcerated on remand do not have access to rehabilitative programs aimed at addressing behavioural and other issues. While the presumption of innocence is a central tenet of the criminal justice system, so is providing the support and tools which enable people to voluntarily pursue positive changes in their lives. These supports and tools must be available to all who wish to access them, at the earliest possible point in their pathway through the criminal justice system.

RECOMMENDATION 85: That the Department of Justice and Community Safety ensure that all incarcerated people—whether held on remand or serving a custodial sentence—in both publicly- and privately-operated prisons, have access to forensic rehabilitation programs and supports which are aimed at addressing the factors underpinning their criminal behaviours.

The Committee understands that the rapid expansion of the Victorian prison population in recent years has made this access more challenging, and that additional resources are required to scale up rehabilitative programs and supports. However, the Committee observes that this has been the case for several years, and believes that resourcing issues should have been addressed by now.

RECOMMENDATION 86: That the Victorian Government provide additional funding for rehabilitative programs and supports in public and private prisons. Funding should be scaled up in line with growth in prison populations, to ensure all who wish to access these services are able to.

RECOMMENDATION 87: That the Victorian Government provide funding to facilitate the expansion of online rehabilitative programs and support services to increase their accessibility to a broader range of incarcerated people.

The Committee recognises that COVID-19 infection control measures have made it extremely challenging to access rehabilitative services and supports in prison. It has been more difficult for incarcerated people to pivot to online services than the general public due to rules restricting their access to technology and the internet. The Committee would like to see these rules modernised, not just in response to the pandemic, but also because contemporary life requires digital literacy and offering opportunities for ongoing development of these skills during incarceration will aid future community reintegration. The Government should identify the concerns that are the basis of the maintenance of these outdated practices and find ways to resolve them through modern technology.

12.4 Specific types of rehabilitative programs which reduce recidivism

The Victorian Government's submission outlined a range of rehabilitative programs and services delivered in prison and immediately following release which aim to reduce recidivism by:

- addressing the issues which underpin criminal behaviours
- enhancing protective factors which increase resilience to criminal behaviours.

Additional suggestions for worthwhile rehabilitative programs and services were also suggested by Inquiry stakeholders.

12.4.1 Mental health service provision

As noted in Chapter 11, mental illness is common among Victoria's prison populations. The Victorian Government said that—in recognition of the prevalence of mental illness among the growing prison population—it has 'significantly expanded and improved' mental health services in prisons in recent years. For example:

- it established a specialist mental health unit at Ravenhall Correctional Centre in 2017
- introduced a Mobile Forensic Mental Health Service
- refurbished bed-based mental health units at the Dame Phyllis Frost Centre, Melbourne Assessment Prison and Port Phillip Prison.[48]

In response to the Royal Commission into Victoria's Mental Health System which reported in March 2021, the 2021–22 State Budget also included a $3.8 billion investment into reforming the Victorian mental health system. While these reforms are broader than the management of mental illness within the criminal justice system, they do encompass initiatives aimed at improving transitional mental illness support for people reintegrating back into the community when they are released from prison.[49]

The Australian Community Support Organisation confirmed that in its experience, individuals incarcerated on sentences of three months or more do generally receive treatment for mental health in prison. However, it suggested that they 'are often released without adequate supports in place to assist them with their mental health as they adjust to the stressors of returning to community'.[50] It suggested that formerly incarcerated people may struggle to access community mental health services as providers have a low-risk appetite and may refuse to treat people who have had contact with the criminal justice system:

> the declining risk appetite in the non-profit and mainstream community services sector see people with untreated mental health, anti-social behaviours and other complex needs turned away from the very services funded to support them, due to poor ability to manage risk, fear of violence or harm, and a lack of training and knowledge required to support forensic cohorts.[51]

The Organisation suggested a 'shared risk approach between services and [the Victorian Government]' might encourage services to support people returning to the community from prison.

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48 Victorian Government, *Submission 93*, p. 51.

49 Ibid., p. 52; Department of Health, *Mental health reform October 2021*, <https://www.health.vic.gov.au/mental-health/mental-health-reform> accessed 8 December 2021.

50 Australian Community Support Organisation, *Submission 91*, p. 17.

51 Ibid.

The Law Institute of Victoria said that the transition from prison to the community is particularly difficult for people with ongoing mental illness and support for this transition is inadequate. It asserted that incarcerated people may not be assisted to make the referrals needed to continue treatments which begun in prison. This is especially problematic for people released on community-based orders, which often mandate participation in treatment as a condition of release. The Institute recommended improving 'engagement with mental illness support services post release, by pairing a prisoner with a case worker to connect them with support services, treatment and rehabilitation programs'. It said that people released from prison can continue recovery following their re-entry into the community.[52]

The Committee recognises that the Victorian Government has made significant investments in response to the Royal Commission into Victoria's Mental Health System and has expanded forensic mental health services in prisons as the number of incarcerated people has increased. Ensuring people have access to these services when they enter prison will help to ensure they have the support and tools they need to address the factors which may contribute to criminal behaviours.

In addition, it is apparent to the Committee that supporting incarcerated people to arrange continuing access to mental health services when they re-enter the community is also critical. The period leading up to, and following, release from prison is highly challenging for individuals and mental health support can underpin successful reintegration and desistance from offending. The Committee would like to see Victorian prisons better facilitate connections between mental health providers in prison and those in the community. It may be that more assertive case management is required to facilitate these connections, or that community-based mental health providers require incentivisation, or risk-sharing arrangements to encourage them to provide services to formerly incarcerated people with complex needs.

FINDING 63: Supporting incarcerated people to arrange continuing mental health services following their release from prison can help make reintegration into the community less stressful and reduce instances of further offending.

The Committee recommends that transitional support arrangements are examined and strengthened in the next Section of the report.

12.4.2 Treatment for alcohol and other drug use issues

Several stakeholders argued that treatment for alcohol and other drug use issues in prison and following release can reduce recidivism and improve the health outcomes of incarcerated people. For example, the Alcohol and Drug Foundation characterised alcohol and other drug treatment as 'an important way to help people break the cycle of offending'. It explained that when meaningful treatment is not accessed in prison,

52 Law Institute of Victoria, *Submission 112*, pp. 82–83.

individuals struggle to reintegrate back into society post-release and may have further contact with the criminal justice system. The submission stated:

> When a person continues to experience AOD [alcohol and other drug] challenges following their release from prison it can impair their ability to reintegrate into the community, including securing work and stable accommodation, and have continued negative impacts on their health and wellbeing. All of these issues, especially when combined, makes it more challenging for that person to then remain out of contact with the justice system.
>
> There is a strong need to increase access to treatment services for AOD in prisons. Providing AOD treatment and support for people who want it can help to make the transition back into the community easier and reduce rates of recidivism.[53]

In its submission, the Victorian Government said it is modernising the delivery of alcohol and other drug treatment programs within the criminal justice system, including in prisons and post-release. In 2018, DJCS and the Department of Health launched the *Forensic Alcohol and other Drugs Treatment Service Delivery Model*, which aims to enhance the assessment and treatment of addiction issues for convicted persons under court orders (both in prison and in the community). The first phase of the project has focused on people subject to community correction orders and combined custody and imprisonment orders, as well as people in the community on parole. The second phase of the project will examine opportunities to streamline the referral, assessment and treatment options for people in contact with the criminal justice system more broadly.[54]

Treatment programs for alcohol and other drug use issues are provided at all Victorian prisons. Programs include long-term group therapy, psycho-educational sessions, individual counselling and transitional assistance programs. Access is based on an assessment of need and suitability for different programs. However, according to Corrections Victoria, every incarcerated person receives 'harm reduction education to minimise the harm associated with drug use'.[55]

The Australian Community Support Organisation and Caraniche are two organisations which currently partner with the Victorian Government to deliver alcohol and other drug rehabilitation programs in Victorian prisons. The Australian Community Support Organisation informed the Committee that it completes more than 9,000 alcohol and other drug assessments a year for clients involved in the criminal justice system and supports in excess of 1,000 people per annum following their release from prison.[56] Caraniche said it is currently contracted by DJCS to provide alcohol and other drug rehabilitation programs within 13 Victorian prisons and, prior to COVID-19, 'had contact' with over 12,000 incarcerated people annually.[57]

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53 Alcohol and Drug Foundation, *Submission 100*, pp. 3, 5.

54 Victorian Government, *Submission 93*, pp. 52–53; Victorian Government, *Forensic alcohol and other drugs treatment service delivery model*, May 2018, p. 10.

55 Corrections Victoria, *Alcohol and other drug services*, <https://www.corrections.vic.gov.au/prisons/health-care/alcohol-and-other-drug-services> accessed 9 December 2021.

56 Australian Community Support Organisation, *Submission 91*, pp. 8–9.

57 Caraniche, *Submission 110*, p. 1.

Caraniche asserted that:

> Although it is not well publicised, the Victorian public prison system provides access to over 35 different AOD treatment programs that range from peer programs to drug education, health programs and criminogenic treatment through to intensive residential treatment programs.[58]

It said programs are tailored to the unique needs of different cohorts of incarcerated people:

> This includes specialist programs for male and female prisoners and culturally safe programs such as the Koori Drug Treatment program that was designed in consultation with community and is delivered by an indigenous cultural advisor working alongside a clinician to address substance abuse and offending in the context of culture and cultural healing.[59]

Despite these service provision figures, the Foundation for Alcohol Research and Education submitted that there are still long waits to access programs addressing alcohol and other drug issues both within prisons and in the community following release from detention.[60] It called for the Victorian Government to implement recommendations 9, 10 and 22 from the Victorian Ombudsman's 2015 *Investigation into the rehabilitation and reintegration of people in detention in Victoria*. These recommendations were aimed at ensuring that treatment programs are available in all Victorian prisons and called for the adoption of a throughcare model.[61] The former Department of Justice and Regulation had indicated that it supported these recommendations.[62]

The Prison Network echoed the Foundation's finding that incarcerated people find it difficult to access alcohol and other drug treatment, as these issues are common among prison populations and service provision is not commensurate to demand. It stated:

> Availability of AOD treatment within the prison setting is limited – complicated in part by the brief stays but also needing additional resources to meet the demands of a prison population of whom 60–70% have addiction issues. For example, the in-prison "drug-unit" provides a Therapeutic Community type model of care which in our experience has facilitated significant positive change in the lives of those who have the privilege of participating. The unit usually houses approximately 10 women at a time. Even in a prison population of 404 at June 30, 2020 (notably lower than the average of 550 over the previous 3 years) this is a very small number of women able to access an evidence-based model of care. Often alternate AOD treatment within the prison has long wait times meaning that many women simply miss out.[63]

58 Ibid., p. 3.

59 Ibid.

60 Foundation for Alcohol Research and Education, *Submission 155*, p. 4.

61 Ibid., p. 5.

62 Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of people in prisoners in Victoria*, report for Victorian Government, PP no. 94, Melbourne, 2015, pp. 155–156.

63 Prison Network, *Submission 142*, p. 2.

The Network suggested that incarcerated women's engagement with alcohol and other drug treatment could be improved by providing them with timely information about treatment options upon their entry into prison (such as counselling, 'day-hab' and residential rehabilitation programs) and by increasing staffing of these programs.[64]

Continuity of treatment following release from prison is also critical to reducing recidivism and preventing adverse health outcomes related to alcohol and other drug issues. Windana, an alcohol and other drug treatment service, pointed out that the prevalence of death by overdose among formerly incarcerated Victorians was as high as 40% in 2017.[65] Guy Coffey suggested that many people are released into the community with ongoing substance addiction issues and no treatment plan. He said that treatment plans are developed for people subject to community correction orders only after they have been released, which can result in delays accessing services, and 'intermittent and poor engagement with treatment'. Guy Coffey argued that:

> engagement with services – whether [an individual's] post-release conditions involve parole, a CCO or no court directed supervision – should occur at least a month prior to release and preferably the prisoners should have a number of treatment session before entering the community.[66]

He said telehealth options can assist with achieving this, and that such an approach would help ensure:

- the person is oriented to the nature of the service(s) and what assistance can be provided;
- the person can express their views on what help is needed and what should be prioritised;
- a comprehensive treatment plan is finalised;
- barriers to engagement with assistance can be identified at the outset and addressed;
- scenarios in which recidivism is more likely can begin to be discussed (e.g., unstable accommodation, relapse into drug use; association with drug using or criminally inclined peers; family conflict etc.);
- rapport with clinicians and community workers can begin to be built.[67]

The Committee is pleased to hear that alcohol and other drug treatment is offered in all Victorian prisons and that thousands of incarcerated people are engaging with these services each year. It accepts stakeholder evidence that the consistent provision of these services through a custodial sentence to re-entry into the community post-release is critical to rehabilitation and reducing recidivism. The Committee urges the Victorian Government to ensure that these programs are adequately resourced to keep up with demand.

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64 Ibid., p. 3.

65 Windana, *Submission 117*, p. 4.

66 Guy Coffey, *Submission 149*, pp. 4–5.

67 Ibid.

RECOMMENDATION 88: That the Victorian Government substantially increase funding to ensure that resourcing for services which treat alcohol and other drug use issues in Victorian prisons and the community is commensurate with demand for these services. Funding should also be provided to enhance connections between prison-based and community-based services to facilitate seamless throughcare for incarcerated people re-entering the community.

As observed in relation to mental health issues, the period immediately before and following an incarcerated person's release back into the community is a highly challenging and stressful time, which can include difficult changes and social isolation. For people with a history of alcohol and other drug misuse, this period is characterised by a heightened risk of death by overdose. It is imperative that people being released from prison have continuity of treatment services throughout this transition to support their successful reintegration into the community, reduce instances of reoffending and prevent adverse health outcomes.

RECOMMENDATION 89: That the Department of Justice and Community Safety strengthen transitional support planning for incarcerated people in both publicly- and privately-operated prisons to ensure continuity of service with regard to mental health and alcohol and other drug treatment following release for those who require it. The Department should engage incarcerated people in transitional planning to ensure that the service meets their needs and that they are familiar with how to access it prior to their release.

12.4.3 Education, work and training

Education, training and work experience opportunities in prisons can support incarcerated people to reintegrate back into the community and refrain from reoffending following their release. Justice Action said the positive impact of education can be 'profound':

> Education is seen to have the most profound impact on prisoners as it provides a multitude of benefits, including the improvement of mental and physical wellbeing, the reduction in substance abuse, and the increase in the chances of post-release employment. Thus, it has been recognised as instrumental in the successful rehabilitation of prisoners, and has contributed to the reduction of recidivism rates.[68]

The Australasian Corrections Education Association said that international research clearly demonstrates that the provision of education and training to incarcerated people reduces recidivism rates:

> Longitudinal research conducted over 7 states in North America link the importance of quality education services in reducing recidivism rates. In New Zealand studies show

68 Justice Action, *Submission 102*, p. 14.

intensive literacy and numeracy reduces re-imprisonment by 4.3% and resentencing by 2.7%[69]

The Uniting Church of Australia, Synod of Victoria and Tasmania outlined an assessment of the benefits of offering education to incarcerated people conducted by the Washington State Institute of Public Policy. The Institute found that, on average, for every $1 invested into providing education in prisons, a return of $18 was achieved through reduced recidivism and increased productive engagement with society.[70]

In recognition of the potentially transformative power of education, training and employment, the Victorian Government delivers several programs within prisons and post-release, aimed at providing opportunities for incarcerated people to access education and gain employment. Each prison has an education centre containing classrooms, a library and computer labs, and all incarcerated people can access state and nationally accredited vocational education and training programs in a range of fields.[71]

People aged under 65 years who are serving custodial sentences are expected, but not compelled, to work approximately 60 hours a fortnight while they are in prison, unless they are medically unfit to do so. Those on remand can opt in to work. Industries vary from prison to prison, but commonly encompass:

- metal fabrication
- the manufacturing of timber products
- horticulture and agriculture.

Opportunities are also available in:

- prison kitchens
- laundries
- cleaning
- maintenance
- gardening teams.

People serving time in minimum security facilities may also have the opportunity to work in the community with Landcare groups and local governments on revegetation or erosion minimisation projects.[72]

Prison workers are paid at one of three different rates, depending on their level of responsibility and the complexity of their work. From this, 20% of their earnings

69 Australasian Corrections Education Association, *Submission 26*, p. 1.

70 Uniting Church of Australia, Synod of Victorian and Tasmania, *Submission 105*, p. 15.

71 Corrections Victoria, *Work, education and training*, <https://www.corrections.vic.gov.au/prisons/going-to-prison/work-education-and-training> accessed 8 December 2021; Victorian Government, *Submission 93*.

72 Corrections Victoria, *Work, education and training*; The Justice Map, *Submission 157*, p. 17.

withheld as compulsory savings accessible upon release. Pay rates are not publicly available. However, The Justice Map asserted that incarcerated people typically earn between $3 and $6 per day.[73]

The Victorian Government also provides post-release initiatives to assist formerly incarcerated people to gain employment when they re-enter the community, including:

- Job Victoria Mentors—an initiative to connect people with local employers and provide six months' work placement support to improve job retention.
- Employment Pathway Brokers—an initiative to establish networks and partnerships with employers, education and training providers and use these connections to assist community correctional services case managers to improve the employment readiness of people released from prison or already in the community on community correction orders.[74]

In 2019–20, 32% of eligible incarcerated Victorians participated in education and training programs. This is just below the national average and is lower than the 40% of incarcerated Victorians who pursued these opportunities in 2018–19. Approximately 93% of incarcerated Victorians were employed in 2019–20, up from 92% the year before and above the national average of 81%.[75]

In the 2018–19 financial year, 35% of incarcerated adults in Australia were undertaking some form of education and 8% of the total prison population were enrolled in pre-certificate courses. This included 3.6% who were enrolled in secondary school subjects, 24.9% in Vocational Education and Training (VET) courses and 1.5% in higher education programs.[76] ACEVic and Adult Learning Australia—national peak bodies for adult community education—submitted that upon release approximately 17% of incarcerated people in Australia had completed a qualification in prison and a further 8% had started or continued education while in prison.[77]

Several submitters to the Inquiry suggested measures for improving the uptake of education, training and employment opportunities in Victorian prisons. The Australasian Corrections Education Association observed that there are no national standards for the delivery, evaluation and review of education services in prisons. Nor are there units of competency for teachers preparing to work in custodial settings. It felt that both of these initiatives could improve educational attainment in prison and support the retention of educators at correctional facilities. It urged the Victorian Government to support the development of these initiatives at the national level.[78]

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73 Corrections Victoria, Work, education and training; The Justice Map, *Submission 157*, p. 17.

74 Victorian Government, *Submission 93*, p. 48.

75 Ibid., p. 58.

76 Australasian Corrections Education Association, *Submission 26*, p. 2.

77 ACEVic, *Submission 92*, p. 12.

78 Australasian Corrections Education Association, *Submission 26*, pp. 1–6.

The Association also observed that incarcerated people have limited access to technology and the internet, inhibiting their access to online education options and preventing them from gaining the digital literacy necessary for contemporary work.[79] It recommended that the Victorian Government promote the realisation of a national strategy to improve access to students studying within custodial settings.[80]

Liberty Victoria also 'strongly support[ed] controlled, restricted access to the internet' for incarcerated people. It argued that online skills are a prerequisite to meaningful participation in today's digital society and preventing incarcerated people from developing these skills has ramifications for their education and employment prospects post-release. It suggested that security concerns can be mitigated by monitoring and controlling access to the internet.[81]

VACRO made similar arguments, noting that poor digital literacy has broader ramifications than reducing incarcerated people's educational opportunities and employability:

> The participants we encounter in our programs are very often experiencing 'digital exclusion'. Those on longer sentences in particular are not equipped with the skills to participate in daily life in a world where the internet and technology are now essential. Looking for accommodation, applying for jobs, opening a bank account, registering with Centrelink, getting a Medicare card: all these things require digital skills and devices that prison prevents our participants from obtaining.
>
> Such digital exclusion is a clear obstacle to reintegration at the point of release. It also limits opportunities for people in prison to engage with services, programs, and interventions that might support their efforts to desist from crime post-release.[82]

In addition to internet access, the Committee heard that enabling incarcerated people to undertake work experience in the community towards the end of their sentence can also improve their job readiness and make reintegration easier. Dr Marietta Martinovic and Gabriela Franich submitted:

> This form of community engagement would allow people in prison to have real employment opportunities and to gain experience as an employee. It would also ease their reintegration and enhance community connection, which may well have been severed during their incarceration.
>
> More specifically, working in the community would empower incarcerated people as they would be able to gain real life experience, self-esteem, confidence, independence and the 'right mentality' to be within the community … Working in the community would make being released less intimidating and confronting as it would give incarcerated

79 Ibid., p. 4.

80 Ibid.

81 Liberty Victoria, *Submission 140*, pp. 28–29.

82 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 30.

> people a set of various productive skills to assist them once in the community. It would also help people in the community see incarcerated people in a positive light.[83]

The Youth Affairs Council Victoria submitted that research suggests that the most successful forms of education are locally accessible, commenced in prison and continued following release. It argued that young people should be supported to gain paid work experience prior to release and to secure employment when they are released from prison.[84]

However, stakeholders noted that some barriers to employment faced by formerly incarcerated people are harder to address, such as negative social stigma. Justice Action said that stigma is a greater factor in women struggling to secure employment post-release than in men 'due to gender discrimination and prejudice'.[85] Catholic Social Services asserted that employers don't consider whether a formerly incarcerated person was young when they committed offences, or whether their crimes were unrelated to the job they are seeking to fill. It said potential employers 'see[ ] convictions on record and proceed[ ] no further, wanting no problems'.[86]

Catholic Social Services pointed out that the *Spent Convictions Act 2021* (Vic) goes some way towards addressing this issue, by limiting when a disclosure of a criminal record must be made. It also viewed the Victorian Government's employment services for formerly incarcerated people positively, but suggested that 'support for tailored programs would better assist those with additional complexities of exiting the [criminal justice system]'. [87]

For more information about spent convictions and the experience of former offenders seeking employment after incarceration, refer to the Inquiry into a Legislated Spent Convictions Scheme conducted by the Legal and Social Issues Committee in 2019.[88]

Jordan Dittloff, a Lived Experience Consultant with VACRO, suggested establishing a service that promotes formerly incarcerated people to prospective employers. He stated:

> actively marketing people into the job or employment market prior to release, reverse marketing prisoners who have a certain skill set, who have worked in certain jobs in prison or have acquired certain skills in industry or have certain tickets. Why not begin the process of marketing them to employers and actually providing a hub for employers who would be willing to give people an opportunity to work to actually flag that willingness and then create that pipeline where people can start to get out to

83 Dr Marietta Martinovic and Gabriela Franich, RMIT University, *Submission 115*, pp. 12–13.

84 Youth Affairs Council Victoria, *Submission 118*, p. 37.

85 Justice Action, *Submission 102*, p. 17.

86 Catholic Social Services, *Submission 124*, p. 21.

87 Ibid.

88 Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into a Legislated Spent Convictions Scheme*, August 2019. Available at <https://www.parliament.vic.gov.au/lsic-lc/inquiries/inquiry/969>

> employment rather than having to hit the ground running and navigate everything else at the same time?[89]

Evidence received throughout the Inquiry strongly suggests that the provision of education, training and work experience to incarcerated people can improve outcomes for individuals post-release and also reduce recidivism rates.

FINDING 64: Education, training and work experience opportunities in prisons can support incarcerated people to reintegrate into the community, gain employment and refrain from reoffending following their release.

Stakeholders have made several suggestions for improving the provision of these opportunities in Victorian prisons. The Committee accepts that national standards for the delivery, evaluation and review of education services in prisons, and specific training for pre-service teachers preparing to work in custodial settings, may improve the quality of education options offered in prisons. However, it notes that these initiatives are outside of the Victorian Government's control. It encourages the Victorian Government to pursue these issues with the Commonwealth Government.

In contrast, expanding incarcerated people's access to the internet is a practical measure within the Victorian Government's control which could profoundly expand the range and quality of education, training and therapeutic options open to incarcerated people. Digital literacy is essential to contemporary employment and modern life. Strong computer skills and an understanding of the internet is empowering, underpins independent living, and supports successful reintegration into the community.

FINDING 65: Greater access to technology, including the internet, will expand the education and rehabilitative programs accessible to incarcerated people and support them to develop the digital literacy essential to contemporary life and successful reintegration into the community.

RECOMMENDATION 90: That the Department of Justice and Community Safety conduct consultation—with public and private prison operators, incarcerated and formerly incarcerated people, education providers, rehabilitative program providers, Victorian Aboriginal organisations and victims of crime, at a minimum—with a view to developing and implementing a digital access policy for Victorian prisons. The policy should establish minimum standards for access to technology and the internet for incarcerated people, and outline security measures to ensure access is utilised ethically, responsibly, in a manner which aligns with community expectations, and which maintains community safety.

89 Jordan Dittloff, Lived Experience Consultant, Victorian Association for the Care and Resettlement of Offenders, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, pp. 24–25.

Lastly, the Committee is pleased to hear that legislative reform to introduce a spent convictions scheme in Victoria has reduced negative stigma formerly incarcerated people face when seeking employment. As noted during the Committee's Inquiry into a potential scheme, Victoria was previously the only jurisdiction in Australia that lacked legislation to deal with this issue. Legislative reform that prevents employers and third parties from accessing outdated, irrelevant criminal records was long overdue.

12.4.4 Measures to keep families connected

The Committee heard that keeping families connected during parental incarceration delivers psychosocial benefits for parents and children, and can reduce parental recidivism. According to VACRO, research shows that 'repairing and maintaining family relationships is an important protective factor against re-offending':

> recognition as a parent can offer a prosocial, respected identity; love of family can provide someone to desist for; and aspiration to be a good parent can act as a 'hook for change'.[90]

Unfortunately, evidence also suggested that, for parents, incarceration is often defined by the pain of separation from family. VACRO noted that 'parents report feelings of anger, anxiety, sadness, depression, shame, guilt, decreased self-esteem, and a sense of loss when separated from their children'. It provided:

> Relationships between parents in prison and their families can be fractured and characterised by infrequent, low-quality communication, and there can also be conflict between parents and the carers of the children, which can harm the chances of good family connectedness post-release. The release itself can present further difficulties: without help to manage a return to the household, tensions can arise, and unrealistic expectations may not be met.[91]

VACRO pointed out that approximately half of imprisoned parents do not receive visits from their children while they are incarcerated. It said that barriers can include 'poor health, financial poverty, and carers who are unwilling or unable to visit due to distance, cost, or time pressure'. Moreover, where family visits do take place, it can be difficult for parents to connect properly with their children as the prison environment can be inhospitable, lack privacy, and can inhibit physical contact. These challenges have been exacerbated by COVID-19 measures in recent years.[92]

VACRO argued that family connectedness throughout parental incarceration should be facilitated through access to family therapy. It suggested that family therapy helps prepare parents and children for reunification post-release by strengthening relationships between parents, carers and children. It can also improve parenting

90 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 12.

91 Ibid.

92 Ibid., p. 13.

skills, supporting incarcerated people to 'manage day-to-day family life, negotiate parenting with minimal conflict, set boundaries, and come to terms with new realities'.[93] Further, VACRO submitted that family connectedness has the greatest positive impact if it is promoted throughout the term of imprisonment, not just immediately prior to reunification:

> The family connectedness domain is not just about preparing families for reunification post release, but about maintaining strong family relationships during the entire period of incarceration. Our participants don't leave their families when they enter prison and re-join when they exit. With the right mix of supports, parents, children, and whole families can develop and maintain healthy relationships with each other while one member is incarcerated, resulting in better immediate and life-long outcomes.[94]

The Victorian Government currently provides financial support for programs aimed at facilitating family connectedness through ministerial grants. Supported programs include:

- Read Along Mums and Read Along Dads Program, delivered by the Friends of Castlemaine Library, which supports incarcerated parents to record audiobooks for their children (described further in Box 12.1).
- Fun with Mum Program, delivered by the Prison Network, which provides transport assistance and fun, informal activities for children visiting mothers in prison.
- Craft and Cooking Program, delivered by the Prison Network, which teaches life skills through meal preparation and craft activities for mothers in prison.
- Prison In-Visits Program, delivered by SHINE for Kids, which provides unstructured art and craft activities to support mothers and fathers to engage with their children during visits.
- Supported Children's Transport Program, delivered by SHINE for Kids, which assists children to visit their incarcerated parents by providing transportation.
- Parent and Family Program, delivered by VACRO, which delivers family therapy and incarcerated parent education to strengthen family relationships.[95]

93 Ibid., p. 15.

94 Ibid., p. 13.

95 Corrections Victoria, *Transitional programs*, <https://www.corrections.vic.gov.au/release/transitional-programs> accessed 10 December 2021.

BOX 12.1: Read Along Dads and Read Along Mums Program

The Read Along Dads Program was first established in Loddon Prison in 2012 by the Friends of Castlemaine Library, before being extended to Middleton (a large new annexe of Loddon) and as the Read Along Mums Program in Tarrengower Prison for women. It supports incarcerated fathers and mothers to record a children's audiobook to be provided to their children along with a hard copy of the same story.

The programs aims to nurture a positive relationship between incarcerated children and their parents, and encourage adults with low literacy skills to engage with books and begin improving their reading skills.

The program costs $37,000 per annum to deliver across three Victorian prisons. Before the COVID-19 pandemic, it typically engaged with 140 prisoners per annum to produce approximately 356 audiobook recordings.

Research indicates that the program can support reduced rates of recidivism. A 7-year study conducted by the Monash University Criminal Justice Research Consortium at the Margoneet Prison Farm demonstrated that fathers participating in both a parenting education program and a Read Along Dads-style program were 82% less likely to reoffend than those that did not participate in these programs. This finding was replicated by an evaluation of a similar program run in the United Kingdom, called Storybook Dads.

Participants in the 2020–21 program described its positive impact during a time where personal visits to prison were suspended due to COVID-19 restrictions. One participant said it helped them feel connected to their family:

> Thank you. My daughter and my niece have loved this. My niece runs to the letterbox every day asking if she has a book from me. It has helped me stay connected to my family and my brother's family.

Another participant said the program was providing a foundation for their relationship with their child, which they hoped to build on when they are released:

> This is my last time. I don't think you know how much we appreciate this, how much it means to us. I chose this book (Allison Lester Drawing book) as we can do something together when I go home. I thought we could draw together. I'll get her some pencils. That way it will be a good start for us to get to know each other again. We can just draw, and not have to talk at first.

Source: Friends of the Castlemaine Library, *Submission 44*.

VACRO was positive about existing supports for families experiencing parental incarceration, but said that it 'would like to see family therapy and family visits services and programs extended to all correctional facilities' due to 'the importance of family connectedness to reintegration, to desistance, and to the wellbeing of the families and

children of a person who is incarcerated'.[96] VACRO felt that data collection in relation to the impacts of parental incarceration on families is currently poor and should be improved, given that family connectedness can reduce recidivism. It stated:

> Victoria has no database tracking the children or families of people in prison and the lack of information in Australia concerning the circumstances of children whose parents are incarcerated is well-recognised in academic and policy literature. There is also no government agency or position with a specific mandate for this cohort in Victoria.
>
> Given that the children of incarcerated parents experience long-term adverse effects including an increased risk of their own criminalisation, and that family connectedness is recognised as a protective factor against recidivism, we strongly recommend that this be rectified. Designating a human services responsibility for this cohort within government would allow for the collection of data on and the designing of service responses for such families.[97]

VACRO recommended that the Victorian Government task a specific department with responsibility for collecting data on families impacted by the criminal justice system and implementing initiatives to improve outcomes. It expressed support for extending the provision of family therapy services to all Victorian prisons.[98]

As discussed in Chapter 11, parental incarceration can have serious and long-lasting negative consequences for mothers, fathers and their children. For parents, separation from children is often permanent and is deeply traumatising. For children, parental incarceration can result in:

- unstable living conditions
- lower education attainment
- trauma
- increased likelihood of future contact with the justice system.

Conversely, supporting incarcerated parents to maintain a connection with their children throughout incarceration can support better outcomes. Maintaining incarcerated people's identity as a parent can provide a 'prosocial hook' on which to build their successful rehabilitation and reintegration into the community. It is also shown to reduce rates of recidivism.

The Committee is pleased to hear that the Victorian Government is supporting several programs aimed at preserving family connection during incarceration. It will examine the operation and impact of these programs, as well as opportunities for broader initiatives aimed at improving family connection, in its Inquiry into children of imprisoned parents.

96 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 16.

97 Ibid., p. 17.

98 Ibid.

12.5 Transitional support critical to reducing recidivism

Almost every Victorian who is incarcerated is eventually released back into the community. The period leading up to, and immediately following, release from prison is an incredibly stressful and uncertain period for an incarcerated person.[99]

The Victorian Aboriginal Legal Service explained to the Committee that the stress accompanying re-entry into the community heightens the risk of reoffending in the weeks immediately following their release. The Service provided:

> One of the most important factors in avoiding reoffending is supporting people released from prison to have a successful transition back into the community. Transitions can be extremely challenging. Access to housing and employment can be very difficult for people with criminal records. Accessing government services such as healthcare or social security payments is not straightforward for people who have been deprived of their liberty and responsibility over their own lives, often for long periods. In the absence of strong support through the transition period, there is a high risk that people released from prison will be drawn back into offending because of the return of health or social problems they were struggling to deal with before being imprisoned, or because they are forced into crimes of poverty. Most strikingly, these difficulties and the stresses of release from a highly institutionalised carceral environment contribute to making formerly incarcerated people 12 times more likely to die in the four weeks after they are released.[100]

Similar observations were made by the Law Institute of Victoria and The Justice Map. The Justice Map noted that Aboriginal Victorians released from prison are 13 times more at risk of death following their release than non-Aboriginal Victorians.[101] It also shared the story of their friend and colleague, prison advocate Christina. Christina's story illustrates the 'health system failures' which can push Victorians into prison and highlights the importance of supporting incarcerated people to transition back into the community following their release. Case Study 12.1 describes Christina's story.

CASE STUDY 12.1: Christina's story

Christina—'Chrissy'—was clever, hilarious, bubbly and brave. Like almost every woman in prison, she had experienced profound trauma and abuse since childhood. She became addicted to alcohol as a coping mechanism when she was a teenager. This later developed into a dependency on crystal methamphetamine, known as 'ice'. Christina once said that she didn't know if she would have lived past her teenage years if she had not used alcohol and drugs, because they were the only supports available to her at that time.

(Continued)

99 Liberty Victoria, *Submission 140*, p. 30.

100 Victorian Aboriginal Legal Service, *Submission 139*, p. 246.

101 The Justice Map, *Submission 157*, p. 10; Law Institute of Victoria, *Submission 112*, p. 79.

CASE STUDY 12.1: Continued

Throughout her 20s, Christina was incarcerated three times for property theft—she stole to support her dependency. On each occasion, Christina begged the court to send her to rehabilitation instead. After her third period of incarceration, Christina asked to be released into a rehabilitation program. The prison could not find a program for her. On her own she found a program and got onto a six-month waiting list. She chose to stay in prison until a bed was available—despite having been due for parole six months earlier. She later told The Age journalist Miki Perkins how she 'literally got the prison chaplain to drive her straight to rehab'.

Christina was articulate and well-read. She had undertaken training in counselling and was not afraid to speak up about the kinds of supports that she and other women in the criminal legal system needed. Jill Faulkner, a social worker who met Christina during her time in Dame Phyllis Frost Correctional Centre, described her as an 'unstoppable warrior woman' in demanding her right to receive counselling and support for her pain and distress, to be able to attend a group that might offer kindness, and a thread to help her weave her experiences together. Yet Christina's consistent experience was that the opportunities for connection and support that she and other women needed were few and far between.

Christina's determination to access rehabilitation paid off and she spent several years in recovery. During this time, Christina became a successful advocate and peer support worker, employed by two community legal centres. She addressed government decision-makers, politicians, lawyers, students and community workers. She told her story in the media on several occasions. She often spoke with colleagues about her ongoing struggles, particularly with loneliness. She emerged as a natural leader, an extrovert whose bubbly personality, strong convictions and generosity energised those around her.

When Christina relapsed—a part of the journey to recovery that is inevitable for most people— she was once again swiftly incarcerated for low-level crime. Some months later, she was released into Stage 4 lockdowns in Victoria, due to the COVID-19 pandemic. Christina was homeless and was put into a hotel room on a short-term basis. One social worker was assigned to check in on her. Her family and friends report that they were not allowed to visit her without prior approval from this social worker.

A few days later Christina died alone in her hotel room of an overdose. It was more than 24 hours before police conducted a welfare check, at her mother's request.

During her time as an advocate, Christina repeatedly spoke about the importance of women's access to housing and the need for immediate access to rehabilitation on leaving prison. She emphasised that women die if these supports aren't made available to them.

Source: The Justice Map, *Submission 157*, pp. 7–8.

Stakeholders to the Inquiry argued that appropriate and timely transition support for incarcerated people can ensure that reintegration is successful and can reduce the likelihood of further offending or adverse health outcomes. The Law Institute of Victoria explained that the 'reduction of reoffending is closely linked to the availability of transitional support for prisoners in Victoria'.[102] The Justice Reform Initiative asserted that there is:

> a strong research base to suggest that if we were to adequately invest in programs and supports for people leaving prison, that we would be able to have a significant impact on recidivism rates.[103]

The Office of the Public Advocate argued that providing transitional support in the weeks leading up to, and following, release is critical to the successful rehabilitation of incarcerated people. It submitted that 'supporting people through this significant transition helps to reduce the risk of re-offending and subsequent return to custody'.[104]

In its submission to the Inquiry, the Victorian Government recognised that supporting incarcerated people to transition back into the community is crucial to enhancing community safety and reducing recidivism. It noted that Corrections Victoria provides a range of pre-release assessments and contracted pre- and post-release support services to assist incarcerated people through this period. However, engagement with these services is voluntary for persons in prison.

People detained on remand can participate in the Remand Release Assistance Program. The Program provides information about support services (such as crisis accommodation, Centrelink payments or drug harm minimisation) that may be able to assist people should they be discharged directly from court. Many people exit the criminal justice system through direct court discharge when they are granted bail, are released on a time served sentence or receive a community corrections order.[105]

Pre-release support for incarcerated people re-entering the community following the completion of a custodial sentence commences with the ReGroup Program. The Program can begin up to 12 months prior to release and encompasses assessment and planning for individual reintegration needs. It provides referrals to relevant support services and identifies people who may be eligible for more intensive pre-release transitional support programs, such as ReLink.[106]

The ReLink Program is provided by VACRO and is available to eligible incarcerated people up to 12 months prior to release. The Program offers two tiers of advice and practical support:

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102 Law Institute of Victoria, *Submission 112*, p. 79.

103 Justice Reform Initiative, *Submission 103*, pp. 4–5.

104 Office of the Public Advocate, *Submission 153*, pp. 39–40.

105 Corrections Victoria, *Transitional programs*; Victorian Association for the Care and Resettlement of Offenders, *ReLink*, <https://www.vacro.org.au/relink> accessed 10 December 2021.

106 Corrections Victoria, *Transitional programs*.

- Level One—Facilitated group sessions focused on providing practical strategies, building skills and fostering positive behaviour change to successfully transition back to family and community, independent living, and succeeding on parole or corrections orders.
- Level Two—Individual sessions for people with complex needs focused on personalised planning and goal setting, and securing referrals to relevant support services.[107]

Post-release programs are also available to people assessed as requiring ongoing support following their exit from remand or completion of a custodial sentence.

People who have served a short sentence or who were detained on remand can be referred to the ReStart program delivered by the Australian Community Support Organisation. ReStart provides three months of intensive practical assistance and support to formerly incarcerated people to help them to reintegrate back into the community.[108]

People re-entering the community after the completion of a sentence who are assessed as having high transitional needs, and other eligible priority cohorts, can be referred to the ReConnect program. ReConnect is a state-wide support program delivered by VACRO, the Australian Community Support Organisation and Jesuit Social Services in different Victorian regions. It is voluntary and provides two tiers of personalised planning and intensive reintegration support. These tiers are:

- Targeted reintegration stream: up to four weeks of post-release support for participants with immediate transition needs that can be addressed through brief, targeted interventions.
- Extended reintegration stream: up to 12 months of post-release support for participants with more complex needs, requiring a longer period of post-release support.[109]

The Victorian Government also noted that it provides reintegration support in relation to:

- housing
- employment
- education and training
- mental health
- alcohol and other drug issues

107 Ibid.; Victorian Association for the Care and Resettlement of Offenders, ReLink; Victorian Government, *Submission 93*, p. 58.

108 Corrections Victoria, *Transitional programs*.

109 Ibid.; Victorian Government, *Submission 93*, p. 58; Victorian Association for the Care and Resettlement of Offenders, *ReConnect*, <https://www.vacro.org.au/reconnect> accessed 10 Deceomber 2021.

- family and community connectedness
- independent living skills.[110]

Stakeholders to the Inquiry generally reflected positively on existing programs that support incarcerated people to transition back into the community. However, they provided suggestions for additional ways to reduce recidivism and improve the health outcomes of people being released from prison:

- the provision of more comprehensive pre-release planning which involves the same organisation who will be providing support following release
- greater access to community support services following release.

The Justice Reform Initiative made observations which reflected poorly on pre-release planning. It said that access to transitional support services too often relies on 'luck':

> Post-release service delivery providers regularly note the numbers of people who access services for the first time and say "I wish you'd been there when I got out the first time". For so many people access to services is a matter of luck; they happened to be in a particular prison; they happened to hear about a particular worker; they happen to be released to a particular geographic region; they happened to be leaving prison at a time when a space was available in a housing program.[111]

The Initiative argued that pre-release planning and support is critical to building a 'sustainable post-release pathway' and that wherever possible, this support should be provided by the same organisation which will be providing support post-release:

> People need holistic, wrap-around, trauma informed, relational casework and outreach support when they leave prison that is genuinely hopeful and compassionate …
>
> People need help and support and advocacy navigating complicated and often discriminatory systems post-release which are frequently set up in such a way that failure is much more likely than success.[112]

The Office of the Public Advocate emphasised the importance of incarcerated people being engaged in pre-release planning for their transition back into the community and the early engagement of support services. However, it asserted that pre-release planning 'will be of little utility if there are no services to provide the necessary support'. It suggested that demand for transitional support services is high due to the prevalence of mental illness and disability among incarcerated Victorians. Further, that support services are inadequately funded or unwilling to take on clients with offending behaviours.[113] The Office of the Public Advocate argued that the Victorian Government has a 'duty of care to adequately fund and resource community-based services' and

110 Victorian Government, *Submission 93*, p. 57.

111 Justice Reform Initiative, *Submission 103*, p. 4.

112 Ibid., p. 3.

113 Office of the Public Advocate, *Submission 153*, pp. 40–41.

recommended that it 'fund the expansion of transition and community based mental health services for former prisoners'.[114]

The Justice Reform Initiative also suggested that 'services and programs that work to keep people out of prison are frequently not funded to adequately meet demand'. It argued that transitional support services should be available to all people who request it:

> A commitment by government to genuinely investing in such services could involve expanding and scaling up programs/services that are either promising, or already have significant evaluation/evidence (for example the work of VACRO, ACSO [Australian Community Support Organisation], Flat Out, Djirra and others in Victoria are already making a significant difference in supporting people build pathways out of the justice system).[115]

The Victorian Aboriginal Legal Service said that it is 'extremely concerned about the significant unmet need for holistic and targeted culturally safe and responsive pre- and post-release programs for Aboriginal people in prison'. It noted that this gap in service provision is acknowledged in *Burra Lotjpa Dunguludja*—phase 4 of the Victorian Aboriginal Justice Agreement—as a factor contributing to high recidivism rates among Aboriginal Victorians. It argued that pre- and post-release programs to support Aboriginal Victorians to transition back into the community must be 'designed, developed and implemented in consultation with the Aboriginal community and in partnership with [Aboriginal Community Controlled Organisations]'. It noted that from 2015 to 2017 it supported the delivery of culturally appropriate ReConnect services but was unable to continue due to insufficient resources. It recommended that the Victorian Government 'provide long-term and stable funding to [Aboriginal Community Controlled Organisations] to deliver pre- and post-release programs … to support men and women leaving prison'.[116]

Jesuit Social Services pointed out that people exiting prison are extremely vulnerable:

> People exiting prison are some of the most vulnerable and disadvantaged members of the Victorian community, yet the limited support available to them means they often cycle through the justice system again and again.[117]

It noted the benefits of ReConnect and recommended 'that the Victorian Government further invest in the provision of more intensive transition services for highly vulnerable people exiting prison'.[118]

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114 Ibid., pp. 41–42.

115 Justice Reform Initiative, *Submission 103*, pp. 4–5.

116 Victorian Aboriginal Legal Service, *Submission 139*, pp. 246–247, 249; A partnership between the Victorian Government and Aboriginal community, *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, p. 44.

117 Jesuit Social Services, *Submission 119*, p. 56.

118 Ibid., p. 57.

It is clear to the Committee that the transition from prison back into the community can be a challenging and dangerous time for formerly incarcerated people, particularly those experiencing alcohol and other drug use issues.

FINDING 66: The period immediately following an incarcerated person's release back into the community can be challenging and dangerous, particularly for people with alcohol and other drug use issues. The risk of relapse, overdose and death is heightened during this period.

Evidence received throughout the Inquiry clearly demonstrates that appropriate and timely support for incarcerated people transitioning back into the community can make this period less stressful and dangerous, and reduce recidivism.

FINDING 67: Appropriate and timely transitional support for incarcerated people exiting Victorian prisons can reduce adverse health outcomes (such as death) following release, facilitate successful reintegration into the community and reduce recidivism.

The Committee notes that Inquiry stakeholders generally reflected positively on the pre-release planning and post-release support services available to incarcerated people to transition back into the community. However, the provision of these services could be improved through more comprehensive pre-release planning which engages both the incarcerated person and the services they will be accessing in the community. Evidence suggested that establishing this connection pre-release can reduce the stress and uncertainty involved in accessing support services independently following release from prison.

It is also apparent to the Committee that access to community-based support services for incarcerated people exiting prison needs to be expanded. It heard that demand currently outstrips supply, and that additional government funding is necessary to bridge this gap.

RECOMMENDATION 91: That the Victorian Government increase funding and other resources available to:

- Corrections Victoria, to support comprehensive pre-release planning for all incarcerated people prior to their reintegration back into the community
- community-based services—that provide mental health, alcohol and other drug treatment, disability support, education and training, and culturally appropriate support—to assist people exiting prison to reintegrate back into the community.

Stakeholders to the Inquiry also highlighted specific areas of transitional support which are essential to successful reintegration and desistance from offending, including timely access to the National Disability Insurance Scheme (NDIS) and secure housing. These are discussed in the following sections of the report.

12.5.1 Access to the National Disability Insurance Scheme

According to the Victorian Government, 'people in prisons with disability, particularly those with cognitive disability, are more likely to have high transitional and post-release needs'. It explained that it seeks to support the transition of incarcerated people with disabilities back into the community through the Prison Disability Support Initiative:

> The Prison Disability Support Initiative aims to improve the identification of people in prison with disability and to provide them with support to access the NDIS through a new service. The Initiative will operate across all prisons, and will better support the rehabilitation of people with disability and complex needs and their transition back into the community.[119]

However, the Committee heard that incarcerated people with disabilities often struggle to access specialised transitional support through the NDIS or face long delays between their re-entry into the community and the commencement of support. The Office of the Public Advocate suggested that this is because of an intergovernmental agreement between the Commonwealth, state and territory governments.[120] The agreement specifies that the National Disability Insurance Agency (NDIA) is responsible for funding support that addresses disability-related behaviours of concern, while the states and territories are responsible for funding programs targeting criminal behaviours. The Public Advocate said this definition is too vague and in reality, there is overlap between disability and criminal behaviours which results in funding disputes between the two levels of government:

> The vagueness or lack of real distinction between these concepts is highly problematic. For the NDIS to apply, the applicant must demonstrate disability-related behaviours of concern that are distinguished from criminogenic behaviours, support for which is the responsibility of the relevant state or territory justice department. In reality, the behaviours that are considered 'criminogenic' are synonymous with the disability-related behaviours of concern – for example difficulty regulating emotions and subsequent physical aggression. Making a distinction between the two is exceptionally difficult and a somewhat theoretical exercise for the purpose of funding decisions. Unclear delineations often become the subject of complex funding disputes between the two entities, leading to inefficiencies and delays for participants.[121]

The Public Advocate said that the NDIA 'has on multiple occasions' refused to fund services supporting people with disabilities who are exiting prison to develop communication and self-regulation skills because these skills would also reduce their risk of reoffending.[122]

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119 Victorian Government, *Submission 93*, p. 75.

120 The Applied Principles and Tables of Support (the APTOS principles). Agreed to by the former Council of Australian Governments (COAG) in November 2015.

121 Office of the Public Advocate, *Submission 153*, p. 37.

122 Ibid.

> **One Law and Advocacy Centre for Women client who was extremely mentally unwell and had an intellectual disability was repeatedly released into the community from either prison or acute mental health wards without mental health outreach or disability support upon release. Without any support in the community, she was caught in a cycle of re-offending (often theft) followed by remand and/or admission to a mental health facility, then release without adequate support.**
>
> Law and Advocacy Centre for Women, *Submission 135*, p. 14.

The Public Advocate also suggested that incarcerated people with disabilities can find it challenging to provide input into NDIS arrangements as part of pre-release planning processes if they have not been in the community for a long time:

> Some prisoners may find it difficult to provide therapeutic input to their therapy prior to their return to mainstream society, especially if they have been in custody for a long time; they may not know what supports they will need or even what is available through an NDIS plan.[123]

The Public Advocate said that 'specialist planning and advocacy can be useful to assist with this'.[124]

Evidence received by the Committee also indicated that access to the NDIS can be further delayed by the unwillingness of NDIA staff to engage with incarcerated people with disabilities if they do not have a set release date.[125] VALID reported that even where people with disabilities wait until after they are released to seek access to the NDIS, they may find it challenging to gain support through the scheme if that support is mandated by legal orders. It said that 'NDIA staff often did not understand or know about Victorian legislation or the way Victoria's criminal justice system operates, and therefore … refused to fund support that they arbitrarily deemed justice-related'. They suggested that NDIA staff do not understand the parameters of Victorian legal orders which leads to poor outcomes for people in the criminal justice system with disabilities.[126]

The Australian Psychological Society advocated for 'developing more streamlined connections between the justice sector and support services'. It argued that supporting incarcerated people to access government support, such as the NDIS, during the early stages of the reintegration process will prevent gaps in transitional support. It suggested that the NDIA and prison staff would benefit from training in understanding the needs of incarcerated people with disability and their entitlement to support under the NDIS. Further, it argued that funding specialist justice-orientated positions within the NDIA would ensure it has the necessary capabilities to work with incarcerated people with disabilities.[127]

123 Ibid., p. 40.

124 Ibid.

125 Ibid.

126 VALID, *Submission 156*, pp. 29–30.

127 Australian Psychological Society, *Submission 90*, pp. 7–8.

The Office of the Public Advocate recommended that the Victorian Government:

> ensure better integration of services and coordination between the justice, disability, mental health systems and housing to ensure a person is fully supported while in detention and on release.[128]

Djirra submitted that even where access to the NDIS is arranged prior to release from prison—or secured shortly thereafter—it can be too complex for some formerly incarcerated people to navigate successfully on their own.[129]

The Committee believes that timely access to the NDIS can assist incarcerated people with disabilities to access the support they need to more successfully reintegrate back into the community. The Committee observes that the intergovernmental agreement dividing responsibility for funding services which address disability-related behaviours of concern versus those which target criminal behaviours has been in place since 2015.[130] It considers it unacceptable that confusion about funding responsibilities still inhibits access to NDIS services for some people exiting the Victorian prison system.

The Committee would like to see NDIS support plans finalised for incarcerated people prior to their release from prison, to ensure timely access to disability support services when they re-enter the community. There is considerable uncertainty regarding release dates for those incarcerated on remand, and release dates for people serving custodial sentences may change with little notice. It is important that pre-release planning for NDIS access is flexible to accommodate this.

The Committee urges the Victorian Government to engage with the Commonwealth Government to resolve NDIS funding issues as a matter of priority.

RECOMMENDATION 92: That the Victorian Government work with the Commonwealth Government to:

- clarify and resolve definitional issues within the Applied Principles and Tables of Support which are inhibiting National Disability Insurance Scheme funding for incarcerated people with disabilities
- ensure that National Disability Insurance Scheme plans for incarcerated people with disabilities can be finalised without the need for a confirmed release date.

128 Office of the Public Advocate, *Submission 153*, p. 41.

129 Djirra, *Submission 138*, p. 21.

130 Department of Social Services, *Disability and Carers: Reports and publications Applied Principles and Tables of Support (APTOS)*, 2021, <https://www.dss.gov.au/disability-and-carers-programs-services-government-international-disability-reform-council/reports-and-publications> accessed 22 December 2021.

12.5.2 Access to housing

Secure housing was an issue raised by many Inquiry stakeholders as critical to both successful community reintegration and reduced recidivism rates. For example, Justice Connect and the Victorian Aboriginal Legal Service both asserted that when formerly incarcerated people have access to stable housing—such as public housing—long term effects include:

- less involvement in police incidents
- fewer court appearances
- less proven offences
- less time spent in custody.[131]

Justice Connect and Fitzroy Legal Service said a lack of safe and stable housing is closely linked to criminalisation, incarceration and recidivism. Fitzroy Legal Service submitted:

> Australian studies suggest that people in unstable accommodation after leaving prison were 3 times more likely to return to prison within 9 months of release. Similarly, a UK-based study found that nearly 80 per cent of people who had been homeless before their incarceration reoffended within 12 months of release, compared to less than half of those with stable housing at the time of their incarceration.[132]

Fitzroy Legal Service said insecure housing contributes to recidivism because it can prevent people from addressing their criminal behaviours and makes it more difficult to gain and maintain employment:

> we know that addressing drug dependence – which features in so much criminalisation – often requires intensive counselling to heal complex trauma. It is unrealistic and unfair to expect someone to meaningfully engage in this kind of difficult and long-term psychological work while living in precarious accommodation, such as a rooming house. Similarly, we know that employment and financial security is important to breaking cycles of incarceration. It is unrealistic and unfair to expect someone sleeping on a friend's couch to find and keep a job.[133]

In addition, the Victorian Aboriginal Legal Service suggested that unstable or unsuitable housing may lead some people to reoffend after they re-enter the community, because returning to prison is preferable to homelessness or staying in unsafe circumstances or with persons they would rather avoid (such as perpetrators of family violence).[134]

VACRO also submitted that accessing secure housing immediately following release is critical to addressing criminal behaviours and reducing recidivism.[135]

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131 Justice Connect, *Submission 158*, p. 38; Victorian Aboriginal Legal Service, *Submission 139*, p. 247.

132 Justice Connect, *Submission 158*, p. 37; Fitzroy Legal Service, *Submission 152*, p. 39.

133 Fitzroy Legal Service, *Submission 152*, p. 40.

134 Victorian Aboriginal Legal Service, *Submission 139*, p. 247.

135 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 19.

> **The first weeks and months post-release are vital: it's when participants are motivated to change. If they can't start their new life securely, the risk of reversion to past harmful behaviours increases.**
>
> VACRO, *Submission 77*, p. 19.

In evidence to the Inquiry, the Victorian Government recognised the relationship between secure housing and successful reintegration back into the community following incarceration. It provided information on several programs assisting people to access secure housing following detention on remand or a custodial sentence, including:

- Reception Transition Triage assessment—evaluates people entering custody and assists them to manage debt and address any existing housing arrangements that, if left, would lead to an exacerbation of debt and difficulty accessing housing in the future.
- Corrections Victoria Housing Program—assists people who are at risk of homelessness and reoffending after release from prison to access transitional housing placements through its arrangements with Registered Housing Agencies.
- Corrections Housing Pathways Initiative—supports people with high integration needs, or who are high risk or violent offenders subject to post-sentence orders, to transition into the community. Initial Assessment and Planning workers assist people entering prison to maintain existing housing tenancies and support people exiting prison to access local homelessness supports.
- Baggarook Aboriginal Women's Transitional Housing Program—delivered in partnership with the Victorian Aboriginal Legal Service and Aboriginal Housing Victoria. It provides short-term transitional housing and case management to assist Aboriginal women who are at risk of homelessness to re-enter the community. Women in the Program sign a lease with Aboriginal Housing Victoria and pay rent and utilities.[136]

However, it was suggested to the Committee that, despite these programs, gaining access to stable housing following incarceration is extremely difficult in Victoria and many people exit prison into homelessness. Fitzroy Legal Service reported that currently, approximately 50% of people leaving prison expect to be homeless upon release and 25% of people report experiencing homelessness in the first four weeks after leaving prison. This is an increase from previous years.[137] VACRO informed the Committee that as many as 80% of participants in its ReConnect program face homelessness or stay in temporary accommodation upon their release from prison. It stated that supporting participants to find and maintain housing is the biggest challenge faced by case managers and takes up the bulk of their time.[138]

136 Victorian Government, *Submission 93*; Corrections Victoria, *Transitional programs*.

137 Fitzroy Legal Service, *Submission 152*, p. 40.

138 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 18.

VACRO also pointed out that formerly incarcerated people are at increased risk of homelessness six months after they are released from prison as this is when financial support for crisis accommodation typically ends.[139]

Evidence indicated that there are a range of factors informing and compounding the difficulties formerly incarcerated people face obtaining secure housing following their release from prison. This includes:

- more people, particularly women, are entering prison while experiencing homelessness as courts are less likely to grant bail to applicants without secure housing.[140] A lack of secure housing can also prevent people being released from prison, as parole boards are reluctant to release people without a fixed address[141]
- incarceration causes people to lose their existing housing by disrupting government payments (such as social security payments) or employment which enables them to maintain rent, or by resulting in the termination of their lease due to their ongoing absence[142]
- unpaid debts for rental arrears, repairs or compensation claims can prevent people from being offered public housing[143]
- private landlords can request criminal histories from rental applicants and have total discretion to reject those who have been incarcerated, who have a large gap in their rental history, or who have been homeless in the past[144]
- there is insufficient public housing and crisis accommodation to meet demand[145]
- there is a lack of specialist accommodation catering for people with disabilities and an unwillingness among providers to accept clients with complex needs and a history of criminal behaviour.[146]

> **When people are in prison, if they're housed, they can lose their housing. So, when they are released they may be able to access two nights of motel accommodation and sometimes they are released straight into homelessness. We're seeing women with extensive trauma histories being forced into rooming houses with men.**
>
> Anonymous, Outreach support worker and Homes Not Prisons activist, Homes Not Prisons, *Submission 148*, p. 17

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139 Ibid., p. 19.

140 Homes Not Prisons, *Submission 148*, p. 13. Smart Justice for Women, *Submission 94*, pp. 15–16; Justice Connect, *Submission 158*, p. 37.

141 Law Institute of Victoria, *Submission 112*, pp. 81–82; Victorian Aboriginal Community Service Association, *Submission 81*, p. 11.

142 Justice Connect, *Submission 158*, p. 38.

143 Ibid., p. 39.

144 Fitzroy Legal Service, *Submission 152*, p. 16; Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 20.

145 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, pp. 18–19; Victorian Aboriginal Community Service Association, *Submission 81*.

146 Office of the Public Advocate, *Submission 153*, p. 18.

VACRO said that in light of these challenges, a 'best case housing pathway' for its clients who are facing homelessness following their release from prison typically involves:

1. A temporary stay in a local motel, funded jointly by ReConnect and their local Housing Entry Point; followed by
2. A place in time-limited crisis accommodation; and then
3. Up to 12 months in a transitional housing property; until ideally
4. A secure move into public housing.

> This lengthy and unstable journey is already far from ideal, but the lack of available public housing stock blocks even this imperfect pathway for many of our participants.[147]

The Australian Community Support Organisation said that in its experience as a pre- and post-release service provider across Australian jurisdictions, a 'high number of individuals' released from correctional facilities go to stay with friends or family or in other transient and insecure housing options when they re-enter the community.[148] The Victorian Aboriginal Community Service Association Ltd. echoed this observation, and reported that 'Aboriginal men and women often exit prison into … short-term, unstable and unsafe accommodation' including hotels and boarding houses.[149]

> **This is my first experience of feeling safe, even a little bit safe. I have searched all of my life for a home. The government and services need to provide more housing. You cannot have a 20-year waiting list. People will die. The housing crisis is perpetuating violence, death, putting people at risk and increasing vulnerability.**
>
> **Lack of housing enables people to be sexually abused, financially abused and children to be removed. You cannot get a house without a job, and you cannot get a job without a house. Centrelink is not enough. We need a living wage.**
>
> Formerly incarcerated woman and member of the Homes Not Prisons Steering Group, Homes Not Prisons, *Submission 148*, p. 18.

A range of strategies to address these challenges were canvassed throughout this Inquiry.

Justice Connect recommended increasing funding for programs that assist incarcerated people to obtain secure housing upon their release. It particularly advocated for improving the resourcing of programs which provide case management support, or which assist people detained on remand or on short sentences to maintain existing housing while they are in prison.[150] VACRO also highlighted the positive impact that a case manager advocating on behalf of a formerly incarcerated person can have on their prospects for securing stable accommodation. It informed the Committee that it

147 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 18.

148 Australian Community Support Organisation, *Submission 91*, p. 10.

149 Victorian Aboriginal Community Service Association, *Submission 81*.

150 Justice Connect, *Submission 158*, pp. 40, 43.

employs a specialist housing coordinator to assist its clients to access private rentals by overcoming private landlords' preconceptions about people who have been incarcerated:

> In our experience, many agents do have stock available for low-income tenants, but strong relationships with agents are required to overcome the significant stigma our participants face, as well as their lack of rental history.[151]

VACRO supported increasing the availability of government rental assistance to support formerly incarcerated people to access private rental accommodation.[152] The Australian Community Support Organisation recommended the 'provision of specific funding and programs addressing homelessness for people exiting custody' and argued that these programs must provide support for at least six to 12 months to be effective.[153]

Stakeholders to the Inquiry—including the Victorian Government—agreed that expanding Victoria's public housing options would assist formerly incarcerated people to access secure accommodation and desist from reoffending. For example, the Justice Map recommended that the Victorian Government 'invest in long-term secure public housing'.[154]

The Victorian Government informed the Committee that it is currently undertaking the 'largest single increase and largest-ever investment in social and affordable housing in Victoria's history' through its Big Housing Build. The project seeks to significantly increase Victoria's social housing stock and provide additional affordable housing. It also encompasses:

- the construction of an Aboriginal family violence refuge in Horsham to deliver culturally appropriate support services for survivors of family violence
- support for public housing residents, with a focus on jobs and employment pathways, education and training
- additional funding for the Private Rental Assistance Program, which supports access to private rental properties.[155]

The Victorian Government noted that it is also funding justice housing, maintenance and upgrades as part of the Building Works Housing Maintenance Stimulus Package. The project will deliver 250 new bedrooms across 16 projects in Melbourne and regional Victoria to support people with a history of contact with the justice system. This will include options for women with children, Aboriginal men and people requiring alcohol and other drug treatment. It is expected to be completed in mid-2022.[156]

151 Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 20.

152 Ibid.

153 Australian Community Support Organisation, *Submission 91*, p. 21.

154 The Justice Map, *Submission 157*, p. 23.

155 Victorian Government, *Submission 93*, p. 49.

156 Ibid.

The Victorian Government asserted that these initiatives will transform the social housing system.[157]

Justice Connect was positive about the Victorian Government's Big Housing Build and viewed it as 'an important opportunity to address Victoria's acute shortage of social housing and ensure that there is enough social housing for people exiting prison and in the justice system'. It argued that Victoria needs to construct at least 60,000 new public and community housing properties by 2031 to align with the national average.[158]

Other stakeholders cautiously welcomed the initiative but expressed reservations regarding its ability to resolve the difficulties incarcerated people face accessing secure housing when they re-enter the community. Fitzroy Legal Service suggested that 'consistent underspending on social housing in Victoria means the homes built through [the Big Housing Build] will fail dismally to meet the demand for affordable housing in Victoria'.[159] Homes Not Prisons asserted that the 'only new housing in the package replaces public housing that has been demolished in the Public Housing Renewal Program' and that some public housing is being replaced with community housing, which may not necessarily be affordable or secure. It argued for 'a large-scale public housing build' because 'motels, rooming houses and Corrections-run bail or parole homes are not good enough'.[160]

Fitzroy Legal Service, Justice Action and The Justice Map all noted that the Big Housing Build is focused on the construction of community and affordable housing options which are predominantly managed by private providers. They argued that criminalised people will struggle to access these types of accommodation because community and affordable housing providers:

- are not required to prioritise applicants at risk of homelessness[161]
- may not set rental rates at a level that is affordable for people exiting incarceration[162]
- are free to reject rental applications from tenants with a history of incarceration, substance abuse issues or mental illness[163]
- are less secure and are characterised by higher eviction rates.[164]

Justice Action suggested that the Big Housing Build could be improved by redirecting the budget for the expansion of the Dame Phyllis Frost Centre into public housing to support the construction of 1,000 additional homes.[165] Fitzroy Legal Service similarly

157 Ibid.

158 Justice Connect, *Submission 158*.

159 Fitzroy Legal Service, *Submission 152*, p. 42.

160 Homes Not Prisons, *Submission 148*, pp. 16–17.

161 Fitzroy Legal Service, *Submission 152*, p. 42.

162 The Justice Map, *Submission 157*, p. 15; Justice Action, *Submission 102*, p. 16.

163 Fitzroy Legal Service, *Submission 152*, p. 42; Justice Action, *Submission 102*, p. 16.

164 Fitzroy Legal Service, *Submission 152*, p. 42; Justice Action, *Submission 102*, p. 16.

165 Justice Action, *Submission 102*, p. 16.

recommended that all funding currently allocated to the expansion of prisons and policing in Victoria be redirected to supporting the expansion of public housing.[166]

VACRO and Justice Connect both recommended increasing transitional and public housing stock targeted at people leaving the criminal justice system.[167] The Victorian Aboriginal Community Service Association Ltd. Recommended 'increasing access to self-contained crisis accommodation, particularly for Aboriginal men and women exiting prison and individuals affected by family violence'.[168]

The Committee understands that housing insecurity is closely linked to criminalisation, incarceration and recidivism.

FINDING 68: Safe, secure, long-term accommodation enables people being released from prison to seek education or employment, rebuild connections with family and community, and engage with therapeutic services addressing criminal behaviours. It is also known to reduce re-offending.

It is also clear to the Committee that the Victorian Government appreciates the positive impact that secure housing can have on recidivism rates and socioeconomic outcomes for people exiting prison. It commends the Government for its ongoing support for programs aimed at assisting incarcerated people to maintain housing security throughout imprisonment and aiding them to access secure housing upon their release. Furthermore, the Committee recognises that the Big Housing Build represents a significant investment in all types of social housing and will go some way to alleviating the difficulties incarcerated people face accessing public, community and affordable housing.

Nonetheless, the Committee shares stakeholders' views that broader access to secure housing for people exiting custodial settings can be achieved through:

- greater provision of housing support workers to assist incarcerated people to maintain existing housing during periods of remand or short custodial sentences, or to arrange accommodation before they re-enter the community
- improving the availability of government rental assistance to support incarcerated people to access private rental accommodation upon their release
- expanding Victoria's social housing stock, and transitional and crisis accommodation available to incarcerated people.

The themes discussed in this Section were also canvassed during the Committee's Inquiry into homelessness in Victoria. The Committee's final report, tabled in the Victorian Parliament on 4 March 2021, included a number of recommendations aimed at breaking the nexus between housing insecurity and custodial settings. These included:

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166 Fitzroy Legal Service, *Submission 152*, p. 42.

167 Justice Connect, *Submission 158*, p. 43; Victorian Association for the Care and Resettlement of Offenders, *Submission 77*, p. 20.

168 Victorian Aboriginal Community Service Association, *Submission 81*, p. 12.

- Recommendation 22: That the Victorian Government provide additional transitional housing for people leaving custodial settings. In addition, that the Victorian Government ensure access to housing support workers and integrated legal support both before and after release to assist persons to access and maintain stable, long-term housing.[169]
- Recommendation 23: That the Victorian Government investigate whether greater access to supported accommodation is required for people seeking bail and whether this would lead to a reduction of individuals on remand.[170]
- Recommendation 24: That the Victorian Government adopt a 'no exits into homelessness' policy for other institutional settings, such as rehabilitation and mental health facilities.[171]

The Committee is disappointed that the Victorian Government has failed to table a response to this Inquiry in the Victorian Parliament by September 2021, within the six-month timeframe required by the Parliament's Standing Orders. The issues contained in the report, and the Committee's findings and recommendations, are urgent. It is imperative that the Victorian Government provide a response as soon as possible. The Committee notes that within the scope of the current Inquiry, housing security plays a significant role in reducing rates of recidivism and supporting individuals to avoid further interaction with the criminal justice system.

RECOMMENDATION 93: That the Victorian Government respond to the Legislative Council Legal and Social Issues Committee's Inquiry into homelessness in Victoria as soon as possible and explain why this response was not made within the six months provided for by the Legislative Council Standing Orders.

12.6 Youth justice system

The Victorian criminal justice system recognises that neurological differences between young people and adults who commit crimes warrant fundamentally different approaches to incarceration and rehabilitation. As a result, children aged 10–18 years and some young adults aged 18–21 years who commit crimes are managed separately through the Victorian youth justice system.[172]

The youth justice system operates on the basis that young people who commit crimes are still undergoing neurological development, making them more prone to increased risk-taking, poor consequential thinking and a lack of impulse control. This can increase the chances that they will engage in criminal conduct. This neurological immaturity also

169 Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria*, March 2021, p. 180.

170 Ibid., p. 181.

171 Ibid., p. 184.

172 Victorian Government, *Submission 93*, p. 20.

improves their prospects for rehabilitation. Victorian Youth Justice Custodial Precincts therefore try to cater for the neurological development of incarcerated young people through the opportunities they provide for positive intervention and rehabilitation.[173]

12.6.1 Youth Justice Custodial Precincts

In Victoria, DJCS is responsible for the management of the youth justice system, including Youth Justice Custodial Precincts. Within the Department, Youth Justice Custodial Services undertake these functions.[174]

Victoria has two Youth Justice Custodial Precincts, with a third under construction at the time of writing. These are described in Table 12.2.

Table 12.2 Victorian Youth Justice Custodial Precincts

Youth justice precinct	Characteristics
Malmsbury Youth Justice Precinct	• Located in Malmsbury, approximately 100 kilometres north of Melbourne. • Accommodates young men aged 15–18 years being detained on remand or serving a sentence and young men aged 18–21 years sentenced to a youth justice centre order by an adult court in Victoria. • Accommodates young men aged 15–20 years who are being detained on remand or who have been sentenced to a youth justice centre order. • Provides a mixture of low and high security residential units.
Parkville Youth Justice Precinct	• Located in Parkville, an inner northern suburb of Melbourne. • Accommodates young men aged between 10–18 years who are being detained on remand or who are serving a sentence, young women aged between 10–17 years who are being detained on remand or who are serving a sentence, and young women between 18–21 years who have been sentenced to a youth justice centre order by an adult court.
Cherry Creek Youth Justice Centre	• Currently under construction in Cherry Creek, west of Werribee. • Will accommodate young people being detained on remand or who are serving a sentence. • Will incorporate a mental health unit and an intensive intervention unit. • Expected to have a 140-bed capacity.

Source: Department of Justice and Community Safety, *Custody in the youth justice system*, <https://www.justice.vic.gov.au/justice-system/youth-justice/custody-in-the-youth-justice-system> accessed 14 December 2021; Department of Justice and Community Safety, *Youth Justice*, <https://www.justice.vic.gov.au/justice-system/youth-justice> accessed 14 December 2021.

173 Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into Youth Justice Centres in Victoria*, March 2018, pp. 9–11.

174 Department of Justice and Community Safety, *Youth Justice: Custody in the youth justice system*, <https://www.justice.vic.gov.au/justice-system/youth-justice/custody-in-the-youth-justice-system> accessed 14 December 2021.

12.6.2 Recent reviews of Youth Justice Custodial Precincts

The Victorian youth justice system has been subject to eight reviews and inquiries in the last decade, which have resulted in a variety of recommendations and improvements to the system.[175]

In August 2016, Penny Armytage, former Secretary of the former Department of Justice and Regulation, and Professor James Ogloff AM, Director of the Centre for Forensic Behavioural Science at Swinburne University, were appointed to examine youth support, youth diversion and youth justice services in Victoria. Their report, *Youth Justice Review and Strategy: Meeting needs and reducing offending*, detailed:

> significant challenges and issues affecting the Victorian youth justice system at the community and custodial levels, as well as issues and shortcomings of the underpinning legislative framework, governance and administration.[176]

The report made 126 recommendations aimed at refocusing the youth justice system on meeting the needs of young people, addressing their criminal behaviours and reducing recidivism.[177]

The Victorian Government accepted all recommendations of this report either in full or in principle, noting that it would improve community safety:

> Implementing the Review's recommendations will make our community safer by reducing recidivism through safe and secure facilities, better case management and access to key workers and establishing evidence based rehabilitation programs that work, delivered by a professional and supported workforce.[178]

The Ogloff-Armytage Review of the Youth Justice System was followed by an independent review of a riot at the Parkville Youth Justice Custodial Centre which occurred from 12 to 14 November 2016, and which resulted in significant damage to the facility. Former Victorian Police Chief Commissioner Neil Comrie AO APM was tasked with investigating the:

- overall adequacy of the precinct for its intended purpose
- circumstances leading up to the riots.[179]

Neil Comrie reported in July 2017. He found that the Parkville Youth Justice Custodial Centre was 'not fit for its intended purpose' and reported that the rehabilitative and educational aims of the facility will only be realised when the precinct provides

175 Victorian Government, *Submission 93*, p. 20.

176 Penny Armytage and Professor James Ogloff AM, *Youth Justice Review and Strategy Meeting needs and reducing offending executive summary*, report for Victorian Government, July 2017, p. 2.

177 Ibid.

178 Government of Victoria, *Response to the Parliament of Victoria, Legislative Council Legal and Social Issues Committee, Inquiry into Youth Justice Centres in Victoria*, 6 July 2016, p. 2.

179 Department of Justice and Community Safety, *Review of the Parkville Youth Justice Precinct: An independent review by Neil Comrie AO APM*, <https://www.justice.vic.gov.au/justice-system/youth-justice/review-of-the-parkville-youth-justice-precinct-an-independent-review> accessed 14 December 2021.

a safe environment for the young people detained there and the facility's staff. He recommended the construction of a replacement youth justice custodial precinct elsewhere and identified security and design imperatives to inform planning for the new facility. He also recommended changes to how youth justice custodial centres are staffed and training regimes to ensure staff appropriately respond to challenging incidents.[180]

The Victorian Government accepted all findings and recommendations of the review and noted that work was already underway to construct a new 'fit-for-purpose youth justice facility' incorporating all of the design and security imperatives outlined in the report.[181] However, it subsequently decided to retain the Parkville Youth Justice Centre.[182]

In November 2016, the Standing Committee on Legal and Social Issues (Legislative Council) was tasked with examining the incidents at the Parkville and Malmsbury Youth Justice Custodial Centres. Terms of reference for the Inquiry included reviewing the safety of the staff and young people at the facility, options for keeping young people out of the youth justice system and the implications of incarcerating young people who have experienced trauma.[183] The Committee tabled its final report in March 2018. It identified 'significant failings in youth justice centres' including:

- High staff turnover and absenteeism
- A breakdown in professional relationships between youth justice staff and young people
- Excessive and improper use of isolation and lockdown, often due to staff shortages, as well as highly deficient recordkeeping by the Department of Health and Human Services
- Vastly inadequate mental health services for young offenders
- Insufficient detox services for young offenders, limiting the options available to magistrates when sentencing young offenders with drug misuse problems.[184]

The Committee also made 33 findings and 39 recommendations to address these issues. Recommendations focused on:

- Stabilising staffing and reducing reliance on agency staff within youth justice centres
- Broadening assessment procedures for young people entering youth justice centres, to include additional factors such as developmental age and cognitive development

180 Ibid.

181 Ibid.

182 Sumeyya Ilanbey, 'Victorian government backflips on Parkville detention centre, scales down youth supermax in Cherry Creek', *The Age*, 27 September 2019, <https://www.theage.com.au/national/victoria/victorian-government-backflips-on-parkville-detention-centre-scales-down-youth-supermax-in-cherry-creek-20190927-p52vow.html> accessed 14 December 2021.

183 Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria*, <https://www.parliament.vic.gov.au/447-lsic-lc/inquiry-into-youth-justice-centres-in-victoria> accessed 14 December 2021.

184 Legislative Council Committee Office, *More action recommended to fix youth justice centres*, media release, Parliament of Victoria, 6 March 2018.

- Sufficient ongoing funding for Victoria Police Youth Resource Officers to continue their work
- The Children's Court review its group conferencing program to determine whether it can occur prior to sentencing
- Providing more effective post-release services to young people who have spent time in a youth justice centre to help reduce the risk of reoffending.[185]

The Victorian Government supported in full or in principle all 39 of the recommendations made by the Committee. It observed that many of the recommendations aligned with the findings and recommendations of previous reviews and that work was, in many cases, already underway to address these:

> Almost three quarters of the Inquiry's recommendations align with the recommendations of the landmark and system wide Youth Justice Review, conducted by independent experts Ms Penny Armytage and Professor James Ogloff AM, as well as recommendations from other reviews and reports into the Youth Justice system. The Government has already made significant investments across Youth Justice to implement reforms that address the recommendations from these reviews.[186]

In 2017, the Victorian Auditor-General's Office commenced an audit examining how well the rehabilitation services provided to young people in Youth Justice Custodial Precincts meet developmental needs and reduce recidivism. It tabled its final report in August 2018, *Managing Rehabilitation Services in Youth Detention*. The Auditor-General found that Victoria's Youth Justice Custodial Precincts are not meeting the needs of the young people incarcerated within them:

> We found that young people in detention have not been receiving the rehabilitation services they are entitled to and that are necessary to meet their needs. As a result, youth detention has not been effectively promoting reduced reoffending.[187]

The report made seven recommendations aimed at improving rehabilitative outcomes, all of which were accepted by the government agencies they were directed at.

Several stakeholders to this Inquiry referred to these reviews of Victorian Youth Justice Custodial Precincts and commented on subsequent government initiatives to address their recommendations. However, in light of the time constraints of this Inquiry and the extensive previous work undertaken in this space, the Committee has elected not to re-examine the conditions in, and rehabilitative programs offered by, Victorian Youth Justice Custodial Precincts.

The Committee notes that it has been over three years since it delivered the findings of its Inquiry into Youth Justice Centres in Victoria. Given that these recommendations aligned with the findings of many of the other reviews and inquiries conducted in this

185 Ibid.

186 Government of Victoria, *Response to the Parliament of Victoria, Legislative Council Legal and Social Issues Committee, Inquiry into Youth Justice Centres in Victoria*, pp. 1–2.

187 Victorian Auditor-General's Office, *Managing Rehabilitation Services in Youth Detention*, August 2018.

space, the Committee believes it would be beneficial for the Victorian Government to provide an update on the progress of implementing the 39 recommendations that the Committee made as part of this Inquiry.

RECOMMENDATION 94: That the Victorian Government provide a detailed update on the measures it has taken towards implementing the 39 recommendations it accepted in full or in principle which were made by the Legislative Council Committee on Legal and Social Issues as part of its Inquiry into Youth Justice Centres in Victoria. This implementation update should be provided within six months of this report being tabled.

RECOMMENDATION 95: That the Victorian Government provide a detailed update on the measures it has taken towards implementing the recommendations it accepted in full or in principle which were made in the following reports:

- the Ogloff-Armytage *Youth Justice Review and Strategy: Meeting needs and reducing offending* (2016)
- the Victorian Auditor-General's Office's *Managing Rehabilitation Services in Youth Detention* (2018).

This implementation update should be provided within six months of this report being tabled.

13 Parole and the post sentence scheme

At a glance

In Victoria, incarcerated people can apply to serve the last part of their custodial sentence in the community through the process of parole. The Adult Parole Board grants or denies parole based on the risk to community safety an incarcerated person presents, as well as the supports and supervision in place to reduce this risk.

People being released at the end of a custodial sentence who continue to pose an unacceptable risk to community safety can be placed on supervision or detention orders through the post-sentence scheme, which enables their ongoing incarceration, supervision and rehabilitation.

Key issues

- There have been several reviews and substantive reform of the Victorian parole system in recent years. However, the primary aim of parole remains to enhance community safety.
- Evidence submitted to this Inquiry suggests that it is unclear how parole reform has impacted community safety.
- Stakeholders are concerned that reforms make it more difficult for some groups in the community, such as Aboriginal Victorians and women, to access to parole.

Findings and recommendations

Finding 69: Between 2009–10 and 2019–20 the proportion of incarcerated people released from prison on parole has declined from 30% to 6% of all discharges from custody. This may mean that more people are being released straight from prison back into the community with limited or no support and supervision.

Finding 70: Recent reforms to Victoria's parole laws made clear the need for community safety to be paramount in parole decision-making. While the number of serious offences that have been committed by people while on parole have decreased in recent years, it is not clear whether community safety outcomes have improved in respect of people exiting prison at the end of their sentence without supervision and management through the parole system.

Recommendation 96: That the Victorian Government:

- undertake an evaluation of the impacts of parole reforms implemented since 2013 on community safety outcomes (including recidivism), and table a report of this evaluation in the Parliament of Victoria
- amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal and Torres Strait Islander representation on the Adult Parole Board
- ensure that the Adult Parole Board can appropriately exercise discretion with regard to applications for parole from individuals who have been unable to complete pre-release programs due to limited availability
- investigate ways to improve parole processes to ensure that individuals applying for parole have direct engagement with the decision-making process
- examine whether community safety could be improved by amending the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

Finding 71: The post sentence scheme has increased the supervision and management of individuals who have committed serious sex and/or violent offences and present a significant risk to community safety following the end of their prison sentence.

13.1 Parole

Parole is the process through which an individual can serve the final part of their sentence of imprisonment in the community. During the parole period, they are supervised by Community Correctional Services (CCS), a division of Corrections Victoria.

To be considered for parole, eligible adults in prison must apply to the Adult Parole Board. They must be serving a term of imprisonment with a non-parole period, and will be subject to consideration by the Board as to the grant, denial or deferral of parole. If parole is granted, the Board also sets any conditions that must be complied with.[1]

The risk assessment process for parole commences when an individual is first received into prison. They undergo evidence-based risk assessment and are also categorised as either a 'general offender' or a 'serious violent or sexual offender'. During their time in prison, they may complete courses and programs that can support a future application for parole.

Individuals are notified by Corrections Victoria when they are able to apply for parole. This can occur up to 12 months before their eligibility date; however, a person can choose to apply at any time before the end of their sentence. Applications are reviewed

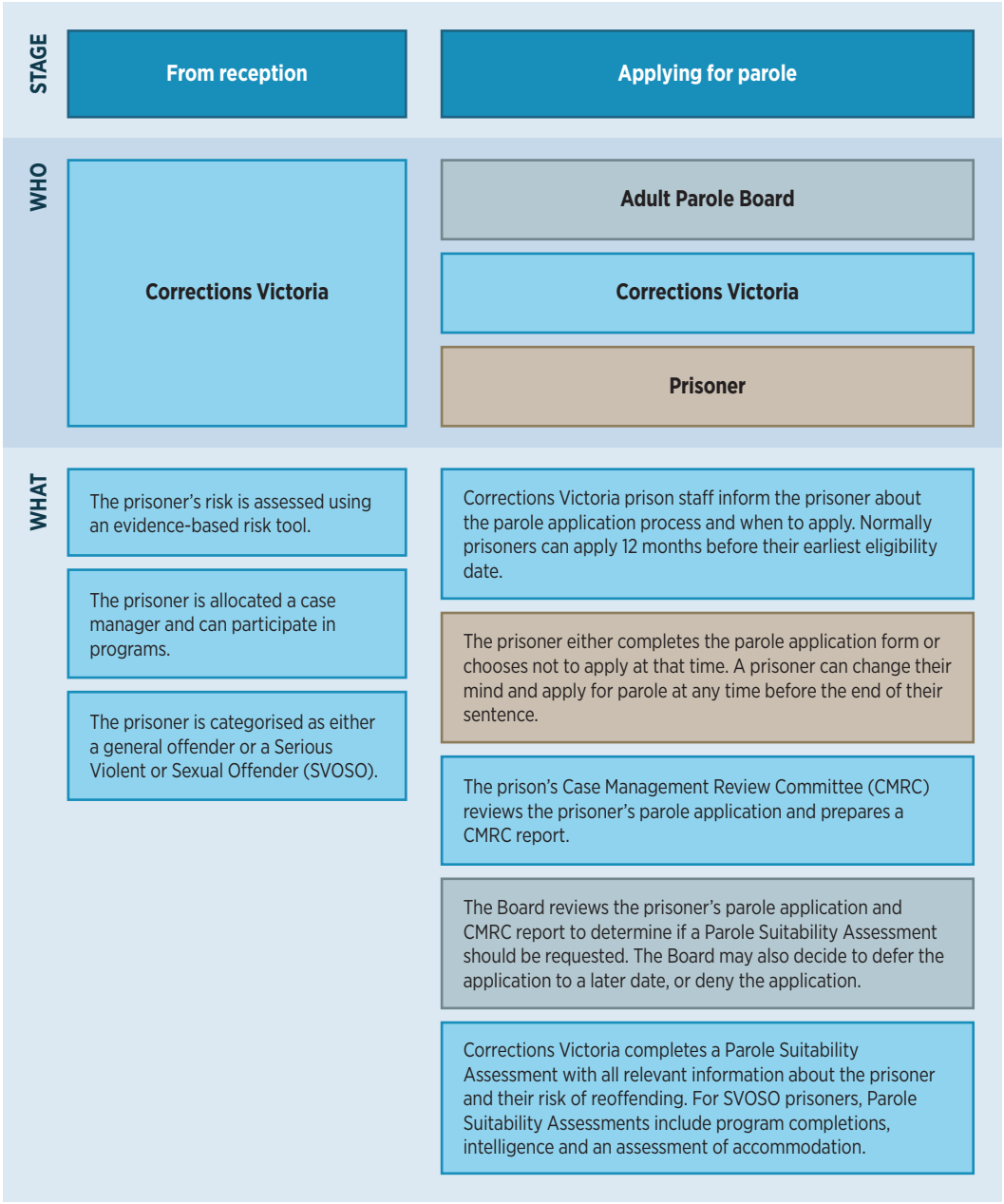
1 Adult Parole Board Victoria, *How parole is managed*, 2017, <https://www.adultparoleboard.vic.gov.au/how-parole-managed> accessed 1 February 2022.

by a prison Case Management Review Committee, who prepare a report for the Adult Parole Board.

The Board then reviews applications and can request a Parole Suitability Assessment. This assessment identifies relevant information about a person, including the risk of reoffending. For individuals considered to be a serious violent or sexual offender, the assessment also encompasses program completions, intelligence and an assessment of accommodation.

The parole process is displayed in Figure 13.1 below.

Figure 13.1 Parole process, reception to application



Source: Legislative Council Legal and Social Issues Committee. Based on: Adult Parole Board Victoria, *Parole process infographic*, infographic, 2017, <https://www.adultparoleboard.vic.gov.au/parole-process-infographic>.

In deciding whether to grant or deny parole, the Adult Parole Board considers the application and the Parole Suitability Assessment together. It may decide to interview the individual or Corrections Victoria staff. It also considers any written submissions received from victims of crime. In carrying out this task, the Adult Parole Board explains that its 'paramount consideration is always the safety and protection of the community'.[2]

Releasing persons on parole involves an important risk assessment. The Victorian Auditor-General's Office described how risks to community safety can include the potential for offences to be committed while on parole, as well as in relation to people leaving prison without supervision or appropriate supports in place. It explained:

> While the overarching purpose of the parole system is to increase community safety, there will always be the risk that some parolees will commit further offences while in the community. This risk is managed through monitoring and supervision by responsible authorities. The parole system also acts as an incentive for good behaviour in prison and encourages participation in in-prison programs. The alternative to parole is prisoners being released from prison with no support or supervision.[3]

In 2020–21, the Adult Parole Board determined 1,317 applications for parole. It granted parole to 63% of applicants, with 37% denied. A total of 79% of parolees successfully completed their parole.[4]

Community Correctional Services (CCS) manages people released on parole in addition to supervising people on various court orders. The Victorian Government stated that the number of people being supervised by CCS had increased by approximately 38% between 2010 and 2019 (from 9,292 to 12,813 people). This subsequently declined in 2020 and 2021,[5] which may partially be explained by COVID-19 response measures.

The Victorian Government noted that between 2009–10 and 2019–20, the proportion of persons being released on parole had decreased, from approximately 30% to 6% of all discharges from prison. In 2019–20, approximately 5% of women were released on parole, compared to around 6% of men.[6]

Figure 13.2 displays the change in discharge type from prison between 2009–10 and 2019–20, including the increase in people being discharged having served their sentence, and the decrease in persons being released on parole.

2 Adult Parole Board Victoria, *Parole process infographic*, infographic, 2017, <https://www.adultparoleboard.vic.gov.au/parole-process-infographic>.

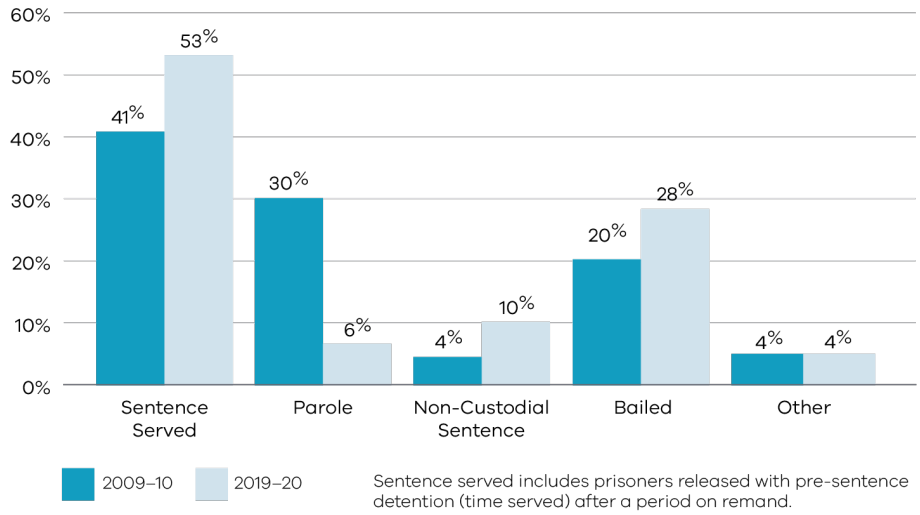
3 Victorian Auditor-General, *Administration of Parole*, PP No 127, Session 2014–16, Melbourne, 2016, p. ix.

4 Adult Parole Board Victoria, *Annual Report 2020–21*, Melbourne, 2021, p. 4.

5 Victorian Government, *Submission 93*, p. 40.

6 Ibid., p. 36.

Figure 13.2 People released from prison by discharge type, 2009–10 and 2019–20



Source: Victorian Government, *Submission 93*, p. 36.

The number of people convicted of committing serious violent offences or sexual offences while on parole has significantly decreased in recent years, as shown in Table 13.1 below. However, it is important to note that this does not offer a complete picture of the impacts of the parole reforms on community safety. In particular, these figures do not show impacts on community safety resulting from people being denied parole and released following their sentence without the support or supervision afforded by the parole system.

Table 13.1 Number of persons convicted of committing serious violent offences or sexual offences while on parole, 2013–14 to 2020–21

Reporting year	Persons convicted
2013–14	60
2014–15	22
2015–16	13
2016–17	5
2017–18	5
2018–19	3
2019–20	4
2020–21	0

Source: Adult Parole Board Victoria, *Annual Report 2020–21*, 2021, Melbourne, p. 4.

The Committee invited the Adult Parole Board to participate in the Inquiry, including through appearance at a public hearing. However, the Adult Parole Board declined this invitation.

Parole for children and young people is determined by the Youth Parole Board in accordance with the *Children, Youth and Families Act 2005* (Vic). However, as noted in Chapter 1, the Committee does not consider the youth justice system in detail in this report.

13.1.1 Recent reform of Victoria's parole system

There have been several high-profile reviews of Victoria's parole laws in recent years.

In 2011, Professor James Ogloff and the Office of Correctional Services (now the Justice Assurance and Review Office) undertook a review of cases of alleged murder by people on parole. During the same period, the Attorney-General requested the Sentencing Advisory Council undertake an examination of the administrative and legislative framework for parole in Victoria. Both reviews resulted in changes to the parole system, including to the parole decision-making risk assessment undertaken by the Adult Parole Board, and processes around parole decision review.[7]

These reviews were followed by the Callinan review of the parole system in Victoria (Callinan Review) in 2013 which led to further reform of Victoria's parole laws. This review was commissioned by the Victorian Government following the rape and murder of a young woman, Jill Meagher, by a parolee. The review, undertaken by former High Court judge, the Hon Ian Callinan AC, made 23 recommendations aimed at reforming the parole system and improving the ways in which community safety is considered in parole decision-making.

In particular, the Callinan Review highlighted that many people leaving prison have experienced disadvantage, and may face numerous challenges to reintegrating into the community:

> On release, even well-intentioned offenders who are ill-equipped to survive in a non-institutional setting can lapse. The vast majority of offenders reside in three of four of the hundreds of postcodes in Victoria. People in prison for years find a different world when they emerge from its gates. It is rare that they have a family to which they can turn for support. Wives, husbands and partners have moved elsewhere. Some formerly simple face-to-face transactions can only be conducted electronically, a medium with which many of them are unfamiliar. Whether released finally or on parole, many prisoners will be adrift within hours. It is difficult for them to find jobs.[8]

It acknowledged that parolees 'cannot be supervised around the clock', and that supervision is 'labour intensive'. It also found that there is high staff turnover, partly due to poor conditions.[9]

7 Ibid., p. 101.

8 Hon Ian Callinan AC, *Review of the Parole System in Victoria*, report for Department of Justice, Corrections Victoria, Melbourne, 2013, p. 6.

9 Ibid., p. 7.

In 2016, the Victorian Auditor-General's Office conducted a review of the administration of the parole system in Victoria. The audit found that the majority of the recommendations made by the Callinan Review had been either fully implemented or 'appropriately modified based on sound evidence and consultation'.[10]

Some of the key changes implemented in conjunction with the Callinan Review, as well as the previous two reviews, included the:

- reversal of the onus for a parole application which placed responsibility for seeking parole on the incarcerated individual, whereas applications had previously been initiated by the Adult Parole Board
- introduction of a 'second tier' of review for parole decision-making in relation to certain individuals
- insertion of a requirement to ensure that community safety and protection is a paramount consideration in parole decision-making
- introduction of a new offence of breach of parole.

These changes were largely aimed at ensuring that people convicted of serious crimes are subject to stringent scrutiny prior to parole being granted.

The Victorian Government's parole reforms were accompanied by investment of approximately $84 million during the four-year period between 2014–15 and 2017–18. The Victorian Auditor-General's Office 2016 review found that these reforms have:

> resulted in a better informed and resourced APB [Adult Parole Board], better trained and supported parole officers and better information sharing between the APB and Victoria Police regarding parolee behaviour.[11]

However, the report also identified a number of challenges. This included that less people are now granted parole, with the result being that 'more offenders are not receiving the support and supervision during reintegration into the community that the parole system offers.'[12]

The Victorian Auditor-General's Office concluded, at the time of the audit, that there was insufficient data and it was too early to evaluate the impacts of the reforms on community safety outcomes:

> it is still too early to fully assess the impacts of the PSRP [Parole System Reform Program] on community safety outcomes. Limitations in the data currently available mean that there are significant barriers to evaluating the outcomes of the parole system in general.
>
> There is now a stronger focus on reducing the risk that parolees will commit further serious offences while on parole …

10 Victorian Auditor-General, *Administration of Parole*, p. xi.

11 Ibid., pp. vii, ix.

12 Ibid.

> However, some challenges remain that have ongoing implications for long-term community safety and the management of offenders. Fewer prisoners are being released on parole. Those who are not released on parole are not subject to parole officer supervision upon release and cannot be ordered to undertake the community-based programs offered by DJR [Department of Justice and Regulation, precursor to the Department of Justice and Community Safety] and service providers.[13]

The Victorian Government also noted a reduction in the number of incarcerated people accessing parole:

> Between 2009–10 to 2019–20, the proportion of people released to parole has fallen from 30 per cent (1,662 people) to six per cent (841 people) of all discharges.
>
> In 2019–20, five per cent of women (87 women) were released on parole and six per cent of men (754 men) were released on parole.[14]

The Committee is concerned by evidence that parole reforms have decreased the proportion of people accessing parole but that the impact of this on community safety and recidivism is currently unknown. It notes that the Victorian Auditor-General's Office was unable to evaluate the impact of parole reform due to a lack of data and because the reforms were too recently implemented at the time of its audit. The Committee recommends that this evaluation be completed as soon as possible. Chapter 2 of the report includes a recommendation that data collection and publication across the criminal justice system be improved.

FINDING 69: Between 2009–10 and 2019–20 the proportion of incarcerated people released from prison on parole has declined from 30% to 6% of all discharges from custody. This may mean that more people are being released straight from prison back into the community with limited or no support and supervision.

13.1.2 Stakeholder views

Stakeholders reflected on the impact and appropriateness of recent parole reforms throughout the Inquiry. They questioned whether reforms:

- undermine the purpose of parole which is to enhance community safety
- disproportionately impact access to parole
- enhance the application process
- improve the management and support of incarcerated people re-entering the community
- the appropriateness of time on parole not being considered time served where parole is cancelled.

13 Ibid., pp. vii, ix–x.

14 Victorian Government, *Submission 93*, p. 36.

Purpose of parole

In its 2016 audit, the Victorian Auditor-General's Office stated that the primary purpose of parole—improving community safety— is not well known:

> It is not well understood that the primary purpose of the parole system is to increase community safety. The parole system aims to do this by providing support and supervision to assist prisoners to reintegrate into the community. Almost all prisoners will be released at some stage, and the alternative to parole is straight release into the community, without support or supervision.[15]

The Adult Parole Board similarly provided that by 'supporting prisoners to return to the community under supervision toward the end of their sentence, parole's main purpose is to increase community safety'. It explained that people released directly from prison into the community, without exiting on parole, 'may increase the risk of reoffending compared to release with supervision on parole'.[16]

The Committee heard that reforms following the Callinan Review made the parole process less accessible (for a similar discussion around bail, see Chapter 9). This is likely to have had flow-on effects for community safety outcomes.

The Human Rights Law Centre said that one way in which parole is now harder to access is that incarcerated persons are no longer automatically considered for parole. It noted that while eligibility is often contingent on the completion of programs in prison, there is often limited availability of these programs. It highlighted how requirements to demonstrate access to housing prevent grants of parole, which 'punishes people without access to housing instead of supporting people to find a safe and secure home'. Further, the submission highlighted issues relating to parole conditions:

> 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.[17]

15 Victorian Auditor-General, *Administration of Parole*, p. vii.

16 Adult Parole Board Victoria, *Purpose and benefits*, 2017, <https://www.adultparoleboard.vic.gov.au/purpose-and-benefits> accessed 30 January 2022.

17 Human Rights Law Centre, *Submission 58*, pp. 10–11.

In evidence to the Inquiry, Emeritus Professor Arie Freiberg AM, Chair of the Sentencing Advisory Council, compared the parole reforms to the recent reforms to the bail system, highlighting that both have become highly risk-averse:

> there is a major crisis. Partly it is our bail laws, but it is Australia wide. It is a risk-averse society. It is also to be seen in parole. Anywhere where there is a conditional provision—bail, community correction orders, parole—we are fearful because of the few, always too many, catastrophic outcomes. So there might be a low risk but a very high catastrophic outcome, and because we are so risk averse we are prepared to keep those people in perhaps longer than they otherwise would, than a risk evaluation might show. Again, I think bail has driven these numbers in Victoria.[18]

The Australian Psychological Society explained that reduced access to parole may only improve community safety in the short-term:

> Reduced access to parole opportunities has resulted in limited ability to monitor offender risk while in the community, or the provision of structured supervision and support in offender transition back into the community. While these legislative changes ensure community protection in the short-term through incapacitation, reduced focus is applied to rehabilitative efforts.[19]

Similarly, Smart Justice for Women described the benefits of a successful parole system for women, with limited access to parole and related supports potentially increasing the risk of reoffending:

> When coupled with intensive case management delivered by well-resourced support services, parole can provide a valuable opportunity for women to reintegrate into the community after time in custody and reduce their risk of reoffending. Conversely, women who complete their full sentence in custody without time on parole are often released back into the community with few supports, which increases the risk of harm both to the individual and to the community.[20]

Dr Marietta Martinovic, Senior Lecturer in Criminology and Justice at RMIT University, emphasised the importance of supported parole, and described to the Committee how the diminished access to parole may act as a disincentive to participate in programs:

> The other thing that a lot of people in prison talk about is that they no longer have an incentive to do well whilst in prison because parole has become quite difficult to get, and a lot of people end up serving time in prison as opposed to being released on parole. All the research that I have ever done says that parole is wonderful. Some of these people end up going on parole for two or three months and are saying to me things like, 'I wish I was there longer', because that supported release into community is of vital importance for people's long-term success.[21]

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18 Emeritus Professor Arie Freiberg AM, Chair, Sentencing Advisory Council, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 28.

19 Australian Psychological Society, *Submission 90*, p. 4.

20 Smart Justice for Women, *Submission 94*, p. 24.

21 Dr Marietta Martinovic, Senior Lecturer, Crimonology and Justice, RMT University, Australian Inside Out Prison Exchange Program Manager, and Australian Prison and Community based Think Tank Leader, public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 10.

The Victorian Aboriginal Legal Service argued that the *Corrections Act 1986* (Vic) should be amended to explicitly include the purpose of parole, as well as the criteria on which parole decisions are made. It said that the 'legislated purpose of parole should highlight that the release of the individual on parole will contribute to the protection of society by facilitating their rehabilitation and reintegration into society'.[22]

Smart Justice for Women stated that the 'purpose of parole for women should be to support their rehabilitation and reintegration into the community, including reunification with their children'.[23]

Disproportionate access to parole

The Human Rights Law Centre stated that the recent reforms have had a disproportionate impact on certain groups, in particular women experiencing poverty and Aboriginal and Torres Strait Islander women.[24] It provided:

> The number of women being granted parole has fallen dramatically over the past decade, both as a percentage of women released and in overall numbers. In 2006/2007, 26 per cent of women released from prison were released on parole. By 2018/2019, only 4 per cent of women released from prison in Victoria were released on parole.
>
> Numerous barriers prevent women being able to access parole once they have served their non-parole period. These include lack of access to stable accommodation and the unavailability of programs in custody. The Callinan Review recommended that parole only be granted if a person has undertaken programs which either the Court or Corrections ordered, directed or believes that the person should engage with. This is particularly problematic given the lack of programs available for women in prison to access, and that women may not receive the necessary support to apply and access the programs that are available.[25]

The Centre explained that requirements to have access to accommodation are a 'challenging barrier' for women leaving custodial settings, 'given that they have high rates of housing instability'. It highlighted the proportion of women in prison that have experienced family violence, which is the leading reason for women seeking support from homelessness services in the State. The submission stated:

> Women exiting prison may not have a safe home to return to and there is a lack of housing services that are appropriate for women who are exiting prison on parole and who are, or at risk of, experiencing family violence. Setting 'suitable and stable accommodation' as criterion for parole can result in women weighing up the risk of returning to violent relationships, or risk having their parole denied.[26]

22 Victorian Aboriginal Legal Service, *Submission 139*, p. 27.

23 Smart Justice for Women, *Submission 94*, p. 10.

24 Human Rights Law Centre, *Submission 58*, pp. 10–11.

25 Ibid., p. 12.

26 Ibid.

In addition, the Human Rights Law Centre explained that these challenges are particularly acute for Aboriginal and Torres Strait Islander people, and in particular, Aboriginal and Torres Strait Islander women. It said that this is due to limited accessibility of culturally appropriate pre-release programs, as well as their generally serving shorter sentences, making them ineligible for some programs.[27]

Parole application process

> **we do not see the board, we barely hear anything, and it really gets to us, especially when we have done everything that is asked of us.**
>
> Caraniche, *Submission 115,* p. 10.

As outlined above, incarcerated individuals are notified by Corrections Victoria when they are eligible to apply for parole. Prior to reforms implemented, applications for parole were initiated by the Adult Parole Board.

In its 2016 audit, the Victorian Auditor-General's Office stated that the revocation of the automatic consideration of prisoners for parole 'has been a positive step' because:

> prisoners have to take responsibility for accessing parole themselves and the [Adult Parole Board] does not have to spend time considering the suitability of prisoners who do not want to go on parole. [28]

However, it noted that systems needed to ensure that 'prisoners are not missing out because they are unable to navigate the application process'.[29]

The Human Rights Law Centre stated that the reverse onus provisions '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'.[30]

Smart Justice for Women asserted that women face various barriers in applying for parole, such as a lack of knowledge of the process and of their rights, administrative delays and limited accessibility of relevant programs. It stated that this is 'reducing the opportunities for women to even apply for parole, let alone make a successful application'. It recommended:

- There should be a presumption that an application for parole will be made at the earliest eligibility date.
- The State is better resourced and equipped to undertake the administrative processes required for parole applications to progress. Accordingly, these applications should occur automatically, rather than women in prison bearing the onus of applying.

27 Ibid., pp. 12–13.

28 Victorian Auditor-General, *Administration of Parole*, p. x.

29 Ibid., p. 9.

30 Human Rights Law Centre, *Submission 58*, p. 11.

- Women in prison should be supported in these applications through the availability of independent information and education around parole processes, and timely access to programs and assessments, especially where these are a pre-requisite for consideration of parole.
- The government should be obliged to provide access to mandated programs in a timely manner.
- Where mandated programs have not been completed in prison, this should not be an automatic barrier to parole being granted. Decision-makers should have regard to the reasons for non-completion, including the availability of the programs, and their appropriateness for the individual having regard to factors including the cultural safety of the programs and their delivery.[31]

The Law Institute of Victoria similarly told the Committee that some of its members reported that people in prison could not apply for parole 'on the basis that they cannot complete the required programs, such as the violent offender program' due to limited accessibility of rehabilitative services.[32]

Like Smart Justice for Women, the Victorian Aboriginal Legal Service advocated for parole processes to occur automatically. It noted that in other Australian and international jurisdictions (such as NSW, QLD, SA and NZ) incarcerated people serving short sentences are 'automatically released on parole on the date set by court, without having to apply' whereas those serving longer sentences must apply for parole. It recommended amending the *Corrections Act 1986* (Vic) to 'provide for automatic court-ordered parole for sentences under five years'. It argued that 'automatic parole will increase access to parole for Aboriginal people, who are more likely to be convicted of low-level offences and sentenced to shorter sentences'.[33]

Dr Martinovic from RMIT University told the Committee that people applying for parole have limited input into the process:

> What happens is that an external person prepares a report, and they usually have very little say in what goes into that report. And it sort of goes nowhere. There is very little communication that happens, and very often—this is the worst part of the process, according to them—they get a no and there is no explanation why the no is given. And that is what they say—'I'm not part of anything. I have no control over anything'. And that is a very difficult thing in life, because at some point most people get out. When they exit the system there is a huge expectation. When you are not well, when you are this and you are that, you go and get help, but you have taken away all this autonomy all the way through the process. How on earth can a person then all of a sudden walk out of the door and say, 'Yes, now I can do everything'? It is impossible.[34]

31 Smart Justice for Women, *Submission 94*, p. 26.

32 Law Institute of Victoria, *Submission 112*, p. 14.

33 Victorian Aboriginal Legal Service, *Submission 139*, p. 27; ibid.

34 Dr Marietta Martinovic, *Transcript of evidence*, p. 11.

Caraniche—a drug and alcohol rehabilitation service provider—described the impersonal nature of parole proceedings, reporting that incarcerated people had stated that they feel like 'they don't matter' because the Adult Parole Board does not often directly speak to them.[35]

Stakeholders also raised a number of concerns with the operation of parole conditions. For example, the Human Rights Law Centre noted that strict conditions are often set, and that breach of parole conditions is a criminal offence. It said that this has resulted 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 minor behaviour such as missing curfew by an hour, not reporting to Community Corrections or not attending a medical assessment.[36]

The Centre said that Aboriginal and Torres Strait Islander people 'are often given a greater number of, and more stringent, parole conditions which lead to a greater chance of conditions being breached'. It noted that parole conditions for Aboriginal and Torres Strait Islander women 'do not take into account their intersectional experiences make their pathway to success on parole much harder'.[37]

The Centre also said that many people in Victoria choose not to apply for parole at all, which may be a result of the harsh punishments resulting from breach of parole.[38] Similarly, Dr Diana Johns, a Senior Lecturer in Criminology at the University of Melbourne, stated: 'Anecdotal evidence … suggests that many people in prison no longer apply for parole on the assumption that their request will be denied'.[39]

The Victorian Aboriginal Legal Service stated that while there is currently Aboriginal representation on the Adult Parole Board, this should be a statutory requirement. For this reason it recommended that the Victorian Government amend the *Corrections Act 1986* (Vic) to ensure the inclusion of Aboriginal representatives.[40]

Management and support

As outlined in Chapter 12, the supports and programs that are available to incarcerated people will significantly influence their likelihood of reoffending post-release. The more widely available and therapeutic these supports are while in prison—including in relation to housing, employment and rehabilitative programs—the less likely an individual is to reoffend. It is equally important for such supports to extend into the post-release period, which is also known as 'throughcare'.

35 Caraniche, *Submission 110*, p. 10.

36 Human Rights Law Centre, *Submission 58*, p. 11.

37 Ibid., pp. 12–13.

38 Ibid.

39 Dr Diana Johns, *Submission 104*, p. 3.

40 Victorian Aboriginal Legal Service, *Submission 139*, p. 179.

The Callinan Review reported that parole officers were not adequately trained and that there was high turnover of staff in these positions. It also noted the difficulty in around-the-clock supervision of parolees and that it 'is impossible under any circumstances to ensure that every parolee comply with every condition of parole'.[41]

However, the Victorian Auditor-General's Office reported that there have been significant changes to parolee case management in conjunction with recent reforms, including a new staffing structure. It stated:

> Parole officers received appropriate training on topics such as the new risk-assessment tool, case management and different offender groups. Their case loads are now more manageable.
>
> … Information sharing between agencies has improved and there are now clear protocols for communication around breaches of parole. However, information sharing between DJR and community-based service providers and clinicians could be improved. Service providers and clinicians do not always have access to information such as detailed assessments and clinical information collected in prison, which inhibits their ability to support parolees. Parole officers also do not always receive appropriate information from service providers and clinicians, which hinders their ability to properly supervise parolees and inform the APB.[42]

The Human Rights Law Centre argued that a throughcare model should complement the parole system to ensure people exiting prison are able to successfully reintegrate:

> 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.[43]

Support services for persons who have left prison are discussed in more detail in Chapter 12.

The Committee also received evidence around the limited role for victims of crime or their support networks in parole applications and management. A submission from Lee Little, whose daughter Alicia was killed in 2017 by her partner, wrote:

> When Alicia's offender was released on parole he had plenty of options, including family, to reside within Victoria. Yet he was granted permission to move to NSW and now has applied to move to Queensland. We feel it risks being 'out of sight, out of mind' and there are a lot of things we don't know about his parole conditions. A media reported that the offender was on an online dating site under a different name - is this not a breach of his parole? We're told he's not allowed to drink alcohol or drive but when I

41 Hon Ian Callinan AC, *Review of the Parole System in Victoria*, pp. 7–8.

42 Victorian Auditor-General, *Administration of Parole*, p. xi.

43 Human Rights Law Centre, *Submission 58*, p. 12.

> asked corrections how they were monitoring this I was told it is by phone and they don't work on weekends. I hope this is not the way parole operates in Victoria, but if it isn't then the offender should be back in Victoria being properly monitored.[44]

Lee Little called for victims of crime and their families to be notified of the parole conditions of those who offended against them if they wish.[45]

John Herron, whose daughter Courtney was murdered in 2019 when she assisted a man with a history of violent offending against women, felt that the 'limited parole monitoring of [domestic violence] offenders needs urgent review'.[46]

The involvement of victims of crime in criminal justice processes is discussed in more detail in Chapters 6 to 8 of this report.

Cancellation of parole

If a person's parole is cancelled by the Adult Parole Board, time spent on parole does not contribute towards that person's sentence unless so directed. The Human Rights Law Centre noted that this means that those individuals are required to serve that time again in prison. It said:

> Alarmingly, 54 per cent of people who had their parole cancelled did not have their time spent on parole counted towards their sentence. The most common reason for denial was because the person "relapsed into drug use". 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.
>
> 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)) which provides that the time a person spends on parole can count as time served.[47]

The Centre advocated for the amendment of parole laws to provide that any time served on parole, prior to parole being cancelled, is counted as time served.[48] This suggestion was also made by the Victorian Aboriginal Legal Service, who noted that the Australian Law Reform Commission had recommended such an approach in its Inquiry into Incarceration of Aboriginal and Torres Strait Islander People.[49]

On this issue, the Law Institute of Victoria told the Committee:

> the internal guidelines and/or policies of the Adult Parole Board of Victoria appear to restrict the application of section 77C of the *Corrections Act 1986* (Vic) to prevent the

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44 Lee Little, *Submission 28*, p. 3.

45 Ibid.

46 John Herron, Submission 42, p. 3.

47 Human Rights Law Centre, *Submission 58*, p. 11.

48 Ibid., p. 5.

49 Victorian Aboriginal Legal Service, *Submission 139*, p. 177.

contribution of time served due to some instances of reoffending on parole, despite any specific restriction in the *Corrections Act 1986* (Vic).

In 2019–20, the Adult Parole Board considered 215 time to count matters, with the discretion under section 77C of the *Corrections Act 1986* (Vic) not exercised to grant any time to count for 117 of these matters, specifically due to prisoner relapse into drug use. While the Adult Parole Board granted at least some time to count in 75 cases, 23 cases were deferred, with the reasoning behind each of these decisions not known.[50]

The Law Institute advocated for time spent on parole to be credited towards a prison sentence, arguing that discretion to refuse this is 'inconsistent with Drug Treatment Orders or other community-based sentences, where time spent on the order in the community is counted towards the sentence'.[51]

As discussed, the reforms implemented in the wake of the Callinan Review were clear in ensuring that community safety should be the primary consideration in a decision on whether to grant parole. The Hon Denis Napthine, former Premier, stated to media at the time of the review: 'The safety of the community will be the highest priority for the Adult Parole Board'.[52]

The Committee recognises that community safety is critical, and that the importance given to this in parole processes is to be welcomed. It is unclear whether the reforms introduced in response to the Callinan Review necessarily strike the right balance between this purpose and ensuring the effective rehabilitation and community reintegration of an individual leaving prison. Crucially, limited access to parole may not necessarily improve community safety if appropriate supports are not in place both before and after a person is released from prison. Evidence to the Inquiry demonstrates that diminished access to parole, combined with limited access to crucial supports, may lead to negative outcomes for community safety.

The Committee also notes that in 2018, the Post Sentence Authority was established to provide for independent and rigorous monitoring of the post sentence scheme for persons who have committed serious sex and/or serious violent offences. This scheme manages individuals that present an unacceptable risk to the community and who have been made subject to ongoing supervision or detention following their prison sentence. The Committee heard evidence from the Post Sentence Authority on the impacts for community safety of this scheme, which is discussed in more detail in the following Section.

The Victorian Auditor-General's Office concluded in 2016 that it was too early at that time to assess the impacts of recent parole reforms on community safety outcomes. Accordingly, the Committee considers it timely that an evaluation is undertaken to

50 Law Institute of Victoria, *Submission 112*, p. 49.

51 Ibid., p. 50.

52 'Review recommends making it harder for violent criminals to get parole', *ABC News,*, 19 August 2013, <https://www.abc.net.au/news/2013-08-20/review-recommends-making-it-harder-for-violent-criminals-to-get/4898372> accessed 1 February 2022.

ensure the parole scheme is meeting its objectives. This assessment should evaluate the impacts of the reforms on community safety outcomes.

In addition, while the Committee welcomes the inclusion of an Aboriginal Elder on the Adult Parole Board, it considers that this should be enshrined in legislation in light of the particular experiences of Aboriginal and Torres Strait Islander peoples in the parole system. Further, the Adult Parole Board should be adequately equipped to take into consideration the reasons for any non-completion of pre-release programs in applications for parole, including their limited availability.

In relation to the input of incarcerated people into parole decision-making, the Committee considers it appropriate that the Victorian Government investigate ways to improve engagement between applicants and the Adult Parole Board.

The Committee also notes that many Australian and international jurisdictions have introduced automatic court-ordered parole for shorter sentences. The Committee would like to see the Victorian Government consider how the introduction of a similar scheme in Victoria could enhance community safety.

FINDING 70: Recent reforms to Victoria's parole laws made clear the need for community safety to be paramount in parole decision-making. While the number of serious offences that have been committed by people while on parole have decreased in recent years, it is not clear whether community safety outcomes have improved in respect of people exiting prison at the end of their sentence without supervision and management through the parole system.

RECOMMENDATION 96: That the Victorian Government:

- undertake an evaluation of the impacts of parole reforms implemented since 2013 on community safety outcomes (including recidivism), and table a report of this evaluation in the Parliament of Victoria
- amend the *Corrections Act 1986* (Vic) to include a legislative requirement to have Aboriginal and Torres Strait Islander representation on the Adult Parole Board
- ensure that the Adult Parole Board can appropriately exercise discretion with regard to applications for parole from individuals who have been unable to complete pre-release programs due to limited availability
- investigate ways to improve parole processes to ensure that individuals applying for parole have direct engagement with the decision-making process
- examine whether community safety could be improved by amending the *Corrections Act 1986* (Vic) to provide for automatic court-ordered parole for sentences under five years.

13.2 Post sentence scheme

The post sentence scheme was established in 2018 following the *Review of Complex Adult Victim Sex Offender Management*, conducted by former Supreme Court Judge David Harper (the Harper Review). Under the post sentence scheme, established under the *Serious Offenders Act 2018* (Vic), a court can order a person who has served their sentence to continue to be subject to detention or supervision orders. Eligible individuals are those that have committed serious violent and/or serious sex offences and are considered to present an unacceptable risk to the community.

The Post Sentence Authority—an independent statutory authority—is responsible for monitoring individuals subject to detention and supervision orders. These orders are outlined in Table 13.2.

Table 13.2 Detention and supervision orders

Supervision orders	• provide for individuals to be supervised by Corrections Victoria upon their release from prison • can be made for up to 15 years and renewed for further periods of up to 15 years • must be reviewed at least every three years by the court • conditions can be set in relation to, among other matters: – where the offender lives – who the offender may contact – activities offender may participate in – participation in treatment programs – drug testing – electronic monitoring • Post Sentence Authority reviews and monitors the progress of persons on supervision orders, reviews alleged breaches of conditions and makes related recommendations
Detention orders	• the Director of Public Prosecutions can apply to the Supreme Court to make a detention order in respect of an individual, which keeps them in detention following the end of their sentence • can be made for up to three years and renewed for additional periods of three years • must be reviewed every year by the Supreme Court • Post Sentence Authority reviews and monitors the progress of persons on detention orders

Source: Post Sentence Authority, 'Supervision orders, 2022' <https://www.postsentenceauthority.vic.gov.au/post-sentence-scheme/supervision-orders> accessed 31 January 2022; Post Sentence Authority, 'Detention orders, 2022' <https://www.postsentenceauthority.vic.gov.au/post-sentence-scheme/detention-orders> accessed 31 January 2022.

Detention and supervision orders can only be made for the purpose of:

- improving the protection of the community
- enabling treatment and rehabilitation of individuals subject to the orders.[53]

53 Post Sentence Authority, *Post sentence scheme*, 2022, <https://www.postsentenceauthority.vic.gov.au/post-sentence-scheme> accessed 31 January 2022.

In a submission, the Post Sentence Authority described detention orders as representing the 'most severe form of restraint on the rights of an offender'. Due to the order's 'serious infringement on the liberty of a person who is detained but not serving a sentence,' the Director of Public Prosecutions must apply to the Supreme Court for such an order. The submission stated that as of 30 June 2021, only four people in Victoria were subject to either a detention order or an interim detention order.[54]

In comparison, there were 128 people subject to either a supervision order or an interim supervision order as of 30 June 2021. The Post Sentence Authority described some of the restrictions in place for people subject to these orders:

> Although offenders subject to a supervision order live in the community, they do not necessarily live in private residential accommodation. Accommodation options that are available reflect offenders offending, risks and needs. For example, serious sex offenders may be required to reside at a 'residential facility', such as Corella Place at Ararat. These facilities are operated by Corrections Victoria and, while not secure, provide an on-site level of oversight and management for offenders whose risks cannot be adequately managed in a less restrictive environment.[55]

People subject to a post sentence order are assigned case managers who facilitate access to supports and services. They are also assessed by the Victorian Government's Multi-Agency Panel, made up of representatives of the Department of Justice and Community Safety, Department of Health, Department of Families, Fairness and Housing, and Victoria Police. The panel reviews the service needs of individuals at least every six months to address identified risks.[56]

The post sentence scheme engages with victims of crime through the Victims Register. The Post Sentence Authority may invite written submissions from victims included on the Register about a direction that it proposes to make, and aims to ensure these are considered in its decision-making processes.[57]

The Post Sentence Authority described the impacts of the post sentence scheme on rates of recidivism in relation to serious offences:

> Reflecting the scheme's purpose which is to prevent serious reoffending, the preventative nature of the scheme, and the comprehensive monitoring tools that are in place, mean that escalating behaviour is likely to be identified and dealt with before more serious offending occurs. For example, if a serious offender's risk of committing serious offences will increase by taking illegal drugs, they may be subject to regular drug testing under the conditions of their supervision order. These tests may lead to charges for offences relating to drug use or failing to comply with the drug test requirements of their order. Prosecution on charges of contravening the conditions of the supervision order may contribute (together with other strategies) to prevent escalation to serious sexual or violent reoffending linked to drug use. While the conviction of offenders on

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54 Post Sentence Authority, *Submission 96*, p. 2.

55 Ibid., p. 3.

56 Ibid.

57 Ibid., p. 5.

> the lesser offences may be regarded by some as a form of recidivism, it is, in fact, a demonstration of the post sentence scheme working effectively to prevent serious reoffending.[58]

Further, the submission stated that other considerations of effectiveness of the scheme include the meaningful engagement with rehabilitative services, opportunities for stable accommodation, assistance in building pro-social support networks and addressing health and disability needs. It noted that 11 individuals were able to 'come off their supervision order when it expired or was revoked in 2020–21'.[59]

At a public hearing, Michele Williams QC, Chair of the Post Sentence Authority, explained the nature of the scheme in preventing serious offences from being committed by persons that can be identified as presenting a serious risk to the community:

> we are balancing a number of different factors when we are looking at this material. The reason for this is the scheme is a preventative one; we are really trying to prevent. And this is where it perhaps dovetails into what you are looking at: rates of recidivism or ways to reduce recidivism. And the reason that we are looking at and have, if you like, what I call the pointy end is because these offenders are the ones who do or inflict the most serious harm. And that is what we are seeking to avoid, obviously, by quite rigorous monitoring and supervising 24/7 …
>
> So, you know, rigorous monitoring—looking at the risks, making sure that the risk of the offender is not escalating. Really the idea behind that is early intervention, because we do not claim that we can prevent altogether an offender from offending, the ones that we are dealing with. What we seek to do is to act early to prevent them from going on to commit more serious offences.[60]

The Act is subject to a five-year statutory review,[61] which will take place in the coming years.

FINDING 71: The post sentence scheme has increased the supervision and management of individuals who have committed serious sex and/or serious violent offences and present a significant risk to community safety following the end of their prison sentence.

13.3 Community reintegration

As discussed in detail in Chapter 12, pre- and post- release programs and supports:

- are critical in supporting individuals to address the causes of their offending
- reduce the risks of reoffending

58 Ibid., p. 7.

59 Ibid., pp. 7–8.

60 Michelle Williams QC, Chair, Post Sentence Authority, public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 43.

61 *Serious Offenders Act 2018* (Vic) s 348.

- to ensure that people are able to successfully reintegrate back into the community following their time in prison.

This is well recognised by stakeholders, many of whom advocated for increasing post-release support. For example, the Centre for Innovative Justice told the Committee that: 'it is well established that measures to address the causes of offending and to support integration into the community upon release are successful in reducing recidivism'. Further, without effective rehabilitative supports:

> incarceration alone is likely to increase rates of offending. Reforms which aim to promote rehabilitation therefore have important implications for community safety, as well as meeting social justice and cost-saving objectives.[62]

The Justice Reform Initiative asserted that there is a 'strong research base to suggest that if we were to adequately invest in programs and supports for people leaving prison, that we would be able to have a significant impact on recidivism rates'.[63] It stated:

> People need holistic, wrap-around, trauma informed, relational casework and outreach support when they leave prison that is genuinely hopeful and compassionate. People need to be able to build trusting relationships over time with workers, who they know that they are going to be in their corner. Support needs to be long term. People who have lifetimes of trauma and incarceration need more than short term support.
>
> People need help and support and advocacy navigating complicated and often discriminatory systems post-release which are frequently set up in such a way that failure is much more likely than success.
>
> People need somewhere to live when they leave prison. Housing – and the affordable housing crisis is not something any of us can ignore if we are serious about keeping people out of prison. It is now well understood that stable housing on release from a period of incarceration is vital in reducing the risk of re-offending.
>
> Pre-release planning and pre-release support is critical in terms of building a sustainable post-release pathway. Wherever possible this support should be conducted by the same community based health or social service organisation that is also providing post-release support.[64]

The Australian Psychological Society stated that additional focus is required towards community reintegration in the post-release period:

> Close to 40% of all prisoners return to custody within two years of release.
>
> Therefore, additional focus is required to address reintegration, and in particular, early and effective responses to deterioration of functioning. This will ensure the greatest chance of post release success. The key reintegration domains identified include accommodation, employment and work readiness, education and training, substance

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62 Centre for Innovative Justice, *Submission 82*, p. 12.

63 Justice Reform Initiative, *Submission 103*, p. 5.

64 Ibid., p. 3.

> use, family and community re-connection, spiritual and cultural re-connection, health and mental health, and practical and logistical needs. In the absence of attention on reintegration needs, there is likely to be little reduction in overall risk of re-offending, particularly given the cross over between core reintegration needs and criminogenic risk factors, as identified above. In light of this, it would be beneficial to increase the link between relevant health providers and the justice sector, to generally improve awareness of relevant offender risk factors. In this way, deterioration in functioning can be better identified and managed.[65]

The provision of rehabilitative and reintegration support in Victoria is discussed in detail in Chapter 12.

65 Australian Psychological Society, *Submission 90*, p. 7.

PART F: JUDICIAL APPOINTMENTS AND TRAINING

14 Judicial appointments

At a glance

In Victoria, the Governor in Council is responsible for appointing all judicial officers based on a recommendation from the Attorney-General. The required qualifications and the process for appointing judicial officers is governed by several pieces of legislation, including the *Constitution Act 1975* (Vic) as well as separate legislation for each Victorian court. To support the appointment process, the Judicial College of Victoria has published a *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*, which potential or current judicial officers can refer to for advice on the expected qualities for officers of the court.

Key issues

- The process for appointing any judicial officer should be clear and transparent to ensure integrity and community trust in the criminal justice system. Currently, there is little public information on the process the Victorian Government uses to identify and appoint judicial officers.
- Diversity of judicial officers is an important factor in promoting public trust and could build the Victorian community's confidence in the judiciary as well as improve justice outcomes. Diversity is achieved when a cross-section of the community is represented within an institution so that different voices, perspectives and experiences can be heard. Evidence shows that Victoria's judiciary is not sufficiently diverse, with many cohorts significantly underrepresented.
- Rural and regional Victoria do not have enough court resources, particularly for specialist courts, which is limiting community access to courts. Improving the accessibility of courts in rural and regional Victoria requires additional judicial officers to increase the capability of courts to meet demand in these areas.
- A judicial officer's security of tenure is protected through the Victorian Constitution to prevent judicial independence being undermined as a result of undue influence from the government or Parliament. Therefore, it is vital that judicial appointment processes are robust and transparent to ensure appropriate judicial officers are appointed, and that judicial education and training reflects contemporary needs and expectations.

Recommendations

Recommendation 97: That the Victorian Government establish a clear recruitment process for identifying and appointing judicial officers to Victoria's courts and tribunals. This process should:

- establish clear principles which govern the process for judicial appointments in Victoria. These principles should emphasise the importance of an open and transparent process for recruiting and appointing judicial officers.
- establish clear and consistent selection criteria for each judicial position. The criteria should be informed by the qualities identified in the Judicial College of Victoria's Framework of Judicial Abilities and Qualities for Victorian Judicial Officers.
- facilitate the use of advisory panels to assist the Attorney-General in identifying appropriate candidates, in accordance with any statutory requirements. Panels should comprise a diverse group of stakeholders from legal and non-legal backgrounds.
- promote transparency by making the recruitment process publicly available on the Department of Justice and Community Safety's website, including advertising vacancies.

Recommendation 98: In the development and implementation of a recruitment process for judicial appointments, the Victorian Government should:

- establish processes that actively promote diversity in the judiciary
- consider ways to identify and engage specific cohorts which are underrepresented in the judiciary with a view of recruiting them into positions where appropriate, including Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities
- collect and make public data on the diversity of applications and recommendations for judicial office.

Recommendation 99: In providing funding to Victorian courts to expand specialist court services into rural and regional Victoria, the Victorian Government should ensure that this includes the recruitment of additional judicial officers to support the work of mainstream and specialist courts in those areas. Where possible and appropriate, selection criteria or standards for appointments to specialist courts, such as the Koori Courts, should be made in conjunction with relevant stakeholders.

14

14.1 The judicial appointment process in Victoria

In Victoria, judicial officers (including judges and magistrates) are appointed by the Governor in Council on the recommendation of the Attorney-General. The Attorney-General identifies a preferred candidate and then obtains approval from

Cabinet, before submitting a recommendation to the Governor. The *Constitution Act 1975* (Vic) prescribes the required qualifications and process for appointing judges to the Supreme Court of Victoria.[1] The Supreme Court's appointment process, as is the case with other Victorian courts, can also be found in legislation governing each Court.

The Department of Justice and Community Safety's website provides general guidance on the appointment process for judicial officers in Victoria. According to the website, when there is a judicial vacancy the Attorney-General will seek expressions of interest from 'qualified persons'.[2] Potential candidates are also referred to the *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* which offers guidance on the attributes the Victorian Government believes the community expects from judicial appointees (see Section 14.1.1 below for an overview of the Framework).

Box 14.1 provides excerpts from the Department's website on the guidance provided for appointments to specific Victorian courts.

BOX 14.1: Department of Justice and Community Safety's guidance for court appointments

Appointments to the Supreme and County Courts of Victoria

Expressions of interest are sought from those with substantial legal experience and knowledge of the jurisdictions of the Supreme and County Courts.

Required qualifications and conditions of employment are contained in sections 75B, 77, 80D and 82 of the *Constitution Act 1975*, section 104 of the *Supreme Court Act 1975*, section 24 of the *Courts Legislation Miscellaneous Amendments Act 2010* and division 3 of the *County Court Act 1958*.

Appointments to the Magistrates' and Coroners Courts of Victoria

Expressions of interest are sought from those with substantial legal experience and knowledge of the jurisdictions of the Magistrates' and Coroners Courts. Experience in dispute resolution is advantageous.

Required qualifications and conditions of employment are contained in sections 7, 9, 10 and sections 16B, 16C, 16D of the *Magistrates' Court Act 1989* and section 94 of the *Coroners Act 2008*.

Source: Department of Justice and Community Safety, *Judicial appointments*, <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments> accessed 9 November 2021.

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1 *Constitution Act 1975* (Vic) s 75B.

2 Department of Justice and Community Safety, *Judicial appointments*, <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments> accessed 9 November 2021.

As part of the appointment process, candidates for judicial office also undertake a series of probity checks before a recommendation is made to Cabinet or the Governor. Probity checks on judicial appointees include:

- Nationally Coordinated Criminal History Check
- Declaration of Private Interests (DPI)
- a statutory declaration
- search of the Australian Securities and Investment Commission Register of Persons Banned and Disqualified
- search of the Australian Financial Security Authority's National Personal Insolvency Index.[3]

The purpose of these checks is to ensure that a candidate is fit for office and to identify any potential conflicts of interest which could affect them undertaking their duties. The process for managing a judicial officer's conflict of interest is discussed further in Section 14.2.5.[4]

In a 2010 discussion paper from the Department of Justice, changes made to Victoria's judicial appointments process were discussed. One of these changes was the introduction of a practice of publishing the key selection criteria for judicial vacancies.[5] As part of its review into judicial appointments, the Department of Justice published a discussion paper which outlined the key selection criteria for judicial officers:

- personal qualities such as integrity, fairness, maturity, sound temperament and commitment to public service
- a demonstrated interest in appropriate dispute resolution is an advantage
- awareness of issues of gender, sexuality, disability and cultural and linguistic difference
- demonstrated intellectual and analytical skills, sound judgment, decisiveness, and the capacity to command authority, and manage and initiate change
- the ability to communicate fairly, effectively and courteously with all court users
- a commitment to the use of technology and participation in ongoing judicial education will also be viewed favourably.[6]
- The Committee notes that a final report was not published.

3 Victorian Government, *Submission 93*, pp. 87–88.

4 Ibid.

5 Department of Justice, *Reviewing the judicial appointments process in Victoria: a discussion paper*, 2010, p. 8.

6 Ibid., p. 11.

14.1.1 Framework of Judicial Abilities and Qualities for Victorian Judicial Officers

In 2008, the Judicial College of Victoria published its *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* which describes what skills, knowledge and behaviours are critical in the performance of a judicial role.[7] It is unclear whether the Framework has been updated since its initial publication. The Framework is based on the Judicial College of England and Wales' (formerly the Judicial Studies Board of England and Wales) *Framework of Judicial Abilities and Qualities* and informed by international best practice standards for judicial performance.

The Framework is not an enforceable document. It is intended as a professional development guide for judicial officers regarding what judicial behaviours should be developed to better undertake their duties. The purpose of the Framework is to present 'core generic judicial qualities and abilities'. The Framework can be used by Victorian judicial officers for self-development, judicial education or professional development.[8]

The Framework was developed to integrate the principle of 'fair treatment' and reflects the obligations imposed by the *Charter of Human Rights and Responsibilities Act 2006* (Vic). According to the Judicial College of Victoria, integration of the principle of 'fair treatment' into the Framework acknowledges the 'need for attention to fairness in every aspect of judicial work in relation to all those who come before the court or tribunal, as well as those who work in the court or tribunal'.[9]

The Framework is divided into six 'headline' abilities and associated judicial qualities:

- knowledge and technical skill
- communication and authority
- decision-making
- professionalism and integrity
- efficiency
- leadership and management.

Table 14.1 summarises the headline abilities and includes examples of practical applications included in the Framework.

7 Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*, 2008, <https://www.judicialcollege.vic.edu.au/sites/default/files/2020-05/2009jcvframework-jcvsite1.pdf> accessed 20 April 2021.

8 Ibid.

9 Ibid.

Table 14.1 Summary of 'headline' judicial abilities and associated qualities under the Framework

Ability	Definition	Practical examples
Knowledge and technical skill	• sound knowledge of law • sound knowledge of procedure	• controls court proceedings through fair and effective management and intervention • weighs relevant issues and matters of law to formulate reasoned and coherent decisions
Communication and authority	• maintains authority in court or tribunal • enables fair and timely hearings • communicates effectively	• appropriately deals with parties, witnesses, victims, representatives, the public, press and staff • always explains the decision
Decision-making	• sound judgement • appropriate exercise of discretion	• objectively and impartially evaluates evidence • reaches reasoned decisions
Professionalism and integrity	• independence and authority of the court • independence and integrity of the judicial officer • personal discipline • promotes highest standards of behaviour	• recognises and discloses potential conflicts of interest • fair to all participants in proceedings • respects and complies with the law
Efficiency	• facilitates fair and timely hearings • actively manages cases to promote efficiency and a just conclusion	• exercises discretion in court proceedings • promptly discharges administrative responsibilities
Leadership and management	• strategically plans and organises • manages quality standards	• identifies and responds to training needs

Source: Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*, 2008, <https://www.judicialcollege.vic.edu.au/sites/default/files/2020-05/2009jcvframework-jcvsite1.pdf> accessed 20 April 2021.

The following sections outline the eligibility criteria for judicial officers across Victoria's courts, including key specialist courts. Chapter 1 outlines Victoria's court hierarchy and provides an overview of the criminal justice system's operations.

14.1.2 Coroners' Court

Section 94 of the *Coroners Act 2008* (Vic) prescribes the eligibility requirements for becoming a coroner in Victoria. A person can become a coroner if they meet one of the following criteria:

- they are under 75 and are, or have been, a judge or magistrate in an Australian court
- they are under 70 and are an Australian lawyer of at least 5 years' standing
- they are under 75 and have been appointed to act as a coroner in another jurisdiction.[10]

10 *Coroners Act 2008* (Vic) s 94.

Coroners are appointed by the Governor in Council at the recommendation of the Attorney-General.

The State Coroner is responsible for the administration and operation of Victoria's coronial system. A person may be appointed the State Coroner if they are a judge of the County Court. The State Coroner may hold the office for a period of up to 5 years, after which they would need to be re-appointed to the position.[11]

The Deputy State Coroner must be a magistrate. They are responsible for acting as the State Coroner in the State Coroner's absence. Like the State Coroner, the Deputy holds the office for a period of up to 5 years before needing to be re-appointed.[12]

14.1.3 Magistrates' Court

The *Magistrates' Court Act 1989* (Vic) prescribes the eligibility requirements for becoming a Magistrate in Victoria.

Section 7 empowers the Governor in Council to appoint a Magistrate, with no limit on the number of appointments that can be made.[13] The Governor in Council is also responsible for appointing the Chief Magistrate and Deputy Chief Magistrates.[14]

The Chief Magistrate is the principal judicial officer of the Magistrates' Court of Victoria and is responsible for:

- assigning duties to judicial officers
- making court rules, in consultation with Deputy Chief Magistrates
- issuing practice directions
- performing other statutory functions.[15]

A Deputy Chief Magistrate is responsible for undertaking duties assigned by the Chief Magistrate and acting as the Chief Magistrate in the Chief Magistrate's absence.[16]

Table 14.2 outlines the eligibility requirements for becoming a Chief Magistrate or magistrate in Victoria.

11 Ibid., s 91.

12 Ibid., ss 92–94.

13 *Magistrates' Court Act 1989* (Vic) s 7(1).

14 Ibid., ss 7(2)–(2A).

15 Magistrates' Court of Victoria, *Judicial officers*, 2021, <https://www.mcv.vic.gov.au/judicial-officers> accessed 2 June 2021.

16 Ibid.

Table 14.2 Eligibility requirements for appointment in the Magistrates' Court of Victoria

Position	Section of the Magistrates' Act	Requirements	Length of term
Chief Magistrate	S 7(2B)	• Already be a judge of the County Court, or simultaneously appointed as a judge of the County Court at the time of becoming Chief Magistrate	Mandatory retirement at age 70 (s 7(4))
Deputy Chief Magistrate	S 7(2)	• Appointed by the Governor in Council • An Australian lawyer of at least 5 years' standing; or • Previously been a judge or magistrate in an Australian court; and • Under the age of 70	Term not exceeding 5 years, but is eligible for reappointment (s 7(2A))
Magistrate	Ss 7(3)–(4)	• An Australian lawyer of at least 5 years' standing; or • Previously been a judge or magistrate in an Australian court; and • Under the age of 70	Mandatory retirement at age 70 (s 7(4))
Reserve Magistrate	S 9A	• Under the age of 78 • Currently or previously a magistrate in a Victorian court or an equivalent in another jurisdiction	5 years from date of appointment or at 78 years of age (s 9B)

Source: *Magistrates' Court Act 1989* (Vic) s 7.

14.1.4 County Court

Section 8 of the *County Court Act 1958* (Vic) prescribes the qualifications and appointment processes for judges of the County Court. The Governor in Council is responsible for appointing the Chief Judge and other judges to the County Court.[17]

Table 14.3 outlines the eligibility requirements for becoming the Chief Judge or a judge of the County Court.

17 *County Court 1958* (Vic) s 8(1).

Table 14.3 Eligibility requirements for appointment in the County Court of Victoria

Position	Section of the County Court Act	Requirements	Length of term
Chief Judge	S 8(1B)	• Already be a Judge of the Supreme Court, or simultaneously appointed as a judge of the Supreme Court at the time of becoming Chief Judge	Mandatory retirement at age 70 (s 8(3))
Judge	S 8(1A)	• An Australian lawyer of at least 5 years' standing; or • Previously been a judge or magistrate in an Australian court	Mandatory retirement at age 70 (s 8(3))
Reserve judge	S 12(2)	• Under the age of 78 • Currently or previously a judge in the County Court or equivalent in another jurisdiction	5 years from date of appointment or at 78 years of age (s 12A(1))

Source: *County Court Act 1958* (Vic) s 8(1A)–(1B).

14.1.5 Supreme Court

The *Constitution Act 1975* (Vic) (Constitution Act) and the *Supreme Court Act 1986* (Vic) prescribe the eligibility requirements for appointing Associate Judges and reserve Associate Judges[18] to the Supreme Court of Victoria.

Table 14.4 outlines the eligibility requirements for judicial appointment in the Supreme Court.

Table 14.4 Eligibility requirements for appointment in the Supreme Court of Victoria

Position	Section of the Supreme Court Act	Requirements	Length of term
Associate Judges	S 104(6)	• Has been enrolled as a legal practitioner of the High Court of Australia or been an Australian lawyer for no less than 5 years; or • Has been a judge, associate judge or magistrate of an Australian court	Mandatory retirement at age 70 (s 104(9))
Reserve Associate Judges	S 105B(2)	• Under the age of 78 years at time of appointment; and • Is or has been an Associate Judge or Master of the Supreme Court in any Australian state or territory, or an associated judge or a Master of the Federal Court of Australia.	5 years from date of appointment or at 78 years of age (s 105C(1))

Source: *Supreme Court Act 1986* (Vic) ss 104(6), 105B(2).

18 Reserve associate judges are either retired or interstate judges appointed by the Governor in Council to serve as a substitute judge for a period of five years.

Section 78A of the Constitution Act prescribes how a person can be appointed as the Chief Justice of the Supreme Court, President of the Court of Appeal or a Judge of Appeal. To be appointed to any of these positions, the only requirement is that a person is a Judge of the Supreme Court of Victoria at the time of appointment.[19] Like other judges, the Chief Justice must mandatorily retire at the age of 70.[20]

A Reserve Associate Judge is not permitted to be appointed as the Chief Justice or the President of the Court of Appeal.[21]

14.1.6 Specialist courts

A specialist court describes a court whose legal jurisdiction is limited to hearing and determining matters within a confined area of the law (e.g. drug offences) or involving a specific cohort (e.g. children).[22]

As outlined in Chapter 1, there are three specialist courts in Victoria—the Children's Court, Koori Court and Drug Court. Table 14.5 summarises the judicial appointment process for these courts.

Table 14.5 Judicial appointment processes for specialist courts

Name of Court	Legislative basis for judicial appointment	Judicial appointment process	Length of term
Children's Court	*Children, Youth and Families Act 2005* (Vic), s 507(1)	• Magistrate or reserve magistrate appointed under the Magistrates' Court Act 1989 (Vic) • Appointed by the President of the Children's Court to preside over a matter in the Children's Court, either exclusively or in addition to other duties (s 507(1))	For as long as they hold the office of magistrate or reserve magistrate (s 507(4))
Koori Court	*Magistrates' Court Act 1989* (Vic) *County Court Act 1958* (Vic)	• The Koori Court is a division of the Magistrates' and County Courts and has the same judicial appointment processes • The Chief Executive Officer of Court Services Victoria can appoint Aboriginal elders or respected persons to work in the Koori Court	For as long as they hold a relevant judicial position in a Victorian court
Drug Court	*Magistrates' Court Act 1989* (Vic), s 4A(3) *County Court Act 1958* (Vic), s 4AA(3)	• Assigned by the Chief Magistrate or Chief Judge in the relevant court	For as long as they hold the office of magistrate or reserve magistrate

Source: Information compiled by the Legislative Council Legal and Social Issues Committee.

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19 *Constitution Act 1975* (Vic) s 78A.

20 Ibid., s 77(3).

21 Ibid., s 78A(2).

22 Justice Michael Moore, 'The role of specialist courts – an Australian perspective', *Federal Judicial Scholarship*, vol. 1, 2001, <http://www.austlii.edu.au/au/journals/FedJSchol/2001/11.html>.

14.2 Revising the appointment process

The following sections discuss a number of suggestions raised by stakeholders to the Inquiry to improve judicial appointment processes. This includes establishing more open and transparent appointment processes, diversification of the judiciary, judicial tenure, appointments to specialist courts and managing potential conflicts of interest.

14.2.1 Open and transparent appointments

Several stakeholders believed that there is a lack of transparency in Victoria's judicial appointment process. There was a perception amongst these stakeholders that judicial vacancies are filled by people with personal or professional connections to the Attorney-General or other senior officials involved in the government or legal profession. In December 2021 an editorial piece in the Australian Financial Review on the lack of diversity in Australia's High Court stated 'most Commonwealth countries ask judges to apply for their jobs. Australia effectively relies on good old boys sitting around a table'.[23]

The lack of a formal recruitment process or publicly available policies on the appointment of judicial officers raises issues around fairness and transparency, and can foster distrust of the judiciary, whose competency and qualifications are not publicly known. This is particularly important considering the tenure of judicial officers and the limited avenues for reviewing an appointment, which is discussed further in Section 14.2.4.

Other jurisdictions have implemented practices in their judicial appointment processes which are aimed at promoting openness and transparency. New Zealand has established a *Judicial Protocol* which formalises the process for appointing judicial officers. The Protocol is based on six guiding principles:

1. clear and publicly identified processes for selection and appointment
2. clear and publicly identified criteria against which persons considered are assessed
3. clear and publicly identified opportunities for expressing an interest in appointment
4. commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection
5. advertising for expressions of interest, recognising that selection should not always be limited to those who have expressed interest
6. maintaining, on a confidential database, a register of persons interested in appointment.[24]

23 Andrew Leigh, 'Why has no person of colour ever served on the High Court?', *Australian Financial Review*, 21 December 2021, <https://www.afr.com/politics/federal/why-has-no-person-of-colour-ever-served-on-the-high-court-20211221-p59j8x> accessed 20 January 2022.

24 New Zealand Crown Law Office, *Judicial protocol*, 2014, <https://www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf> accessed 25 October 2021.

New Zealand's judicial appointment process and others are discussed further in Section 14.3.

In its submission, the Victorian Aboriginal Legal Service said there needs to be greater transparency in the process for appointing Victorian judicial officers. It discussed the lack of a formal application process which denies fair opportunity for qualified candidates to apply for positions:

> There is no formal application process for judicial appointments, however, and no dedicated body for assessing candidates and making decisions. The partial exception to this has been the use of advisory panels to give the Attorney-General advice on appointments to the Magistrates' Court and VCAT [Victorian Civil and Administrative Tribunal], though the Attorney-General retains discretion to ignore the assessment of the panel or make appointments outside the panel process. The result is that judicial vacancies are often filled by people with personal or professional connections with the Attorney-General or the heads of jurisdiction for each court. Though the quality of appointments is generally high, the process denies a fair opportunity to qualified candidates without those connections.[25]

The perception that appointments are made through personal or professional connections was echoed by the Community Advocacy Alliance. In its submission, it argued that the appointment process was at the 'whim of the Attorney-General':

> the system of appointment of judges is fatally flawed in that appointments are at the whim of the Attorney-General of the day. This too easily leads to "jobs for mates" and politicises the process. The [Community Advocacy Alliance] further submits that judicial appointments should be made by a Joint Parliamentary Committee and that judges should be appointed on contracts for, say, five years, renewable on the Judicial Conduct Commission being satisfied that KPIs are being met.[26]

In its submission, the Victorian Government acknowledged the importance of continually improving the judicial appointment process to promote transparency and independence. It discussed the outcome of the 2021 *Review of Sexual Harassment in Victorian Courts and VCAT*, which identified areas of improvement:

> The Sexual Harassment Review highlighted how influential recruitment processes are in defining workplace culture and safeguarding community confidence in the judiciary.
>
> A recommendation of the Sexual Harassment Review is that the Attorney-General amend the appointment process for judicial officers to explicitly incorporate candidate character and behaviour assessments. This recommendation has been accepted by government and its implementation is under consideration.[27]

Victoria's Victims of Crime Commissioner, Fiona McCormack, told the Committee that the judicial appointment process needs to be strengthened. She said there needs to

25 Victorian Aboriginal Legal Service, *Submission 139*, p. 262.

26 Community Advocacy Alliance, *Submission 21, Attachment 1*, p. 2.

27 Victorian Government, *Submission 93*, p. 88.

be confidence that the judiciary is equipped to work with victims of crime and other vulnerable people. At a public hearing, Ms McCormack indicated that a stronger appointment process could ensure a robust judiciary with the support and resilience to deal, for example, with cases involving trauma:

> we need a robust justice system, we need robust courts, we need robust judicial officers in order to deal with hearing the most horrific stories. Sometimes the reports that come just through our enquiries line about people's experiences are absolutely horrific. Imagine hearing about the sexual abuse of children or violent perpetrators over and over and over, and the impost on the court, the overwhelming impost that the court is managing.[28]

The experiences of victims of crime in navigating the criminal justice system and its processes is discussed further in Chapter 7.

In June 2021, the Law Council of Australia published its *Policy on the Process of Judicial Appointments*, which addresses key processes and principles the Council believes should govern the appointment of judicial officers in Federal Courts and Tribunals. The purpose of the policy is to 'ensure transparency in Federal judicial appointments and diversity in Australia's judicial officers' and 'promote public trust in the administration of justice'.[29] The Law Council of Australia recommended that the Australian Government establish a selection panel to provide candidate recommendations to the Attorney-General.[30] The Council further recommended:

- legislative provisions for membership to and governance of the selection panel to ensure transparency and public confidence
- consideration of representation within the panel so that it is reflective of the diversity of each jurisdiction, such as identifying particular social, cultural or other groups to participate
- alongside members of the legal profession, the selection panel should include community members who are not elected officials or from the legal profession
- establishing processes for the selection panel to give thorough and regular consideration to diversity alongside merit when making recommendations.[31]

In Victoria, the Attorney-General can establish advisory panels to assist with the appointment of magistrates and non-judicial appointments to the Victorian Civil and Administrative Tribunal. However, appointments to the Magistrates' Court do not require the use of an advisory panel. The appointment of an advisory panel is at the discretion

28 Fiona McCormack, Commissioner, Victims of Crime Commission, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 7.

29 Law Council of Australia, *Policy on the Process for Judicial Appointments*, 2021, p. 3, <https://www.lawcouncil.asn.au/publicassets/0eac8c98-b1d7-eb11-943d-005056be13b5/2021-06-26-PS-Process-of-Judicial-Appointments.pdf>.

30 Ibid., p. 4.

31 Ibid., pp. 4–5.

of the Attorney-General.[32] Advisory panels for judicial vacancies in the Magistrates' Court are convened to:

- provide advice to the Attorney-General
- assess expressions of interest
- interview short-listed candidates
- prepare a report and list of suitable candidates for the Attorney-General.[33]

In the Committee's view, the process for appointing any judicial officer should be clear and transparent to ensure the integrity of, and maintain community trust in, the criminal justice system. This is particularly important in light of the limited mechanisms for reviewing an appointment once it has been made, as discussed in Section 14.2.4. Currently, there is little public information on the process the Victorian Government uses to identify and appoint judicial officers.

For this reason, the Committee considers that the Victorian Government should establish a clear, consistent and transparent appointment process for all judicial vacancies which takes into account the legislative requirements of each court. This process should incorporate advisory panels which assist the Attorney-General to identify appropriate candidates. To ensure that a range of voices and experiences are incorporated in recruitment processes, panels should comprise a diverse group of stakeholders from legal and non-legal backgrounds. In addition, the recruitment process should be made publicly available on the Department of Justice and Community Safety's website.

RECOMMENDATION 97: That the Victorian Government establish a clear recruitment process for identifying and appointing judicial officers to Victoria's courts and tribunals. This process should:

- establish clear principles which govern the process for judicial appointments in Victoria. These principles should emphasise the importance of an open and transparent process for recruiting and appointing judicial officers.
- establish clear and consistent selection criteria for each judicial position. The criteria should be informed by the qualities identified in the Judicial College of Victoria's *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers*.
- facilitate the use of advisory panels to assist the Attorney-General in identifying appropriate candidates, in accordance with any statutory requirements. Panels should comprise a diverse group of stakeholders from legal and non-legal backgrounds.
- promote transparency by making the recruitment process publicly available on the Department of Justice and Community Safety's website, including advertising vacancies.

32 Department of Justice, *Reviewing the judicial appointments process in Victoria: a discussion paper*, p. 8.

33 Ibid., p. 19.

14.2.2 Diversification of the judiciary

> **[Diversity] is particularly important because when people come to court it is great if they can sort of visually see a representation of the Victorian community before them and not feel that it is something very alien to them.**
>
> Louise Glanville, Chief Executive Officer, Victoria Legal Aid, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 22.

Diversity is achieved when a cross-section of the community is represented within an institution so that different voices, perspectives and experiences can be heard. In public institutions, an increase in diversity of staff has been shown to increase public confidence in their operations and ensure more representative outcomes. The Committee believes that the court system in Victoria would benefit from greater diversity as it promotes public trust and confidence in their decisions and activities, and importantly, facilitates more just outcomes for those who interact with it. However, the Committee heard throughout the Inquiry that the Victorian court system does not reflect the diverse and multifaceted make-up of the community.

In its research, the Committee has not found a lot of demographic profiles of the courts. However, the information which is available does indicate there is a lack of diversity, not just in Victoria but around Australia:

- In 2015, Asian Australians accounted for 0.8% of the judiciary but 9.6% of Australia's population.
  - In Victoria, four judicial officers were Asian Australians, accounting for 1.72% of total judicial officers.[34]
- At 30 June 2020, 45.1% of total judicial officers in Victoria were women. However, women were more likely to be a judicial officer in the lower courts.
  - In the Magistrates' Court, 51% of Magistrates were women.
  - In the County Court of Victoria, 40% of judicial officers were women.
  - In the Supreme Court of Victoria, including the Court of Appeal, 33% of judicial officers were women. [35]

Stakeholders emphasised the importance of ensuring a diverse judiciary. This includes to better understand the unique challenges and needs of different cohorts, such as in relation to gender, cultural, and religious factors. Stakeholders identified several cohorts which they believed should be better represented among the judiciary. This includes Aboriginal Victorians, culturally and linguistically diverse communities and persons with a disability. These cohorts also experience compounded harms when interacting with

34 Asian Australian Lawyers Association Inc., *The Australian Legal Profession: A snapshot of Asian Australian diversity in 2015*, 2015.

35 The Australasian Institute of Judicial Administration, *Judicial Gender Statistics: Number and Percentage of Women Judges and Magistrates at 30 June 2020*, 2020, <https://aija.org.au/wp-content/uploads/2020/07/2020-JUDICIAL-GENDER-STATISTICS-v3.pdf> accessed 20 January 2022.

the criminal justice system. Chapter 4 considers the overrepresentation of particular cohorts in the criminal justice system. Alongside these cohorts, some stakeholders also believed a more diverse judiciary should include officers with experience or training in relation to victims of crime and trauma-informed practice.

Louise Glanville, Chief Executive Officer of Victoria Legal Aid, discussed the importance of a diverse judiciary, stating:

> I think the most important thing about the judiciary in Victoria is to make sure that as far as possible it represents the community. So [Victoria Legal Aid's] position is that it supports diverse appointments and it supports governments and Attorneys-General looking widely to see who are the best and most diverse and appropriate candidates for the judiciary or for the magistracy. I think that is a really important point—that diversity. It is particularly important because when people come to court it is great if they can sort of visually see a representation of the Victorian community before them and not feel that it is something very alien to them.[36]

Dr Marietta Matrinovic, a Senior Lecturer in Criminology and Justice at RMIT University, explained that diversification of the judiciary is an issue that is often raised by incarcerated individuals. She told the Committee that incarcerated people often believe that the magistrates or judges involved in their cases do not understand or relate to their experiences and that this can hamper their understanding.[37]

In its submission, the Victorian Council of Social Service recommended that community consultation be undertaken to determine whether a judicial diversity strategy should be developed to facilitate the appointment of judicial officers from diverse backgrounds. It stated diversity considerations should include gender, cultural and linguistic diversity, lived experience, and diverse legal backgrounds.[38]

The Victims of Crime Commissioner outlined the knowledge, skills and capabilities that should be considered when appointing judicial officers. This included:

- understanding trauma, the differing types of victimisation and the gendered nature of particular crimes
- capacity to accommodate diversity and understanding of the Victorian community's diverse cultural and religious backgrounds
- ability to facilitate a safe court environment for victims to give evidence
- willingness to intervene during cross-examination where appropriate, and ability to identify when questioning is in a manner or tone that is belittling, insulting or otherwise inappropriate

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36 Louise Glanville, Chief Executive Officer, Victoria Legal Aid, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 22.

37 Dr Marietta Matrinovic, Senior Lecturer, Crimonology and Justice, RMT University, Australian Inside Out Prison Exchange Program Manager, and Australian Prison and Community based Think Tank Leader, public hearing, Melbourne, 19 October 2021, *Transcript of evidence*, p. 16.

38 Victorian Council of Social Service, *Submission 137*, p. 8.

- ability to balance plea and sentencing hearings to accommodate defence pleas in mitigating a sentence, as well as proper consideration of victim impact, including Victim Impact Statement entitlements (for example, the entitlement to read a statement aloud).[39]

The Victims of Crime Commissioner recommended that the Victorian Government amend the judicial appointment process to require consideration of the knowledge, skills and capabilities outlined above. It further recommended that the Judicial College of Victoria amend the *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* to incorporate the 'expectations of the contemporary judicial role in upholding victims' interests in the criminal trial process'.[40]

Anoushka Jeronimus, Co-convenor of Smart Justice for Young People, also believed that the process for appointing judicial officers should focus on ensuring expertise and core competencies. In particular, she believed that the recruitment of judicial officers should value expertise and knowledge in key areas such as 'trauma, gender, cultural awareness and safety, and understanding the experience of victims' as well as the value of restorative justice.[41]

Restorative justice and other alternatives to incarceration are examined in Chapter 10.

As discussed in Chapter 4, Aboriginal Victorians are overrepresented in the criminal justice system. These communities also experience compounded harm when they encounter the system, including courts. Several stakeholders argued that there is a gap in judicial representation for Aboriginal and Torres Strait Islander communities.

In its submission, the Aboriginal Justice Caucus said more cultural competence and representation was needed to ensure that courts understand the socio-cultural factors impacting Aboriginal and Torres Strait Islander peoples. It advocated for more judicial career opportunities for Aboriginal people, stating investment was needed to:

> enable Aboriginal people to be employed as a Judicial Officer. Aboriginal people bring a wealth of knowledge spanning thousands of years and hold skills necessary to understanding the causes [of] reoffending in Aboriginal Communities.[42]

In its submission, the Victorian Aboriginal Legal Service discussed how a lack of diversity in the judiciary limits the courts' ability to consider legal issues from different perspectives:

> The effect of this is that, particularly for higher courts, judicial appointments are typically made from a very narrow pool, with little diversity in race, gender or professional background. The focus of attention on senior members of the Bar denies the courts and the Victorian community the benefit of judges with more understanding

39 Victims of Crime Commissioner, *Submission 99*, p. 20.

40 Ibid., pp. 21–22.

41 Anoushka Jeronimus, Co-convenor, Smart Justice for Young People, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*, p. 13.

42 Aboriginal Justice Caucus, *Submission 106*, p. 16.

> of different aspects of the legal system, different clients, and expertise in different areas of law …
>
> A key goal of a reformed judicial appointments process should be to improve diversity on the bench. Appointments are generally made from a very narrow pool, focused on practising barristers, especially for higher courts. This lack of diversity leaves the judiciary missing important perspectives on the law. Greater diversity is essential to ensuring the impartiality of the justice system and to retaining societal trust in the administration of justice.[43]

The Victorian Aboriginal Legal Service advocated for increased representation of Aboriginal and Torres Strait Islanders in Victoria's judiciary. The submission outlined that a more diverse judiciary is 'essential to maintaining public confidence in the administration of the law'.[44] Mr George Selvanera, Acting Chief Executive Officer of the Victorian Aboriginal Legal Service, stated:

> [The judiciary] is not a particularly diverse group of people. They do not look like this Committee, for instance. They certainly do not look like VALS [Victorian Aboriginal Legal Service]; I can assure you of that. Now, that is a long-term project, to increase the number of Indigenous people, for instance, that might be in the judiciary. So we would encourage, for instance, judicial appointments that bring in … more of the expertise of people who have actually worked directly in Aboriginal legal services or providing direct support to people who are Aboriginal, to help to improve—equipping … judges with that know-how.[45]

The Victorian Aboriginal Legal Service advocated that reform should 'focus on improving the diversity in the judiciary, particularly the representation of Aboriginal people and lawyers with experience working with Aboriginal people'.[46] It recommended that the Victorian Government reform the judicial appointments process so that it ensures:

- transparency and public confidence
- that appointees have the appropriate skills and experience to serve the community
- the judiciary is representative of the community.[47]

Stakeholders also raised diversity of knowledge, skills and experiences as an influence on judicial decision making. In particular, stakeholders considered that the criminal justice system could better support practitioners to understand the complex needs of different cohorts and awareness of how different socio-cultural factors influence outcomes.

43 Victorian Aboriginal Legal Service, *Submission 139*, p. 263.

44 Ibid., p. 262.

45 George Selvanera, Acting Chief Executive Officer, Victorian Aboriginal Legal Service, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, pp. 36–37.

46 Victorian Aboriginal Legal Service, *Submission 139*, p. 263.

47 Ibid.

Stabilise Pty Ltd believed a candidate's awareness of disability issues and how they could have an impact on a person's experience of the criminal justice system should be considered in the appointment process. Its submission included several suggestions on how the experiences of persons with a disability could be improved when they encounter the criminal justice system:

1. The appointment of Judges and Magistrates includes an awareness and understanding or support to develop:
    a. awareness of the issues impacting on people with a disability.
    b. the issues relating to specific disabilities especially involving cognitive impairment.
2. That people with a disability have the same rights for redress under the law as other members of the community.
3. Judges are provided with structural expertise to hear and determine cases involving people with a disability
4. The person with a disability is supported to have information made accessible by an appropriately skilled support person/independent Advocate.
5. The process be modified to ensure an inclusive and accessible system.
6. Awareness of the multifaced issues for people who are from Sexually, Culturally, Linguistically, religiously diverse communities including First Nations people.[48]

In its submission, the Victorian Government said that diversity in appointment processes is subject to the availability of candidates:

> In all cases, consideration is given to legislative requirements, court operational demands, and budget. The diversity of appointments is also considered, noting that, as indicated above, the pool of judicial candidates is often drawn from the Victorian Bar and is therefore influenced by the diversity of that body and the availability of senior legal practitioners willing to take up judicial office.[49]

The Committee considers that representation and diversity are important factors in promoting public trust and confidence in the judiciary and improving justice outcomes. Establishing a process which entrenches practices aimed at increasing diversity would be beneficial. The Committee recommends that the Victorian Government actively promote diversity in the judiciary through its engagement and recruitment activities. The Government needs to identify underrepresented cohorts and develop recruitment strategies to address it. This includes Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities. Data should be collected and made publicly available on the diversity of applications and recommendations for judicial office. This would enable monitoring and evaluation of the effectiveness of any actions to improve diversity. Ideally, this should occur in collaboration with the judicial heads of jurisdiction.

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48 Stabilise Pty Ltd, *Submission 53*, p. 5.

49 Victorian Government, *Submission 93*, p. 87.

RECOMMENDATION 98: In the development and implementation of a recruitment process for judicial appointments, the Victorian Government should:

- establish processes that actively promote diversity in the judiciary
- consider ways to identify and engage specific cohorts which are underrepresented in the judiciary with a view of recruiting them into positions where appropriate, including Aboriginal and Torres Strait Islander peoples and culturally and linguistically diverse communities
- collect and make public data on the diversity of applications and recommendations for judicial office.

14.2.3 Judicial appointments for specialist courts

Another issue raised by stakeholders was judicial appointments to specialist courts, particularly in rural and regional Victoria. The eligibility criteria and length of terms for key specialist courts in Victoria is outlined in Section 14.1.6 and an overview of specialist courts within Victoria's justice system is provided in Chapter 1.

In its submission, the Australian Psychological Society discussed that specific capabilities should be required for judicial officers presiding over specialist courts, particularly knowledge and skills relevant to a court's area of law:

> It is appreciated that judges and magistrates presiding over specialist courts require particular capabilities. The APS [Australian Psychological Society] believes forensic psychologists are in an ideal position to assist in the provision of training and consultation in relation to this. This might particularly concern … the application of therapeutic jurisprudence practices to optimise the manner in which proceedings occur to increase the likelihood that offenders will benefit from these interactions.[50]

This was echoed by John Herron, who has personal and professional experience with the criminal justice system. John Herron believed that judges and magistrates should be appointed to areas of law where they have expertise. He noted that in his experience, 'there have been a few appointments to the criminal appeals court where the judges do not have any criminal law experiences'.[51]

In addition, the Aboriginal Justice Caucus advocated for appointments to the Koori Court to be in accordance with standards established by elders and respected persons:

> Judicial Officers' engagement with community must be accounted for prior to appointment in specialist courts, such as the Koori Court. Appointing a judicial officer with no prior knowledge of issues surrounding Aboriginal people can result in uninformed sentencing and avoidable incarceration. The AJC [Aboriginal Justice

14

50 Australian Psychological Society, *Submission 90*, p. 10.

51 John Herron, public hearing, Melbourne, 6 September 2021, *Transcript of evidence*.

> Caucus] recommend that Judicial Officers appointed to sit on specialists courts, such as the Koori Court, must meet standards set by [Court Services Victoria] Elders &/or Respected Persons and the AJC.[52]

Expanding specialist court services for rural and regional Victoria

> **It is a struggle to attract people that want to work in the regions, and obviously discussions we have are around how to get people to have more experience working regionally as well, even if they do want to come back to Melbourne.**
>
> Rebecca Falkingham, Secretary, Department of Justice and Community Safety, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 15.

Stakeholders to the Inquiry told the Committee that more court resources were needed in rural and regional Victoria, particularly specialist courts. The expansion of specialist court services into rural and regional Victoria requires additional judicial officers to oversee cases. Chapter 10 discusses the expansion of specialist courts in terms of infrastructure and other resources.

There was a belief amongst some stakeholders that more therapeutic court services are needed in rural and regional Victoria. For example, the Assessment and Referral Court was signposted as a specialist court service which needs to be better resourced and expanded across Victoria. Chapter 10 provides an overview of the Assessment and Referral Court.

A statewide expansion of a specialist court, like the Assessment and Referral Court or Koori Courts, would require additional judicial officers to ensure there is no impact on the mainstream or specialist court systems. However, the Department of Justice and Community Safety told the Committee there are challenges in getting judicial officers into rural and regional areas. At a public hearing, Rebecca Falkingham, Secretary of the Department of Justice and Community Safety, stated that:

> we have done a lot of work with both the Magistrates and VCAT to run transparent, open recruitment so we are able to have a wider reach right across the state … It is a struggle to attract people that want to work in the regions, and obviously discussions we have are around how to get people to have more experience working regionally as well, even if they do want to come back to Melbourne.[53]

As discussed in Chapter 10, the Committee considers that there is a need for further expansion of specialist courts throughout rural and regional areas. However, it is important that funding in this space includes the recruitment of appropriately qualified and trained judicial officers. This could include, where possible and appropriate, identifying ways to engage communities, to ensure appointments reflect the wishes of those communities—for example, appointments to Koori Courts.

52 Aboriginal Justice Caucus, *Submission 106*, p. 14.

53 Rebecca Falkingham, Secretary, Department of Justice and Community Safety, public hearing, Melbourne, 5 November 2021, *Transcript of evidence*, p. 15.

RECOMMENDATION 99: In providing funding to Victorian courts to expand specialist court services into rural and regional Victoria, the Victorian Government should ensure that this includes the recruitment of additional judicial officers to support the work of mainstream and specialist courts in those areas. Where possible and appropriate, selection criteria or standards for appointments to specialist courts, such as the Koori Courts, should be made in conjunction with relevant stakeholders.

14.2.4 Judicial tenure

In Australia, the independence of the judiciary is ensured through the separation of powers doctrine. As part of this doctrine, judicial officers have security of tenure to prevent the threat of removal from office becoming an undue influence on their ability to carry out their functions. The Australian Constitution[54] and other legislative instruments prescribe limited and exceptional circumstances for the removal of judges or magistrates.[55] However, as noted in Section 14.1, judicial positions have mandatory retirement ages.

A research article by Scientia Professor George Williams and Dr Rebecca Ananian-Welsh, *Judicial Independence from the Executive*, explained that security of tenure is important for upholding judicial independence, particularly from the government. The article stated that:

> Once appointed, judges require security of tenure. Tenure ought to be guaranteed by law either for life, until a statutory age of retirement, or for a substantial fixed term without interference by the executive in a discretionary or arbitrary manner.[56]

In Victoria, only the Parliament has the authority to remove an officer of the judiciary from their position. However, an officer can be stood down temporarily (i.e. suspended) by a principal head of jurisdiction or council of judges.

Under s 97 of the *Judicial Commission of Victoria Act 2016* (Vic), a principal head of jurisdiction (e.g., the Chief Magistrate) can stand down a judicial officer. The Act prescribes that a stand down determination can only be made if the head of jurisdiction believes:

- the continued performance of functions by the judicial officer is likely to impair public confidence in the impartiality, independence, integrity or capacity of the officer or the court, and
- immediate action is required.

54 See: *Commonwealth of Australia Constitution Act 1900* s 72.

55 Parliament of Australia, *Odgers' Senate Practice*, 2021, <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice> accessed 4 November 2021.

56 Rebecca Ananian-Welsh and George Williams, 'Judicial independence from the executive: a first-principles review of the Australian cases', *Monash University Law Review*, vol. 40, no. 3, 2014, p. 599.

A stand down determination remains in force for 21 days unless the principal head of jurisdiction who made the order determines it should continue.

For some judicial positions, a head of jurisdiction does not have the authority to issue a stand down determination. Instead, the relevant council of judges may make a determination for an officer to stand down, if they are:

- a head of jurisdiction
- a judicial officer of the Supreme Court
- a judicial officer of the County Court.

The Judicial Commission of Victoria or a Commission's investigating panel can make a recommendation to stand down a judicial officer if it believes that:

- a complaint or referral can be substantiated
- the complaint or referral amounts to proved misbehaviour or incapacity in a way that warrants the removal of the officer
- one or more of the following applies
  - the officer has been charged with, found guilty or convicted of an indictable offence
  - the officer has been committed to stand trial for an indictable offence in Victoria or elsewhere
  - the continued performance of functions by the judicial officer is likely to impair public confidence.

Box 14.2 outlines the role of the Judicial Commission in relation to investigating complaints against judicial officers.

BOX 14.2: Role of the Judicial Commission of Victoria in investigating complaints against judicial officers

The Judicial Commission of Victoria is established under the Constitution Act to investigate complaints about judicial officers and members of VCAT. It can investigate complaints related to the conduct or capacity of judicial officers or tribunal members, but not the correctness of their decisions.

Any person can make a complaint to the Judicial Commission.

When the Commission receives a complaint, it must do one of the following:

- dismiss the complaint
- in the case of a serious complaint (i.e. one which could warrant removal from office if proven), refer the complaint to an investigating panel
- in the case of a less serious complaint, refer the complaint to the relevant head of jurisdiction with a recommendation about the future conduct of the officer.

(Continued)

BOX 14.2: Continued

An investigating panel is responsible for investigating matters referred to it by the Commission which could amount to proved misbehaviour or incapacity, such as to warrant a removal from judicial office, if substantiated.

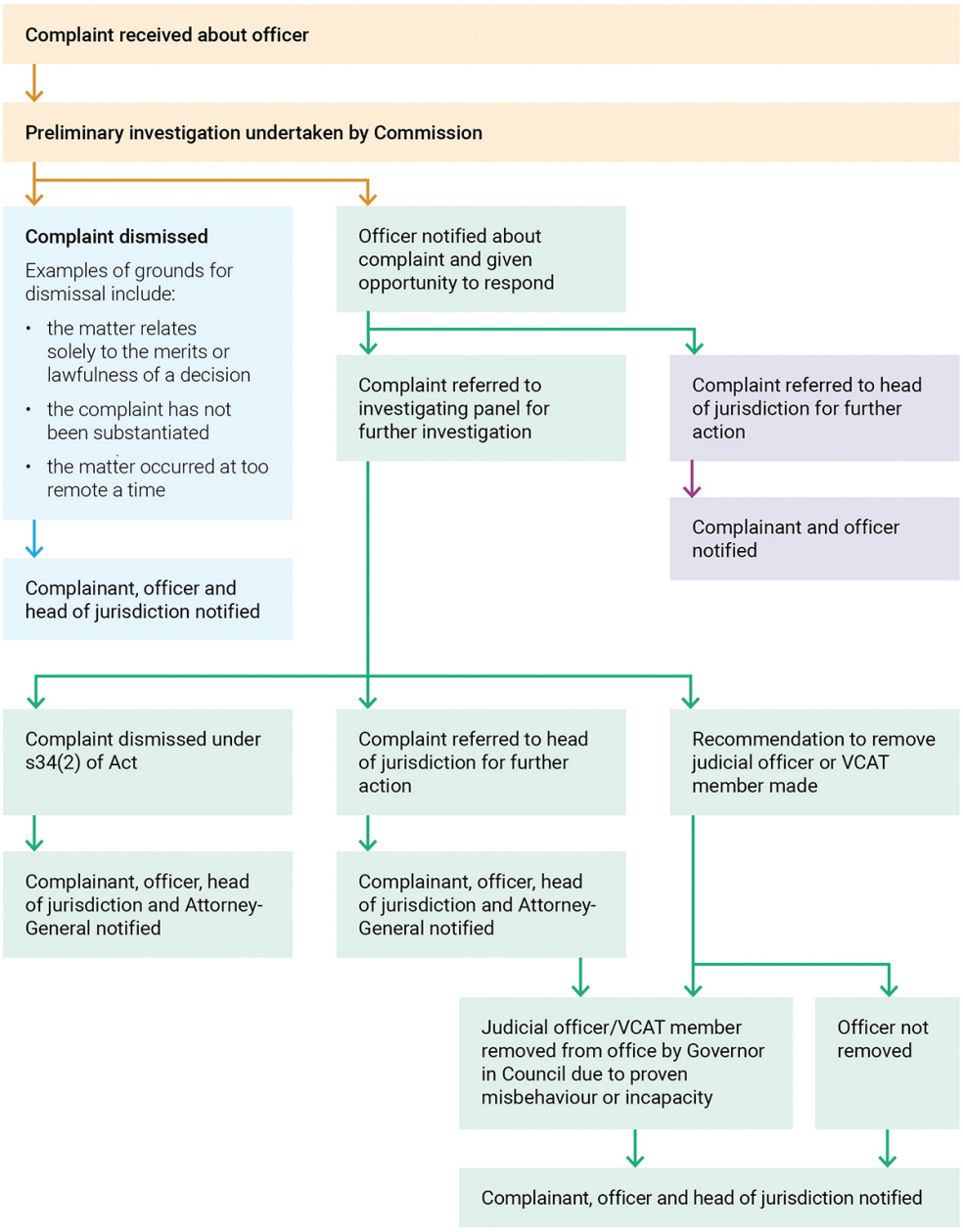
Figure 14.1 below outlines the complaints process, including investigation, of the Judicial Commission.

After investigating a matter, the panel must take action such as:

- dismissing the matter, either wholly or in part, if it –
  - is vexatious
  - does not relate to a judicial officer
  - relates to conduct prior to a person's appointment to judicial office and does not amount to proved misbehaviour or incapacity which could warrant removal from office
  - relates to the merits or lawfulness of a decision or procedural ruling
  - relates to a person's private life
  - is frivolous or not made in good faith
  - relates to an officer who has resigned or retired
  - occurred at too remote a time to justify further consideration
  - is considered unnecessary or unjustified
- referring a matter to the nominated head of jurisdiction or nominated person
- preparing a report for the Governor in Council and/or Attorney-General.

Source: Judicial Commission of Victoria, *About*, 2021, <https://www.judicialcommission.vic.gov.au/about-the-judicial-commission> accessed 10 November 2021; Judicial Commission of Victoria, *Complaints process explained*, 2021, <https://www.judicialcommission.vic.gov.au/complaints/complaint-process-explained> accessed 10 November 2021; *Judicial Commission of Victoria Act 2016* (Vic) pt 4.

Figure 14.1 Judicial Commission of Victoria's complaints process



Source: Judicial Commission of Victoria, *Complaints process diagram*, 2021, <https://www.judicialcommission.vic.gov.au/complaints/complaint-process-diagram> accessed 10 November 2021.

An investigating panel of the Judicial Commission is required to provide a report on each of its investigations to the Attorney-General. This report should include the panel's findings and recommendations, including whether the conduct amounted to proved misbehaviour or incapacity such as to warrant removal from judicial office. The Attorney-General must present a copy of the report to each House of the Victorian Parliament as soon as practicable after receiving it.

The Parliament of Victoria is the only authority with the power to remove a person from judicial office. Section 87AAB of the Constitution Act prescribes the process for removing a person from judicial office. A judicial officeholder can only be removed 'on the ground of proved misbehaviour or incapacity'. Box 14.3 below outlines the process for removal from judicial office in Victoria.

BOX 14.3: Removal from judicial office

Section 87AAB of the Constitution Act prescribes that the holder of judicial officer can be removed from office under the following circumstances:

1. The Governor in Council may remove the holder of a judicial office from that office on the presentation to the Governor of an address from both Houses of the Parliament agreed to by a special majority in the same session praying for that removal on the ground of proved misbehaviour or incapacity.
2. A resolution of a House of the Parliament or of both Houses of the Parliament praying for the removal from office of the holder of a judicial office is void if an investigating panel has not concluded that facts exist that could amount to proved misbehaviour or incapacity such as to warrant the removal of that office holder from office.
3. This section extends to term appointments or acting appointments to a judicial office but does not prevent the holder of the office ceasing to hold office on the expiry of the term or the period for which he or she is appointed to act.
4. Except as provided by this Part, no holder of a judicial office can be removed from that office.

Source: *Constitution Act 1975* (Vic) s 87AAB.

At a public hearing, Kelvin Glare, Chairman of the Community Advocacy Alliance, believed that judicial appointments should be made by contracts, which included key performance indicators. He also recommended that Victoria introduce a judicial conduct commission as a mechanism to hold judicial officers accountable. At a public hearing, Mr Glare told the Committee that:

> Victoria must introduce a judicial conduct commission with the power to discipline judges where warranted and the power to set key performance indicators that all judges must meet on pain of being removed from office, because as everyone knows, at the moment the appointment of judges is for life. Each state in the USA now has a judicial conduct commission, as do Canada and New Zealand, and New South Wales and the Australian Capital Territory also have judicial conduct commissions.[57]

57 Mr Kelvin Glare AO APM, Chairman, Community Advocacy Alliance, public hearing, Melbourne, 21 September 2021, *Transcript of evidence*, p. 38.

When explaining why judicial appointments should be made by contract, Mr Glare explained:

> Really, no-one should get open slather, no matter what they have done before. I have seen magistrates who would convict everyone who came before them. I have seen magistrates who would bend over backwards to dismiss cases against everyone who came before them. Now, they cannot both be right. But there is no process at the moment for assessing their suitability to sit on the bench. They sit there and they make these decisions year in, year out. I have been embarrassed in court at times prosecuting when a magistrate has simply ignored the evidence and imposed a conviction. I have equally been angry and frustrated when they have ignored the evidence and dismissed the case. So there has to be some sort of accountability and assessment. That is why I say we need a commission—someone who can review the performance of the various judicial officials.[58]

In contrast, Louise Glanville from Victoria Legal Aid discussed the security of tenure for judicial officers, stating that it was in place to ensure judicial independence. She suggested it was more important to ensure the right people are on the judiciary and that there is diversity:

> In terms of the question of tenure, leaving aside the concept of acting judges and some more limited tenures in some jurisdictions, judges are usually appointed for the term, and there is an age limit to how long that term is. I think that is done for reasons that are supportive of the rule of law and the nature of independence more generally. For me what is more important is getting the right people in those roles, and that is the diversity theme that I identified early on.[59]

The Committee has not made any specific recommendations on reforming Victoria's approach to judicial tenure. Security of tenure is protected through the Victorian Constitution to prevent judicial independence being undermined as a result of undue influence from the government or Parliament. Instead, the Committee believes it is more important to ensure appointment processes are robust and transparent to ensure appropriate judicial officers are appointed, and that judicial education and training reflects contemporary needs and expectations. Further, strategies to improve the diversity of the cohort of judicial officers would strengthen the judiciary by ensuring that it represents a broader cross-section of the community. Particular avenues for strengthening appointment processes, including in terms of transparency and diversity, were discussed further in the sections above. The Committee considers that implementation of these recommendations will improve public confidence in judicial bodies and respond to some of the concerns raised during the Inquiry relating to judicial tenure.

Judicial training and education are discussed further in Chapter 15.

58 Ibid.

59 Louise Glanville, *Transcript of evidence*, p. 22.

14.2.5 Managing potential conflicts of interest and bias

In presiding over proceedings, judges and magistrates must act impartially. Judicial impartiality is considered a fundamental element of Australia's common law system with principles of impartiality found in the Australian Constitution and its conventions, as well as common law precedent.[60] According to the Australian Law Reform Commission, there are two different types of judicial bias which could occur:

- **Actual bias**—a claim of actual bias requires proof that the judicial officer is dealing with matters in a way that is close minded or prejudiced. Further, that this bias has unduly affected their ability to preside over a case.
- **Apprehended bias**—considers whether a judicial officer may appear to be biased. It does not require strong or clear evidence or indication that proceedings were actually influenced. In Australia, there is a test for apprehended bias which considers whether a fair-minded person with knowledge of the facts has 'reasonable apprehension' that an officer may not be impartial or unprejudiced.[61]

In September 2020, the Attorney-General of Australia referred a review into judicial impartiality and bias within the federal judiciary to the Australian Law Reform Commission. The review is considering what reforms need to be introduced to ensure that the federal judiciary is impartial and that there are protections in place against judicial bias. It is also considering the role a transparent appointments process, including increased judicial diversity, can have on improving the impartiality of federal courts. At the time of writing, the review was still under way. In April 2021, the Australian Law Reform Commission released a consultation paper, along with several background papers, to assist stakeholders in providing submissions to the review. In its background paper on *Cognitive and Social Biases in Judicial Decision-Making*, the Commission noted that one institutional strategy to reduce judicial bias is 'increasing diversity in social groups of appointments to judicial office to mitigate the effects of implicit social bias on particular groups.'[62] The consultation paper further noted that:

> Judicial appointments processes have a role to play both in ameliorating the effect of implicit social biases and lack of cultural competency, and in ensuring that those appointed to judicial office possess the personal skills and qualities necessary to manage the systemic and ongoing challenges to impartiality identified in consultations.[63]

In its *Victorian Criminal Proceedings Manual*, the Judicial College of Victoria provides guidelines for judges and magistrates to manage any potential conflicts of interest for

60 Australian Law Reform Commission, *The law on judicial bias: A primer*, report for Australian Law Reform Commission's Review of Judicial Impartiality, 2020, p. 5.

61 Ibid., p. 6.

62 Australian Law Reform Commission, *Judicial Impartiality: Cognitive and Social Biases in Decision-Making*, Background paper for Review of Judicial Impartiality, April 2021, p. 22.

63 Australian Law Reform Commission, *Judicial Impartiality*, Consultation paper for Review of Judicial Impartiality, April 2021, p. 26.

cases they preside over.[64] Another opportunity to manage potential conflicts of interest or bias amongst the judiciary is through the appointments process.

As noted in Section 14.1, as part of the appointment process, judicial officers are required to undertake a series of probity checks prior to being recommended to Cabinet or the Governor. The purpose of probity checks is to ensure that an appointee is suitable for judicial office and to reveal any potential conflicts of interest. However, the Victorian Government explained that there are some exceptions to the probity check process:

> probity checks and DPIs [Declarations of Private Interests] are not required for appointments of serving judicial officers to other judicial positions. In these instances, the Chief Justice has pre-existing oversight of probity for judges, and, in place of the DPI, the serving judicial officer must confirm in writing that they are not aware of any matter that would give rise to a conflict of interest in being appointed to the position concerned.[65]

Alongside probity checks, actively acknowledging personal biases is another mitigating practice that could preserve an officer's ability to preside impartially over criminal proceedings. Judicial officers could be encouraged to acknowledge their own biases by undertaking education in this space, such as in relation to trauma-informed practices. At a public hearing, Ms Tania Wolff, President of the Law Institute of Victoria, believed it was important that judicial officers understand how their own trauma and experiences could affect their role:

> I do not understand why we do not have trauma-informed practice in law school as a subject, for example. I think in anything where you are dealing with human conflict or issues you require that, and it is not just understanding someone else's situation, it is actually understanding yourself—understanding what is showing up for you. Therefore you can be a better practitioner—a better lawyer, a better judge, whatever it is. So I think we need to have that awareness and to understand that there is an underlying trauma in so many people who come before the criminal justice system. Unless we have an understanding of that, unless we understand intergenerational trauma and its impact, then we are not going to be able to be good decision-makers.[66]

Judicial education, including the need for trauma-informed practices in the criminal justice system, is discussed further in Chapter 15.

14.3 Judicial appointment processes in other jurisdictions

Part 4 of the Inquiry's Terms of Reference directed the Committee to consider judicial appointment processes in other jurisdictions. The following sections examine appointment processes in several Australian jurisdictions as well as two international jurisdictions. The court system of each jurisdiction is also broadly outlined for context.

64 Judicial College of Victoria, *Victorian Criminal Proceedings Manual*, 2014, <https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27528.htm> accessed 4 November 2021.

65 Victorian Government, *Submission 93*, pp. 87–88.

66 Tania Wolff, President, Law Institute of Victoria, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 13.

The Committee focused its research on Westminster-style jurisdictions to allow it to make direct comparisons to judicial appointment processes in Victoria.

This discussion has informed the Committee's findings and recommendations in relation to appointment processes, along with other evidence received during the Inquiry.

In examining the processes in other jurisdictions, the Committee found several examples where transparency is promoted within recruitment processes through the use of a protocol. In many of these jurisdictions, the established protocol outlines the recruitment process for appointing judicial officers as well as the key selection criteria which should be used alongside legislative criteria.

Another common factor in jurisdictions that have established protocols for judicial appointments is the use of selection panels (or commissions) to identify preferred candidates. These panels typically involve the relevant heads of jurisdiction for a judicial vacancy, but some also include community members (including representatives from key legal or civic bodies and individuals from non-legal backgrounds).

Table 14.6 Comparison of judicial appointment processes in New South Wales, Queensland, Northern Territory, Tasmania, New Zealand, England and Wales, and Victoria

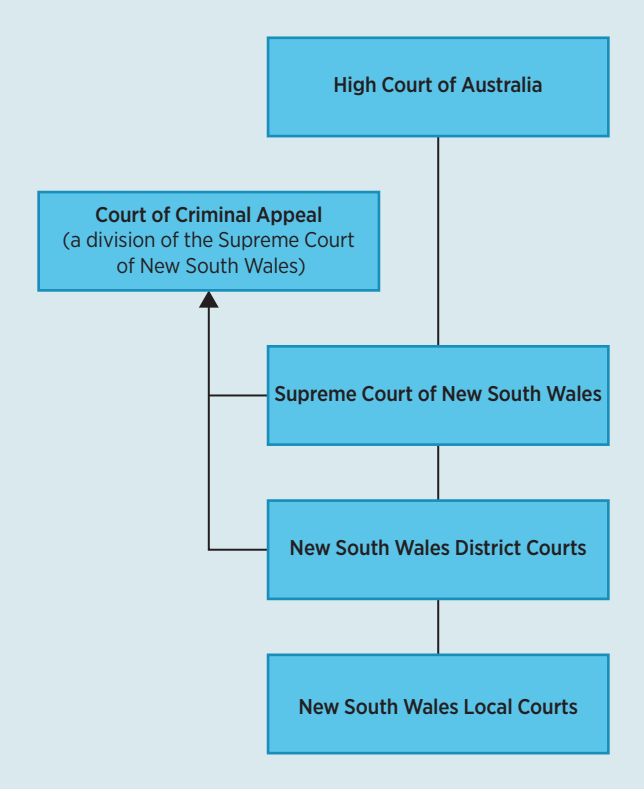
Jurisdiction	Appointed by Governor (or equivalent)	Appointed by Commission	Public appointment protocol	Advisory boards/ selection panels identify suitable candidates	All vacancies are advertised
New South Wales	✓			✓	
Queensland	✓		✓	✓	
Northern Territory	✓		✓	✓	
Tasmania	✓		✓	✓	✓
New Zealand	✓		✓		✓
England and Wales		✓	✓ (in statute)	Dedicated Commission	✓
Victoria	✓			✓ (Magistrates' Court only)	✓ (Expression of Interest process)

Source: Legislative Council Legal and Social Issues Committee.

14.3.1 New South Wales

Figure 14.2 below shows the New South Wales court hierarchy, which is similar to the Victorian hierarchy.

Figure 14.2 New South Wales' court hierarchy



Source: Armstrong Legal, *Court processes*, <https://www.armstronglegal.com.au/criminal-law/nsw/court-processes/appeals> accessed 29 October 2021.

Like Victoria, New South Wales' legislation governing its courts sets out the eligibility criteria for appointing Magistrates and Judges. Broadly, the qualifications for a judicial position in New South Wales are:

- a person is eligible to be appointed as a Judge of the Supreme or District Courts if they are an Australian lawyer of at least 7 years standing[67]
- a person is eligible to be appointed as a Judge of the Local Court if they are an Australian lawyer of at least 5 years standing.[68]

Judicial officers are appointed by the Governor on the advice of the Executive Council. This is typically based on recommendations from the Attorney-General to the Cabinet.

Whilst there are no statutory provisions governing the selection process, there are general guidelines. Further, there are different processes in place for selecting judicial officers for the superior court and heads of jurisdiction versus the District and Local Courts. Table 14.7 below summarises the selection criteria for all judicial officers and Table 14.8 summarises the processes for the different judicial jurisdictions.

67 *Supreme Court Act 1970* (NSW) s 16; *District Court Act 1973* (NSW) s 13.

68 *Local Court Act 2007* (NSW) s 13.

Table 14.7 Selection criteria for New South Wales judicial officers

Criteria	Description
Overriding principle	All appointments are made based on merit, and diversity in the judiciary should be actively promoted.
Professional qualities	• legal proficiency • professional expertise and specialisation • applied experience (i.e. practicing law or other branches of legal practice) • intellectual and analytical ability • ability to discharge duties promptly • capacity to work under pressure • oral, written and interpersonal communication skills • ability to explain procedure and decisions to all parties • workload management • ability to maintain authority and respect • willingness to participate in ongoing judicial education • ability to use/learn modern technology
Personal qualities	• integrity • independence and impartiality • good character • common sense and good judgement • courtesy and patience • social awareness

Source: Legislative Council Legal and Social Issues Committee. Information taken from Department of Communities and Justice, *Judicial careers*, <http://www.careers.justice.nsw.gov.au/appointments> accessed 29 October 2021.

Table 14.8 Selection processes for different judicial jurisdictions in New South Wales

Judicial jurisdiction	Appointment process
Supreme Court, other superior courts and heads of jurisdiction (e.g. Chief Justice of the Supreme Court)	The appointment of Judges to the higher courts and the appointment of heads of jurisdiction are made following consultation with the head of jurisdiction and relevant legal professional bodies.
District Court and Local Court	• Vacancies are advertised and expressions of interest are received. Candidates can also be nominated. • A selection panel is formed to assist the Attorney-General. The panel includes: – relevant Head of Jurisdiction – Secretary of the Attorney-General's Department – member of the legal profession – prominent community member. • The panel develops a shortlist of candidates who are interviewed. • A report is then provided to the Attorney-General, who recommends a nominee to Cabinet.

Source: Legislative Council Legal and Social Issues Committee. Information taken from Sydney Criminal Lawyers, *Judicial Appointments: Politics or Merit?*, 2016, <https://www.sydneycriminallawyers.com.au/blog/judicial-appointments-politics-or-merit> accessed 29 October 2021.

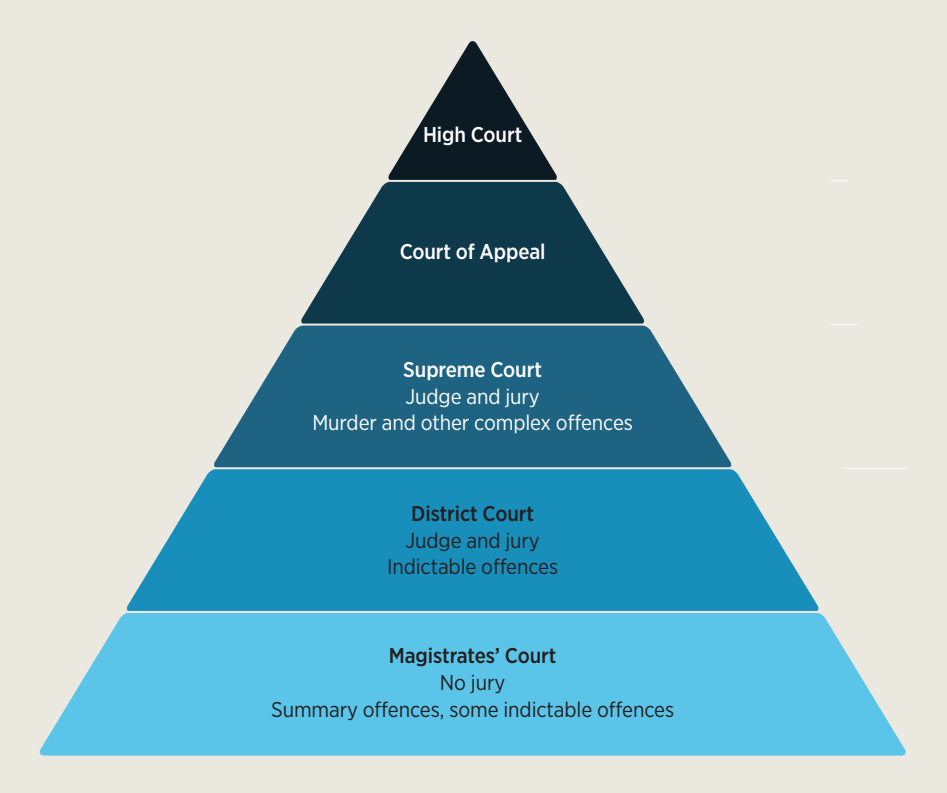
14.3.2 Queensland

In Queensland, the requirements for appointing judicial officers are contained in several pieces of legislation, including:

- *Constitution Act 1867* (Qld)
- *Supreme Court of Queensland Act 1991* (Qld)
- *District Court of Queensland Act 1967* (Qld)
- *Magistrates Act 1991* (Qld).

Figure 14.3 below shows the court hierarchy in Queensland.

Figure 14.3 Queensland's court hierarchy



Source: Queensland Legal Aid, *The criminal court system*, 2015, <https://www.legalaid.qld.gov.au/Find-legal-information/Publications/Legal-information-guides/Have-you-been-charged-with-an-offence-a-guide-to-appearing-in-the-Magistrates-Court/The-criminal-court-system> accessed 29 October 2021.

Like Victoria, Queensland legislation prescribes that the Governor in Council can appoint a judicial officer. Requirements in legislation generally relate to years of standing as a lawyer. For example, Queensland's Constitution prescribes that the Governor in Council may appoint a Judge to the Supreme Court if the person has at least five years' standing as a barrister or solicitor.[69] There is also a mandatory

69 *Constitution of Queensland 2001* (Qld) s 59.

retirement age of 70 years for Judges in the Supreme Court.[70] The same requirements are in place for Magistrates.[71]

The process for appointing judicial officers is conducted in accordance with the *Protocol for judicial appointments in Queensland*.[72] The Protocol applies to the appointment of judicial officers to the Supreme Court (including Court of Appeal), District Court, Land Court and Magistrates Court.

The Protocol establishes a Judicial Appointments Advisory Panel. The purpose of the Panel is to advise the Attorney-General on a shortlist of potential candidates suitable for appointment as a judicial officer based on expressions of interest. The Panel consists of:

- a Chairperson:
  - for appointment to the Supreme Court or the President of the Land Court, a retired Supreme Court Judge is Chairperson
  - for appointment to the District Court or Land Court, a retired District Court Judge is Chairperson
  - for appointment to the Magistrates Court, a retired Chief Magistrate from the District Court or a retired Magistrate is Chairperson
- President of the Bar Association of Queensland or an authorised representative
- President of the Queensland Law Society or an authorised representative
- up to two individuals—one of whom must be a lawyer—which:
  - in the view of the Attorney-General, represent community views and standards
  - have appropriate knowledge, expertise and experience in the justice system
- if the appointment is for a Land Court vacancy, one of the individual members is a former Land Court President or retired Judge of the Supreme or District Court.[73]

The Protocol also outlines the selection criteria for appointing judicial officers. It states that appointments are made based on merit and candidates are assessed against the Australasian Institute of Judicial Administration's *Suggested Criteria for Judicial Appointments*. Table 14.9 below outlines the Administration's criteria.

70 Ibid., s 60; *Supreme Court of Queensland Act 1991* (Qld) s 21; *District Court of Queensland Act 1967* (Qld) s 14.

71 *Magistrates Act 1991* (Qld) s 4.

72 Department of Justice and Attorney-General, *Protocol for judicial appointment in Queensland*', 2021, <https://www.publications.qld.gov.au/dataset/protocol-judicial-appointments-qld/resource/87a0a5c7-96da-4415-bc44-2f840f9fa0ba>.

73 Government of Queensland, *Protocol for judicial appointments in Queensland*, 2021, <https://www.courts.qld.gov.au/about/judicial-appointments> accessed 20 October 2021.

Table 14.9 Australasian Institute of Judicial Administration's *Suggested Criteria for Judicial Appointments*

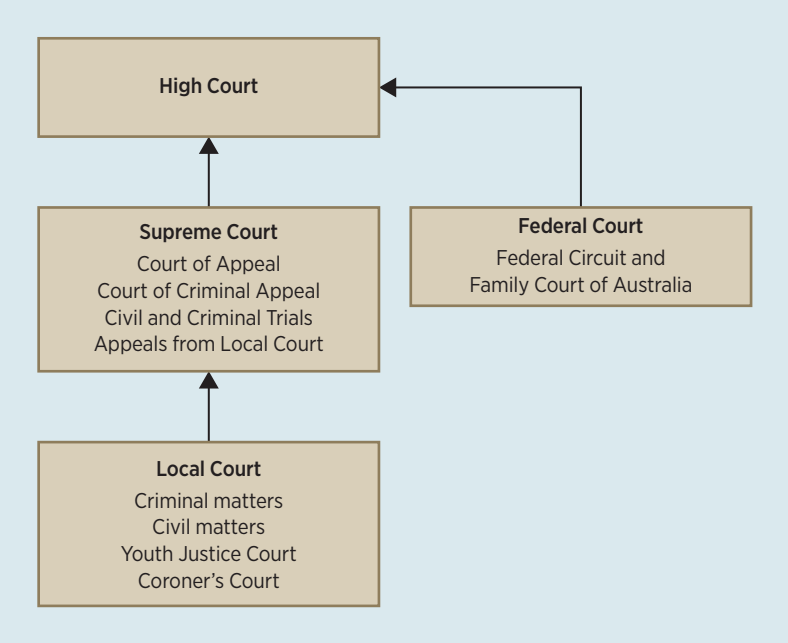
Criteria	Description
Intellectual capacity	• legal expertise • litigation expertise or familiarity with court processes • ability to absorb and analyse information • appropriate knowledge of law and underlying principles
Personal qualities	• integrity and independence of mind • sound judgement • decisiveness • objectivity • diligence • sound temperament • ability and willingness to learn and develop
Ability to understand and deal fairly	• impartiality • awareness and respect of diverse communities and understanding of their differing needs • commitment to justice, independence, public service and fair treatment • willingness to listen • commitment to respect
Authority and communication skills	• ability to explain procedure and decisions • ability to inspire respect and confidence • ability to maintain authority • ability to communicate orally and in writing
Efficiency	• ability to work expeditiously • ability to organise time effectively • ability to manage workloads effectively • ability to work constructively with others
Leadership and management skills	• ability to form strategic objectives and provide leadership • ability to engage constructively and collegially • ability to represent court appropriately • ability to motivate, support and encourage professional development • ability to manage change • ability to manage resources

Source: Government of Queensland, *Protocol for judicial appointments in Queensland*, 2021, <https://www.courts.qld.gov.au/about/judicial-appointments> accessed 20 October 2021.

14.3.3 Northern Territory

Figure 14.4 below shows the court hierarchy in the Northern Territory. This hierarchy is somewhat similar to Victoria's court system, except the Northern Territory does not have a County or District Court system.

Figure 14.4 Northern Territory's court hierarchy



Source: Supreme Court of the Northern Territory, *About*, <https://supremecourt.nt.gov.au/about> accessed 29 October 2021.

In the Northern Territory, the Administrator of the Northern Territory[74] is responsible for appointing judicial officers in the Territory's courts. Like other jurisdictions in Australia, several pieces of legislation governing courts in the Northern Territory also prescribe the eligibility requirements for appointing judicial officers. For example, s 32(1) of the *Supreme Court Act 1979* (NT) prescribes that the Administrator can appoint a Judge to the Supreme Court if that person:

- is under the age of 72
- is or has been a Judge of an Australian court
- is an admitted lawyer of 10 years standing.[75]

The Northern Territory Government has developed a *Protocol for judicial appointments and appointment as President or Deputy President of the Northern Territory Civil and Administrative Tribunal*, which outlines the selection process for appointing judicial officers. Table 14.10 summarises the processes for appointing various judicial officers in the Northern Territory.

74 The Administrator of the Northern Territory is appointed by the Governor-General of Australia to represent the Commonwealth Government in the Northern Territory. The Administrator performs similar functions to the State Governors.

75 *Supreme Court Act (1979)* s 32(1).

Table 14.10 Northern Territory's process for appointing judicial officers

Position	Process for appointment
Judge of the Supreme Court	• An Advisory Panel is appointed by the Attorney-General. • The Panel is chaired by a former Judge of a Supreme Court or the Federal Court who has not been retired for more than 7 years. • Other members of the panel include: – Solicitor-General of the Northern Territory or Director of Public Prosecutions – Chief Executive Officer of the Department of the Attorney-General. • The Panel is responsible for providing at least two recommendations to the Attorney-General, and: – calling for expressions of interest is not required – in forming its recommendations, the Panel is required to consult with the Chief Justice, the President of the Northern Territory Bar Association, and the President of the Law Society of the Northern Territory. • The Attorney-General will provide the Panel's recommendation to Cabinet. • If the Attorney-General departs from the Protocol for appointing a Supreme Court Judge, they are required to notify Cabinet. • If Cabinet departs from the Protocol, they are required to announce it publicly.
Chief Justice	Process is the same as the one used for appointing a Judge to the Supreme Court, except the Advisory Panel is also required to consult with the outgoing Chief Justice.
Judge of a Local Court	Process is generally the same as the one used for appointing a Judge to the Supreme Court, except: • expressions of interest are invited (the Panel can also decide to conduct interviews) • the Advisory Panel should also consult with the Chief Judge of the Local Court • any objections from the Chief Justice or Chief Judges to any Panel recommendation must be communicated to the Attorney-General.
Chief Judge or Deputy Chief Judge of the Local Court	• When appointing the Chief Judge, the process is the same as the one used for appointing a Judge to a Local Court, except the Advisory Panel is also required to consult with the outgoing Chief Judge. • When appointing the Deputy Chief Judge: – if a person is already serving as a Judge of a Local Court, the Attorney-General is not required to follow the Protocol – if a person is not serving as a Judge of a Local Court, the process is the same as the one used for appointing a Judge to a Local Court.

Source: Northern Territory of Australia, *Protocol for judicial appointments and appointment as President or Deputy President of the Northern Territory Civil and Administrative Tribunal*, <https://localcourt.nt.gov.au/sites/default/files/reviewoftheprocessesfortheappointmentofjudicialofficersinthenorthernterritory-report.pdf> accessed 22 October 2021.

14.3.4 Tasmania

Tasmania's court hierarchy is similar to that of the Northern Territory (see Figure 14.4 above), comprising of Magistrates and Supreme Courts but no District or County Court system.

As is the case in other Australian jurisdictions, the Governor is responsible for appointing judicial officers in Tasmania. Tasmanian legislation governing courts in the

state also prescribe general eligibility requirements for judicial officers. For example, s 4 of the *Supreme Court Act 1887* (Tas) prescribes that a person is eligible to be a Judge of the Supreme Court if that person:

- is 35 years old
- is an Australian lawyer of at least 10 years standing
- is a current or former Judge of:
  - the Federal Court of Australia
  - the Supreme Court of another State or Territory
  - the High Court of New Zealand
  - the Supreme Court of New Zealand.[76]

The Tasmanian Department of Justice has established a *Protocol for Judicial Appointments* which outlines the selection processes and criteria for appointing judicial officers. However, the following judicial positions are exempt from the Protocol unless otherwise directed by the Attorney-General:

- an acting role as Chief Justice, Chief Magistrate or Deputy Chief Magistrate
- acting Associate Judge
- acting Judge of the Supreme Court
- a permanent part-time Magistrate who is converting from a permanent full-time Magistrate.
- temporary Magistrates appointed from outside Tasmania where it is not possible to appoint an existing Magistrate to preside over a case.[77]

The Tasmanian Protocol outlines selection criteria for judicial appointment. It states that candidates should be:

- an experienced legal practitioner with a high record of professional achievement coupled with a knowledge and understanding of the law consistent with judicial office.
- an excellent conceptual and analytical thinker, displaying independence and clarity of thought.
- an effective oral and verbal communicator in dealing with legal professionals, litigants and witnesses and able to explain technical issues to non-specialists.
- highly organised, able to demonstrate or develop sound court management skills and work well under pressure.

76 *Supreme Court Act 1887* (Tas) s 4(1).

77 Department of Justice (Tasmania), *Protocol for judicial appointments*, <https://www.justice.tas.gov.au/about/policies/protocol_for_judicial_appointments> accessed 22 October 2021.

- capable of making fair, balanced and consistent decisions according to law without undue delay.
- a person of maturity, discretion, patience and integrity who inspires respect and confidence.
- committed to the proper administration of justice and continuous improvement in court practice, working collegiately with judicial colleagues and effectively with court officers to those ends.[78]

Similar to New South Wales and the Northern Territory, the Tasmanian Protocol prescribes a selection process for judicial appointments which includes establishing an Advisory Panel. The Panel is responsible for making recommendations to the AttorneyGeneral. In Tasmania, the selection process is the same for all judicial appointments, except positions exempt from the Tasmanian Protocol. The selection process for judicial appointments in Tasmania involves:

- calling for an expression of interest, including advertising in three Tasmanian daily newspapers, one national paper and on the Department of Justice website
- establishing an Assessment Panel to review expressions of interest and make further enquiries about potential candidates. The composition of the Panel differs depending on the type of vacancy
- upon receiving the Panel's recommendations, the Attorney-General can undertake further confidential consultation
- inviting the Executive Director of the Law Society of Tasmania, President of the Tasmanian Bar Association and Chair of the Legal Profession Board to make a comment once a preferred candidate is identified
- the Attorney-General recommending a candidate to Cabinet
- the Cabinet recommending an appointment to the Governor-in-Council who is responsible for issuing the appointment.[79]

14.3.5 New Zealand

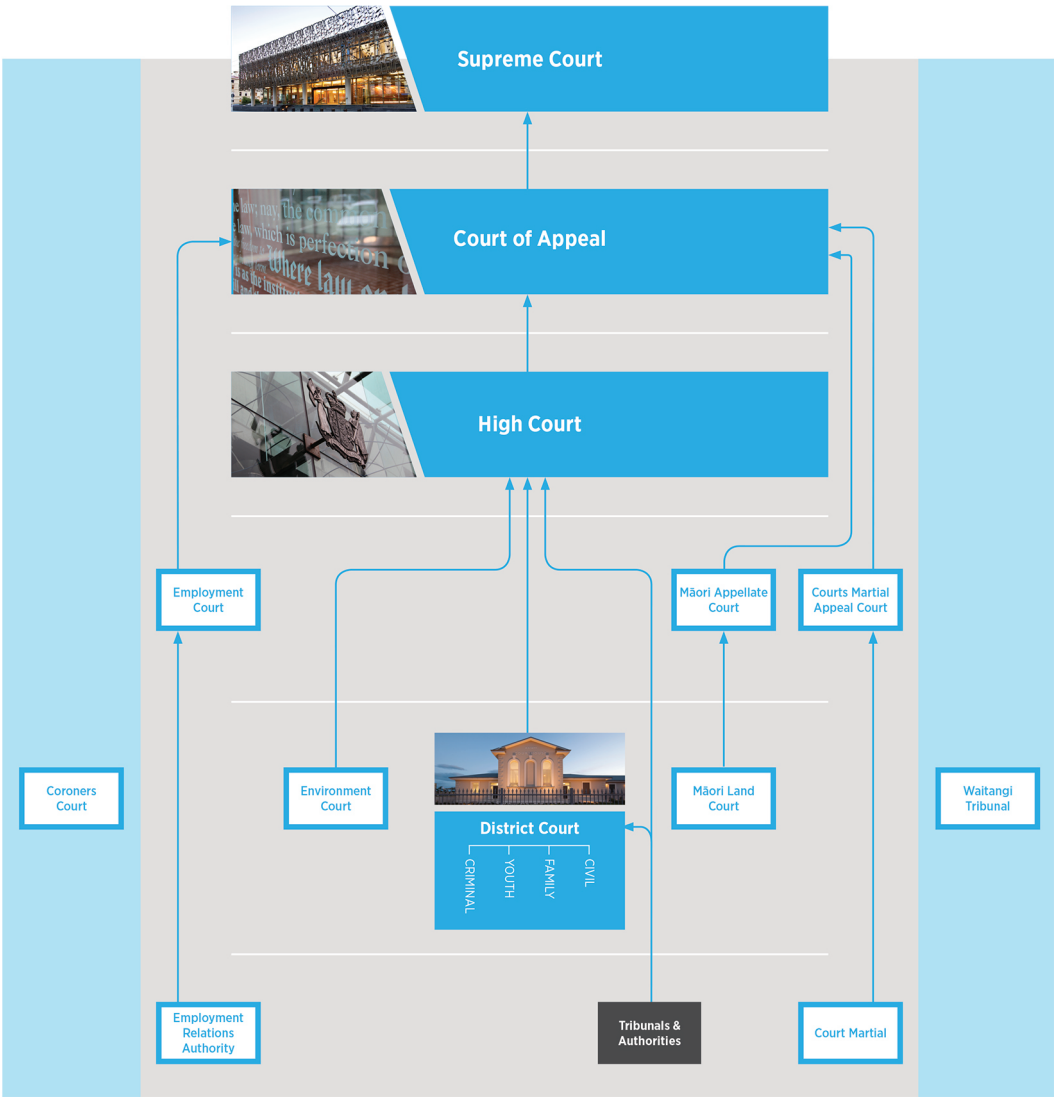
The New Zealand court system functions similarly to Australia's court system. The names of the main courts are also similar. However, in New Zealand, the Supreme Court is the highest court (the equivalent of Australia's High Court), and its High Court is situated below it in the court hierarchy (similarly to Australia's Supreme Courts). The New Zealand court system also includes the Māori Land Court which deals with cases and disputes about Māori land.[80] There is a Māori Appellate Court which hears appeals from the Māori Land Court. Figure 14.5 below shows New Zealand's court hierarchy.

78 Department of Justice (Tasmania), *Protocol for judicial appointments*, <https://www.justice.tas.gov.au/about/policies/protocol_for_judicial_appointments> accessed 22 October 2021.

79 Department of Justice (Tasmania), *Protocol for judicial appointments*, <https://www.justice.tas.gov.au/about/policies/protocol_for_judicial_appointments> accessed 22 October 2021.

80 Māori Land Court, *About the Māori Land Court*, 2021, <https://maorilandcourt.govt.nz/about-mlc> accessed 29 October 2021.

Figure 14.5 New Zealand's court hierarchy



Source: New Zealand Ministry of Justice, *Our New Zealand Court System*, <https://www.justice.govt.nz/assets/Documents/Publications/our-nz-court-system.pdf> accessed 29 October 2021.

The judicial appointment process in New Zealand is similar to the processes used in Australia. The Governor-General of New Zealand makes judicial appointments on the recommendation of the New Zealand Attorney-General.

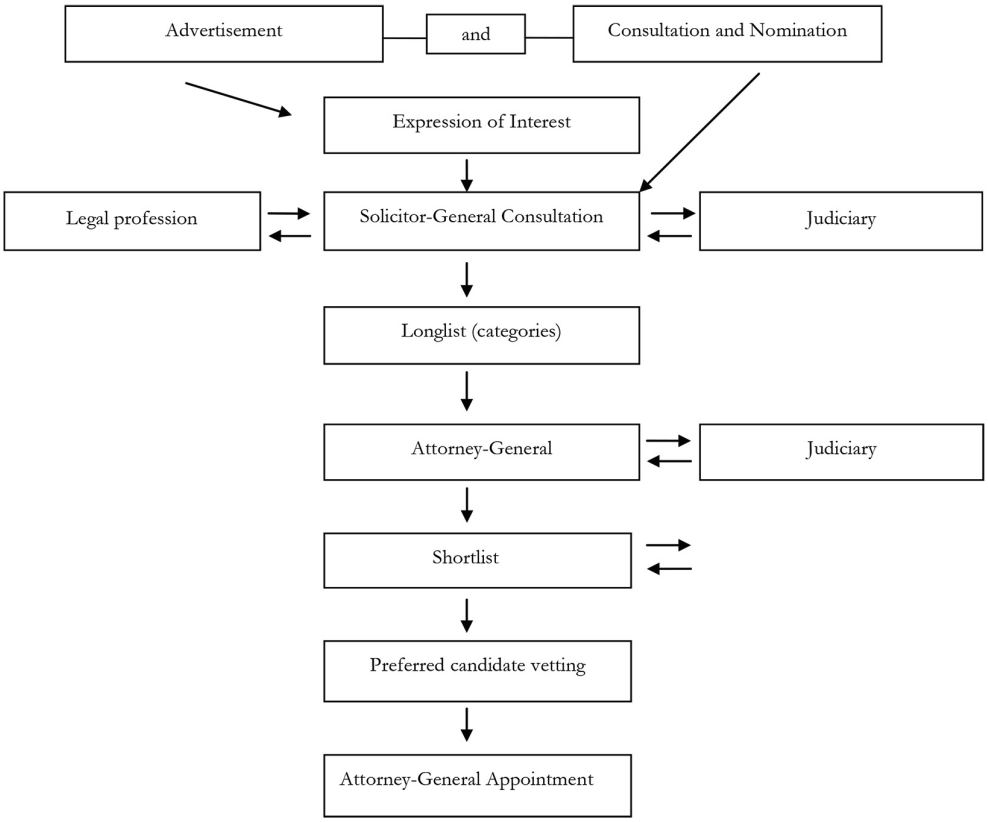
For higher court appointments, such as the Supreme Court, there is an established convention that the Attorney-General should consult with the Chief Justice and SolicitorGeneral before making recommendations. There is also a constitutional convention that the Attorney-General acts independently of party–political considerations when appointing Judges according to their qualifications, personal qualities and relevant experience, without consideration of their political beliefs.[81]

81 Courts of New Zealand, *Appointments*, <https://www.courtsofnz.govt.nz/about-the-judiciary/role-Judges/appointments> accessed 22 October 2021.

As is the case in Australia, legislation governing courts in New Zealand also prescribes eligibility requirements for judicial officers. For example, s 94 of the *Senior Courts Act 2016* (NZ) prescribes that a person cannot be appointed as a Judge in a senior court unless they have been a barrister or solicitor with seven years' standing.[82]

New Zealand has established a *Judicial Protocol* which formalises the process for appointing judicial officers. Figure 14.6 below, taken from the New Zealand Protocol, shows the process for judicial appointments.

Figure 14.6 Appointment process for New Zealand judicial officers



Source: New Zealand Crown Law Office, *Judicial protocol*, 2014, <https://www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf> accessed 25 October 2021.

The New Zealand Protocol requires that the eligibility criteria for a vacant judicial position are publicly announced. Eligibility criteria cover several factors, including:

- legal ability
- character qualities (such as integrity, honesty, open-mindedness and impartiality)
- personal technical skills
- reflection of society (i.e., that a candidate is aware of, and sensitive to, the diversity of New Zealand society).[83]

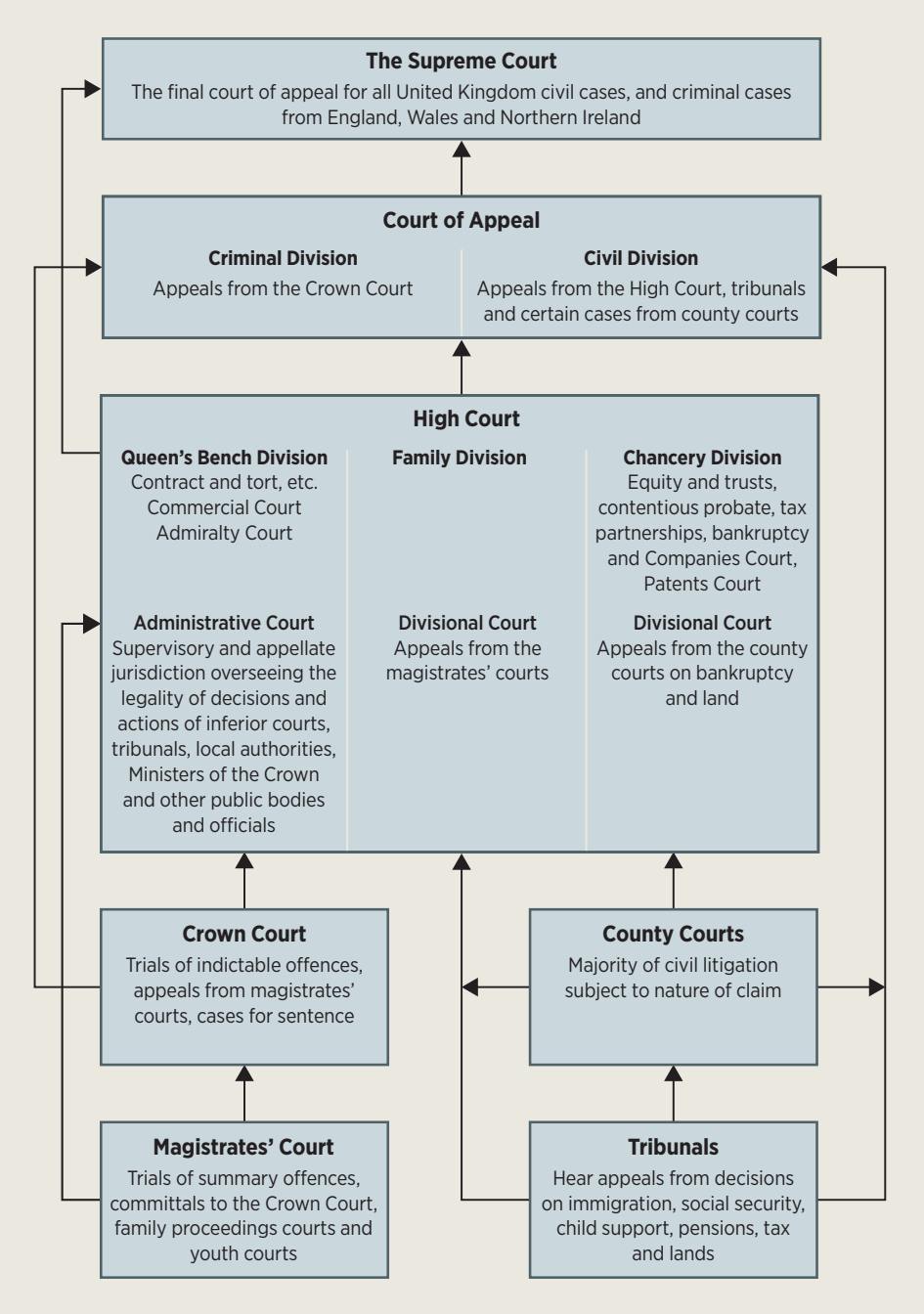
82 *Senior Courts Act 2016* (NZ) s 94.

83 New Zealand Crown Law Office, *Judicial protocol*, 2014, <https://www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf> accessed 25 October 2021.

14.3.6 England and Wales

The United Kingdom's court hierarchy has developed over 1,000 years and comprises a mix of courts and tribunals which have responsibility to preside over specific cases. Furthermore, there are separate court systems for England and Wales, Scotland and Northern Ireland. However, the United Kingdom Supreme Court (the highest court) can preside over criminal cases for England, Wales and Northern Ireland. Figure 14.7 below shows the United Kingdom's court system.

Figure 14.7 United Kingdom's court hierarchy



Source: JustCite, *UK Court Structure*, <http://www.justcite.com/kb/editorial-policies/terms/uk-court-structure> accessed 29 October 2021.

In England and Wales, the Judicial Appointments Commission selects candidates for judicial office and for some tribunals with United Kingdom-wide powers. The Commission is responsible for running selection exercises and making recommendations for judicial positions up to, and including, the High Court.[84]

On request of the Lord Chancellor, the Commission also participates in the selection of senior judicial officers, including:

- Lord Chief Justice
- High Court Heads of Division
- Senior President of Tribunals
- Lord and Lady Justices of Appeal.[85]

The Commission does not select Magistrates or judicial officers in the Supreme Court. However, the Chairman does sit on the panel for Supreme Court positions.[86]

According to the Commission's website, the selection process for appointing a judicial officer can take months. Figure 14.8 below outlines the typical selection process followed by the Commission.

Figure 14.8 Judicial Appointments Commission's selection process for judicial officers

Source: Judicial Appointments Commission, *Guidance on the application process*, <https://judicialappointments.gov.uk/guidance-on-the-application-process-2> accessed 18 October 2021.

Under the *Statistics and Registration Services Act 2007* (UK), the Commission is required to collect and publish statistics on applications, shortlists and position recommendations for the appointment of Judges. According to the Commission, this data is used to evaluate the diversity of applications and recommendations for judicial office.[87]

84 Judicial Appointments Commission, *About us*, <https://judicialappointments.gov.uk/about-the-jac> accessed 18 October 2021.

85 Ibid.

86 Ibid.

87 Judicial Appointments Commission, *Statistics about judicial appointments*, <https://judicialappointments.gov.uk/statistics-about-judicial-appointments> accessed 18 October 2021.

Appointment of Commissioners

The Judicial Appointments Commission is comprised of 15 Commissioners who come from a wide array of backgrounds, not just the legal profession. Twelve of the Commissioners are appointed through open competition and through their own right, not as representatives of their field.[88]

Schedule 12 of the *Constitutional Reform Act 2005* (UK) prescribes that the Chairman of the Commission must be a lay member and that the Lord Chancellor is responsible for deciding the number of additional Commissioners.[89] The makeup of the Commission is provided for in the *Judicial Appointments Regulations 2013* (UK).

The makeup of the Commission comprises:

- a Chairman (who is a member of the legal profession)
- six judicial members (including two tribunal members)
- two professional members—suitable qualifications include Barrister, Solicitor of the Senior Courts or Fellow of the Chartered Institute of Legal Executives. Each professional member must have different qualifications to their counterparts
- five lay members
- one non-legally qualified judicial member.[90]

88 Judicial Appointments Commission, *Appointment of Commissioners*, <https://judicialappointments.gov.uk/appointment-of-commissioners> accessed 18 October 2021.

89 *Constitutional Reform Act 2005* (UK) sch 12.

90 Judicial Appointments Commission, *The Commission*, <https://judicialappointments.gov.uk/the-board-of-commissioners/the-commission> accessed 18 October 2021.

15 Judicial training and education

At a glance

The Judicial College of Victoria is established under the *Judicial College of Victoria Act 2001* (Vic). Its functions include assisting in the initial and continuing training and professional development for judicial officers. Victoria is the only state or territory in Australia with a statutory authority dedicated to judicial education.

Key issues

- The Judicial College provides training in six key areas: law, skills, judicial life, social context, First Nations and non-legal knowledge. It offers in-house and external training.
- There is limited publicly available information about training for judicial officers.
- The Committee's deliberations were hampered by the lack of specific information provided by the College relating to the nature of the training the College provides, how training opportunities are taken up, or the effectiveness of the training.
- The Act governing the Judicial College should be changed to reflect changes in the Committee system since the Act was first drafted.
- Understanding and implementing trauma-informed practices is vital to promoting a less adversarial process for victims of crime in the criminal justice system. Evidence suggests that some judicial officers do not demonstrate sufficient understanding of trauma-informed practices. Further training should be considered for all judicial officers.
- Evidence indicates that vulnerable community members are experiencing intentional or unintentional discrimination from judicial officers. Improved training is required to ensure judicial officers are acting and sentencing in culturally safe, trauma-informed and appropriate ways.
- Cultural competency and awareness may impact sentencing decisions by accounting for unique factors experienced by Aboriginal Victorians and culturally and linguistically diverse people. Further training is required to support culturally safe court processes and sentencing outcomes.
- People living with cognitive disability may be regarded as unreliable witnesses by some judicial officers. Disability awareness should be increased for all judicial officers.

- LGBTIQ+ people—particularly transgender and gender diverse people—are experiencing discriminatory practices due to a lack of understanding about issues specific to the LGBTIQ+ community. Further training is needed to reduce the risk of sentencing outcomes which promote psychosocial and physical harm.
- Government must provide funds to support training for judicial officers.

Findings and recommendations

Recommendation 100: That s 19 of the *Judicial College of Victoria Act 2001* (Vic) is amended to reflect the powers, privileges and immunities of all parliamentary committees, as proposed by the Committee:

(1) The College must comply with any information requirement lawfully made of it by—

a. the Legislative Council or a committee of the Legislative Council;

b. the Legislative Assembly or a committee of the Legislative Assembly; or

c. a joint committee of both Houses of Parliament.

Note: A committee under s 19 includes but is not limited to a committee established under the *Parliamentary Committees Act 2003*, a committee established under the Standing Orders of the Legislative Assembly or the Legislative Council, a committee established by resolution of either or both Houses of Parliament, or a committee established under the Joint Standing Orders of the Parliament of Victoria.

Finding 72: Judicial officers are highly skilled professionals with significant knowledge and expertise. However, stakeholders considered that there are various issues in relation to which judicial officers would benefit from improved education and training. These issues include:

- trauma-informed practice
  - including an understanding of trauma as it is experienced by those who come before judicial officers in the criminal justice system; and
  - support for judicial officers to deal with vicarious trauma so that it does not adversely influence their decision-making or job performance
- engaging people with lived experience to develop judicial training related to specific cohorts or issues. For example, training areas which could benefit from the perspective of those with lived experience include:
  - increasing cultural competency, in particular in relation to Aboriginal Victorians and culturally and linguistically diverse communities
  - awareness of particular issues experienced by the LGBTIQ+ community
  - experiences of persons with a disability.

Finding 73: There is little public information on the extent to which judicial officers undertake regular and comprehensive judicial education and training in the areas outlined above, or in other related areas. While the Judicial College of Victoria provides a suite of high-level training and education programs and services, it is unclear how these are utilised and what their outcomes are. To increase public confidence that judicial officers are engaging in education and training, the College would benefit from improving transparency around training and education across all court jurisdictions.

The Terms of Reference for this Inquiry required the Committee to undertake:

> an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime.

In undertaking this work, the Committee sought the advice of the heads of jurisdiction of Victoria's criminal courts through invitations to make submissions and provide evidence at public hearings. As outlined in Chapter 10, all of these courts declined these invitations to participate in the Inquiry. Direct insight into the ways in which judicial officers ensure they have appropriate expertise to undertake their roles would have been beneficial to the Committee's task and would have enabled it to provide further meaningful findings and recommendations to the Victorian Government.

The Committee also wrote to the Judicial College of Victoria a number of times to request specific information on its judicial training and education activities. A copy of this correspondence, as well as the Judicial College's responses, are attached in full at Appendix B of the report. The Judicial College's responses have informed the discussion in the sections below.

In brief, the Committee requested information with regard to:

- available training and education for judicial officers, including any mandatory training and education
- orientation, training and professional development opportunities for new judicial officers following their appointment
- availability of specialist education or training for judicial officers in specialist courts
- availability of training, education or other resources in relation to trauma-informed practice, culturally safe practice, family violence, restorative justice and children and youth
- whether and how the performance of judges and magistrates is taken into consideration when designing training and education programs
- how consistency of knowledge and skills is facilitated across regional and metropolitan areas.

The Judicial College provided a response to the Committee on Wednesday, 22 December 2021. Further correspondence was received from the Judicial College on Wednesday, 16 February 2022.

The Committee is grateful for the information received and the Judicial College's engagement with the Inquiry. However, the response provided only limited information in relation to the Committee's request, and did not address many of the questions raised, including:

- the Judicial College's views on the knowledge and skills that judges and magistrates need to do their job well
- the requirement for and proportion of judicial officers who participate in professional development opportunities, or proportion of judicial officers who access training or resources on specific legal issues (e.g. trauma-informed practice) offered by the Judicial College
- whether judicial officers are required to participate in professional development each year, and if so, what these requirements are
- reflection on:
  - how the Judicial College is responding to heightened demands for public accountability and transparency, a challenge identified in its strategic plan, *Masters of our fate*
  - the usefulness of the International Framework of Court Excellence
- how the Judicial College keeps track of professional and legal developments in other jurisdictions and applies relevant education or other matters in Victoria
- any plans to expand its services and resources.

Because limited information was provided, the Committee was hampered in its ability to understand judicial training and education processes and to assess fully what may be required, within this report.

Correspondence between the Committee and the College, including the questionnaire, can be found in Appendix B.

The Committee notes that s 19 of the *Judicial College of Victoria Act 2001* (Vic) (Judicial College Act) empowers the houses of parliament to request information from the Judicial College. In addition, certain parliamentary committees are similarly empowered under s 19—specifically joint investigatory committees and the House Committee under the *Parliamentary Committees Act 2003* (Vic) (Parliamentary Committees Act), and committees of the Assembly or Council on a private bill.

BOX 15.1: *Judicial College of Victoria Act 2001* (Vic)

Section 19 — Parliamentary requirement for information

(1) The College must comply with any information requirement lawfully made of it by—

(a) a House of the Parliament; or

(b) a Joint Investigatory Committee or the House Committee, within the meaning of the *Parliamentary Committees Act 2003*; or

(c) a committee of the Legislative Council or Legislative Assembly on a private Bill.

(2) In this section "information requirement" means a requirement to give information of a specified kind within a specified period relating to—

(a) the performance by the College of its functions; or

(b) the exercise by the College of its powers; or

(c) the College's expenditure or proposed expenditure.

Source: *Judicial College of Victoria Act 2001* (Vic) s 19.

However, in explicitly referencing certain types of parliamentary committees and not others, the Committee is concerned that some parliamentary committees, including the standing committees of the Council and the Assembly and any select committee appointed by a resolution of either or both Houses are, by implication, unable to access the s 19 request power.

The Committee notes that the Judicial College Act was drafted at a time when parliamentary committees predominantly operated as a system of joint investigatory committees under the Parliamentary Committees Act. This system has since been supplanted by the current standing committee framework, supported by joint investigatory committees under the Parliamentary Committees Act that fulfill specific scrutiny and oversight functions.

The inclusion of committees considering a private Member's bill further highlights the problematic absence of other types of parliamentary committees in s 19. Private bill committees are a rare occurrence in contemporary parliamentary proceedings. The Committee notes that the Explanatory Memorandum for the Judicial College Act indicated that the intention was for the College to recognise the information gathering powers of all parliamentary committees and so, as the structure of committees has evolved, s 19 of the Judicial College Act no longer reflects its drafting intention. The Explanatory Memorandum states:

> Clause 19 requires the College to provide specific information to Parliament or a Parliamentary Committee when requested. The information may relate to the

performance by the College of its functions, the exercise by the College of its powers or the College's expenditure or proposed expenditure.[1]

The Judicial College did not cite why information was not provided as requested by the Committee, and the Committee considers there is no technical reason why information cannot be provided under current legislation. Nevertheless, the Committee is of the view that s 19 is out of date. Further, it does not reflect the current parliamentary committee structure and fails to meet the needs of the parliament or its committees in its current guise.

The Committee considers s 19 of the Judicial College Act should be updated to recognise the powers and immunities of all parliamentary committees. The powers, privileges and immunities of parliamentary committees are outlined in s 19 of the *Constitution Act 1975* (Vic), which notably, does not distinguish between different types of parliamentary committee, and sets out a clear principle that all parliamentary committees have equivalent powers, privileges and immunities regardless of their purpose or establishing mechanism.

The Committee recommends that the parameters of the Judicial College Act be clarified to reflect the information gathering powers of all parliamentary committees. The amendments should be drafted to ensure the operation of s 19 can withstand any future changes to the structure of the parliamentary committee system and does not detract from the s 19 power as it currently exists. In making this recommendation, the Committee acknowledges the importance of maintaining the separation of powers between the parliament and the judiciary. Amending s 19 of the Judicial College Act would not undermine this separation, which is fundamental to our system of government. The amendment would serve to ensure greater transparency and accountability in relation to how the Judicial College acquits its legislated responsibilities.

RECOMMENDATION 100: That s 19 of the *Judicial College of Victoria Act 2001* (Vic) is amended to reflect the powers, privileges and immunities of all parliamentary committees, as proposed by the Committee:

(1) The College must comply with any information requirement lawfully made of it by—

(a) the Legislative Council or a committee of the Legislative Council;

(b) the Legislative Assembly or a committee of the Legislative Assembly; or

(c) a joint committee of both Houses of Parliament.

Note: A committee under s 19 includes but is not limited to a committee established under the *Parliamentary Committees Act 2003*, a committee established under the Standing Orders of the Legislative Assembly or the Legislative Council, a committee established by resolution of either or both Houses of Parliament, or a committee established under the Joint Standing Orders of the Parliament of Victoria.

15

1 Explanatory Memorandum, *Judicial College of Victoria Act 2001* (Vic).

15.1 Judicial College of Victoria

The role of the Judicial College is outlined in Box 15.2.

BOX 15.2: Role and functions of the Judicial College

The Judicial College of Victoria is established by the *Judicial College of Victoria Act 2001* (Vic). The Act prescribes the body's functions are to:

- assist in the professional development of judicial officers
- provide continuing education and training for judicial officers
- produce relevant publications
- provide (on a fee for service basis) professional development services, or continuing judicial education and training services, to persons who are not judicial officers within the meaning of this Act
- liaise with persons and organisations in connection with the performance of any of its functions.

In undertaking its work, the College is required to consult with judicial officers on its activities. It is also required to have regard to the differing needs of different classes of judicial officers, and in particular, to the training of newly appointed officers.

The Judicial College is managed by a board of directors, which is chaired by the Chief Justice of the Supreme Court of Victoria and includes the heads of the Victorian court jurisdictions. Two additional directors are nominated by the Attorney-General, one of whom must have academic experience, and the other whom must have experience in community issues affecting courts.

Source: *Judicial College of Victoria Act 2001* (Vic) ss 5, 8.

In addition to its education, training and professional development services for judicial officers, the Judicial College produces various legal resources, some of which are publicly available. These include bench books used by judicial officers and court practitioners that provide insight into particular issues or areas of law, such as:

- working with vulnerable witnesses
- responding to the needs and experiences of victims of crime in the courtroom
- sentencing and the Koori Court.

The Judicial College's direction and goals are set out in its strategic plan for 2017–2025, *Masters of our fate*. These include:

- enhancing its existing offerings
- developing stronger learning partnerships with Victorian courts and tribunals

- expanding its scope
- assisting the judiciary to further improve the justice system.[2]

The Judicial College informed the Committee that its renewed strategic direction would refocus towards consulting with judicial officers about the nature and extent of its activities. In addition, supporting new appointees will also be given 'due emphasis'. The College noted that over '100 new appointees will transition into judicial life' in 2022.[3]

The Judicial College is particularly well-respected within Australia, and as noted by the Victorian Government in its submission, Victoria is 'the only Australian state or territory with an independent statutory entity dedicated to judicial education'.[4]

15.1.1 Education and training programs

The Judicial College designs a variety of educational and professional development events for judicial officers across six key areas: law, skills, judicial life, social context, First Nations and non-legal knowledge. Social context includes areas such as family violence, restorative justice and vulnerable witnesses.[5]

Programs are now primarily delivered online, increasing accessibility for judicial officers in regional and rural areas.

The Judicial College provided a list of events held over the previous three years, as well as its planned events for 2022. This information is in Appendix B of the report.

The Judicial College may also develop training programs in response to recommendations from reviews or investigations into practices within the judiciary. In March 2021, the final report of the independent *Review of Sexual Harassment in Victorian Courts* was released. The report recommended that the Judicial College develop an education program for existing and newly appointed judicial officers on sexual harassment, gender equality and discrimination.[6] On 17 February 2022, the Supreme Court Chief Justice Anne Ferguson released a statement that the recommendations of the review have been accepted, and that work was underway into a much-needed education program for judicial officers on sexual harassment.[7]

Additionally, on 22 February 2022, the Judicial Commission of Victoria released the *Judicial Conduct Guideline: Sexual Harassment*. It outlines the standards of behaviour

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2 Judicial College of Victoria, *Masters of our fate 2017–2025*, Melbourne, 2017, p. 11.

3 Samantha Burchell, Chief Executive Officer, Judicial College of Victoria, 22 December 2021, p. 5.

4 Victorian Government, *Submission 93*, p. 88.

5 Samantha Burchell, p. 2.

6 Dr Helen Szoke AO, *Review of Sexual Harassment in Victorian courts: Preventing and addressing sexual harassment in Victorian courts and VCAT*, 2021, p. 74.

7 Chief Justice Anne Ferguson, *Statement from Anne Ferguson Chief Justice of the Supreme Court of Victoria*, media release, Supreme Court of Victoria, Victoria, 17 February 2022.

expected of judicial officers and is intended to serve as a guide for any investigations into complaints of sexual harassment which the Commission undertakes.

New appointees

The Judicial College provides different types of support to new judicial appointees, including:

- Designing and implementing induction programs for tribunal members, magistrates, and judges
- Conducting induction mapping in most courts and for VCAT resulting in the creation and refining of induction programs, including reviews of those induction programs
- Providing a range of programs and events that support the transition to judicial life.[8]

The Judicial College explained that it meets with new appointees on an individual basis to provide a general overview on the College and its functions, including the range of educational offerings available. The appointee is offered demonstrations of digital legal resources, such as Bench Books.[9] The Judicial College offers new appointee workshops, during which participants 'practice new skills under the guidance of experienced judicial officers' over a number of days. It also offers 'fundamentals seminars', which feature new appointees interviewing more experienced officers on key areas related to their work.[10]

Internal court training

Courts and tribunals also offer in-house professional development options for staff. These include orientation and induction programs, education committees and interjurisdictional networks, and issues-based seminars and conferences.

There is limited publicly available information on in-house education and training for judicial officers, although some information is included in court annual reports. For example, the Magistrates' Court's *Annual Report 2020–21* stated that a *Judicial Immersion Guide* had recently been created, which is 'a comprehensive reference document for magistrates'. No further information on the content or direction of this guide was provided. The annual report also described training seminars organised on sentencing in family violence crime, to 'promote consistency of practice and uniformity across metropolitan and regional venues'.[11] The Magistrates' Court's annual report further noted that it had delivered broader family violence training to court staff, including court registrars and interpreters.[12]

8 Samantha Burchell, p. 3.

9 Ibid.

10 Ibid., p. 5.

11 Magistrates' Court of Victoria, *Annual Report 2020–2021*, Melbourne, 2021, p. 22.

12 See, for example, ibid., p. 33.

In its submission, the Victorian Government noted that in addition to in-house training, judicial officers may also access external training and receive an annual allowance for development opportunities:

> Each jurisdiction also provides education and training according to their individual needs. That is, each court may develop its own internal programs or conferences on particular issues, either on their own or with the College's support. Victorian judicial officers can also access programs from the National Judicial College of Australia and may attend other conferences or events. Judicial officers receive an annual allowance for professional development.[13]

The submission did not specify the amount of the allowance, whether there is a certain number of hours of training or professional development that judicial officers are expected to undertake each year or uptake of training opportunities. Nor did the Judicial College provide that information, although it was requested by the Committee.

15.2 Stakeholder views on judicial training and education

In correspondence to the Committee, the Judicial College described the importance of high-quality, continuing judicial education:

> Judicial work requires being knowledgeable about and sensitive to the human needs of individuals in the courtroom, such as defendants, plaintiffs, jury members, victims, witnesses and court staff. In turn this requires awareness of the increasingly diverse contexts in which legal disputes occur, whether as a result of criminal offending, commercial or civil disagreement, injury, family violence, mental health issues, addictions or substance abuse or other circumstances.
>
> Further, judicial work is inherently complex. The inexorable growth of common law and statutes presents a constant pressure for judicial officers to maintain their knowledge and mastery of the law. Judicial officers require accessible, comprehensive and reliable reference material which is tailored to the questions that arise in the courtroom.
>
> It is now well recognised that those appointed to judicial roles have a need for lifelong learning that only experience, education and reflective practice can bring. Judicial education fosters and enhances the unique combination of knowledge, competencies and attributes necessary for a high standard of judicial behaviour and performance. It also significantly contributes to maintaining public confidence in the justice system as a whole.[14]

The Committee received varied evidence from stakeholders regarding training, education and professional development for judicial officers. Some offered advice on the broad range of skills required to deal with criminal justice matters. For example, Smart Justice for Young People asserted that all judicial officers dealing with children and young people should have certain competencies, and that there should be mechanisms in place to assess these competencies:

13 Victorian Government, *Submission 93*, p. 88.

14 Judicial College of Victoria, *Masters of our fate 2017–2025*, p. 7.

> The question for the Committee is really how we assess and require all judges and magistrates (to be appointed or already appointed) to meet critical core competencies and skills to practice and make decisions (on a foundational as well as ongoing basis) that:
>
> - are culturally and gender aware/safe
> - are trauma informed
> - understand child brain and young person development and neuro diversity
> - understand best practice engagement with young people
> - understand family violence
> - understand recidivism
> - problem solving
>
> While appreciating the skills of members of specialist courts like the Children's Court, we see value in all judicial decision makers having these competencies and being equipped to problem solve intersecting problems underlying a young person's offending.[15]

Other stakeholders raised particular issues which are addressed in the following sections.

15.2.1 Specialist courts

As noted throughout this report, Victoria's specialist courts (including the Drug Courts, Koori Courts, Family Violence Courts) play an important and growing role in therapeutic justice options. In light of the complexity of this task and the significance of their work, some stakeholders told the Committee that judicial officers in these courts should receive specialised training in relation to their work.

The Justice Reform Initiative noted in its submission that the Judicial College offers training programs for the specialised courts, including the specialist family violence courts:

> Specialist courts … have a key role to play in reducing recidivism. They have brought new techniques to judicial practice- therapeutic jurisprudence and "solution-focused" judging amongst them. Judicial officers are expected to deploy the relevant skills and techniques to make specialist courts succeed. They should have the judicial education/training to help them develop those skills, to enable them to most effectively engage people appearing before them with the programs and resources intended to provide support, and thereby lower the risk of re-offending. Australia's formal judicial education system is mature and well respected by the judiciary. Courts provide in-house professional development. Victoria's Judicial College (JCV) has a central role to play, a reputation for excellence and works in very close collaboration with the judiciary.

15

15 Smart Justice for Young People, *Submission 88*, p. 18.

> For example, JCV is responsible for developing and delivering multi-disciplinary training for specialist family courts in Shepparton, Ballarat, Moorabin, Frankston and Heidelberg. This training involves a departure from traditional adversarial modes of justice and a move to a collaborative and problem-solving approach. Provided the resources are available, there are good reasons to be confident that this combination of approaches can ensure that judges and magistrates are well equipped to take up positions in specialist courts.[16]

The Victorian Government also cited examples of specialist training that judicial officers who sit in therapeutic courts receive. This includes family violence programs run by the Judicial College, which officers in the Specialist Family Violence Courts are required to complete. The Judicial College also delivered a five-day Drug Court Education Program, with multidisciplinary training for magistrates as well as staff from organisations such as:

- Victoria Police
- Victoria Legal Aid
- Community Correctional Services
- community health and social services.

This program focused on topics such as the foundations of drug courts, role definition, case management and leadership.[17]

15.2.2 Trauma-informed practice

As discussed in Part C of the report, a concern raised by many victims of crime and other groups during the Inquiry was the need for greater trauma-informed practice in court proceedings. For example, Jane O'Neill, Team Leader for the Victims Assistance Program, Hume Region at Merri Health, described experiences of its support workers with magistrates who did not adopt a trauma-informed approach.

Jane O'Neill explained that some judicial officers considered crimes 'as not being serious' if the victim did not have physical injuries. In her view, this demonstrated a lack of working knowledge amongst court practitioners on the wide-ranging impacts victims of crime can experience, including psychological, emotional and financial abuse as well as coercive control and intimidation.

Jane O'Neill stated that trauma-informed practice is 'the most important type of training and education for all of the professions working within that legal framework'.[18] A victim-survivor that spoke at a public hearing, Hope, told the Committee that:

16 Justice Reform Initiative, *Submission 103*, pp. 7–8.

17 Victorian Government, *Submission 93*, pp. 90–91.

18 Jane O'Neill, Team Leader for Victims Assistance Program, Merri Health Hume Region, public hearing, Wangaratta, 30 June 2021, *Transcript of evidence*, p. 7.

> If judges, Crown prosecutors and in fact all court staff are given trauma-informed training, this would be a huge step in having a legal system that is slightly fairer to the victim.[19]

In its submission, ermha365—an organisation providing complex mental health and disability services—explained the importance of ensuring recognition and understanding within the criminal justice system, of the complexities of compounding forms of vulnerability:

> Intersectional vulnerabilities compounds vulnerability. People with complex needs do not react to authorities as expected, particularly in unusual and stressful situations, and/or do not comprehend the system. Invariably, when those in authority lack the training and experience to recognise this issue, they do not lend their discretionary powers to people they perceive as uncooperative, thereby escalating the problem. Once in contact with the law, the compounded vulnerabilities of these clients sets them on a downward spiral.[20]

The Law Institute of Victoria stated that 'sentencing knowledge and expertise of judges and Magistrates could … be improved, including by increasing training in cultural competency and trauma informed practice'.[21] Similarly, the Victims of Crime Commissioner, Fiona McCormack, told the Committee that:

> I think that we need ongoing training for judicial officers. I think that is fundamental, particularly in understanding about trauma, understanding about systemic barriers and challenges for certain groups.[22]

Acknowledging and understanding the impact of vicarious trauma is another important factor for promoting trauma-informed practices. It is important that judicial officers consider the affects vicarious trauma—or prior traumatic experiences—can have on their decision-making in the courtroom. Trauma-informed training should also include strategies for managing biases that are identified.

Along with professional development training, Victoria's courts should also embed workplace practices to support the health and wellbeing of judicial officers and court staff who are confronted daily with the traumatic experiences of the parties to crime and all individuals who find themselves in the criminal justice system. These practices can help prevent the vicarious trauma experienced by judges and magistrates from affecting their job performance. It also promotes a positive and safe work environment.

19 Hope, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 2.

20 ermha365, *Submission 84*, p. 9.

21 Law Institute of Victoria, *Submission 112*, p. 7.

22 Fiona McCormack, Commissioner, Victims of Crime Commission, public hearing, Melbourne, 20 September 2021, *Transcript of evidence*, p. 5.

15.2.3 Cultural competency

Cultural competency was raised as a critical area of focus within the criminal justice system, and in particular, in relation to Aboriginal Victorians and culturally and linguistically diverse communities.

At a public hearing, George Selvanera, Acting Chief Executive Officer of Victorian Aboriginal Legal Service, stated that cultural competency among judicial officers is currently insufficient:

> There is not sufficient cultural competence within the judiciary, and it is really interesting to us. When I say 'really interesting to us' what I mean is it is deeply concerning to us that only members of the Koori Court are expected to undergo or undertake cultural awareness training. That should not be the case. It should be the case that anyone involved in any kind of tribunal or any kind of judicial function undertake not just cultural awareness training, which is promoting some level of understanding—2-hour elearning or whatever it might be, even if it is one day or whatever it is—but I think … it needs to be substantial. It needs to give real insight about what the impact of systemic racism is and what that means, then, for Aboriginal people as they present in whatever context, I guess, it is that they come into contact with judicial processes. So there is a need to develop not just that awareness but that cultural competence and to equip everyone who is involved in judicial processes—and that is not just even the judicial officers themselves; it is the people supporting them, because they often act as workers interacting, then, with the Aboriginal people coming into courtrooms or tribunals or whatever it might be—and ensure that they have that cultural competence, that they understand what self-determination means, they understand the impact of the colonial history on today's Aboriginal people and they understand the different kinds of ways of interacting that will support that person to participate in the process more, to feel more confident, I guess, in terms of the engagement with that process.[23]

Victoria Legal Aid asserted that in order to achieve systemic change, cultural safety competence is required across the criminal justice system—including for judicial officers, lawyers, police, corrections and court staff. It said that greater knowledge is required in 'understanding why First Nations people continue to be before the system in overrepresented numbers'.[24]

In its submission to the Inquiry, the Victorian Aboriginal Legal Service made a number of recommendations with regard to judicial expertise and training. This included:

- all judicial officers should be required to undertake training with regard to 'Aboriginal and Torres Strait Islander cultural issues, and their interaction with the criminal legal system'

23 George Selvanera, Acting Chief Executive Officer, Victorian Aboriginal Legal Service, public hearing, Melbourne, 21 October 2021, *Transcript of evidence*, p. 36.

24 Victoria Legal Aid, *Submission 159*, p. 9.

- all judicial officers should be required to undertake 'regular face-to-face training in cultural awareness, systemic racism and unconscious bias'
- funding for the Service to deliver cultural awareness training to bail justices, including in relation to the application of s 3A of the *Bail Act 1977* (Vic)
- training delivered to judicial officers should be adapted for broader use throughout the criminal legal system.[25]

Smart Justice for Women supported the Victorian Aboriginal Legal Service's advocacy for regular cultural competency training.[26]

The Aboriginal Justice Caucus recommended the development of a cultural competency training framework, as well as a specialised Bench Book for resources specific for Aboriginal and Torres Strait Islanders:

> The AJC [Aboriginal Justice Caucus] recommend a Cultural Competence Training framework designed by an independent First Nations person with close consultation with the AJC and Aboriginal specific legal services. The framework of this cultural competency training must be endorsed by the AJC and slightly modified in consultation with the local community, for example through local RAJAC's [Regional Aboriginal Justice Advisory Committees], dependant on what community the court resides in. The AJC firmly believe that this training package delivered to all CSV [Court Services Victoria] staff and Judicial officer with bi-annual refresher training will support in building a more culturally competent workforce.
>
> It is further recommended that a bench book be developed that contains detailed information of what local Aboriginal organisations and resources that exist to service Aboriginal people who offend. A detailed bench book will support in building on Judicial Officers knowledge of Aboriginal services and can make informed sentencing decisions to avoid incarceration and ultimately less Aboriginal deaths in custody.[27]

In relation to culturally and linguistically diverse communities, the Centre for Multicultural Youth submitted that judges and magistrates, along with other actors in the criminal justice system, should have core competencies and skills in order to make decisions that are culturally and gender aware and safe, are trauma-informed, and reflect the needs of young people.[28]

Chapter 14 discusses the need for greater diversity across Victoria's judiciary to improve cultural competency and awareness.

25 Victorian Aboriginal Legal Service, *Submission 139*, pp. 13, 20, 38–39.

26 Smart Justice for Women, *Submission 94*, p. 19.

27 Aboriginal Justice Caucus, *Submission 106*, p. 16.

28 Centre for Multicultural Youth, *Submission 95*, p. 10.

15.2.4 Disability

Another issue raised by stakeholders was the need for judicial officers to have an understanding of disability during sentencing processes.

In a submission, Stabilise—a company that addresses sexual expression opportunities for people living with disability—raised anecdotal experiences of parents of children with disability seeking justice outcomes for their children as victims of sexual assault. It submitted that these experiences highlight 'gaps in the process for survivors with a disability':

> Anecdotal experiences from parents who attempted to support their child with a disability who had been sexually assaulted, highlighted the gaps in the process for survivors with a disability.
>
> Law enforcement and Judicial systems deem these survivors as not credible witnesses.
>
> Structural barriers for those who are non-verbal is embedded in the lack of communication software, images and concepts and exacerbated by fear of retribution due to their dependence on others, powerlessness and lack of independent supports.
>
> One parent who supported their child with a disability to navigate the legal system after being sexually assaulted, reported that a Judge determined that as the person had autism, anything else (like being sexually assaulted) would have a limited impact on them.
>
> This child had been sexually assaulted on a school bus.[29]

The submission advocated for specialist training for judicial officers in relation to cognitive disabilities.[30]

The Office of the Public Advocate told the Committee that judicial training around different forms of disability is required in light of the overrepresentation of people with disability in the criminal justice system:

> Given the over-representation of cognitive disability, ABI [acquired brain injuries] and mental illness among Victoria's remand and prison population, [the Office of the Public Advocate's] view is that judicial training in this area should specifically consider the factor of disability in relation to sentencing, dealing with offenders, recidivism and causes of crime. Education should consider the ways in which the criminal justice system discriminates on the basis of disability when disability is not actively taken into account within the criminal justice system, or adjacent systems such as housing and supports for behaviours of concern, effectively criminalising disability including punishing it by incarceration.[31]

29 Stabilise Pty Ltd, *Submission 53*, p. 4.

30 Ibid.

31 Office of the Public Advocate, *Submission 153*, p. 44.

The Office suggested that training programs 'should be co-designed, delivered and evaluated by people with lived experience of the criminal justice system', and in particular, with persons with cognitive impairments, acquired brain injuries and mental illness. It stated that:

> Co-design, delivery and evaluation, or at the very least, consultation with and contribution by those with lived experience, will ensure that educational materials are created with direct and full participation of the class of people who will be affected by judicial educative outcomes.[32]

15.2.5 LGBTIQ+ community

While the Committee did not receive a significant amount of evidence in relation to the experiences of the LGBTIQ+ community, some concerns were raised regarding the level of understanding of issues relevant to the community during court processes. In a submission, Transgender Victoria highlighted instances of both intentional and unintentional discriminatory treatment:

> Unfortunately, many members of our community have experienced both intentional and unintentional discriminatory treatment from judges and magistrates during sentencing. In particular, there has been a lack of awareness of the impact of sentencing transgender women to custodial sentences which are ultimately served in men's prisons. These issues are described in some detail in the LGBTIQ Legal Service's 2020 Legal Needs Analysis. At page 19, this report notes the mental health impact of being placed in a single sex prison environment that does not accord with a person's gender identity. It also highlights the difficulty many trans and gender diverse people experience in accessing gender-affirming healthcare while incarcerated. Furthermore, it notes the significant additional vulnerability that the trans and gender diverse community have to poor mental health and suicidality, which is exacerbated significantly by incarceration.[33]

Transgender Victoria submitted that all judicial officers presiding over criminal matters where there is a risk of imprisonment should 'be required to undergo LGBTIQA+ inclusive practice training'. It said that this training should:

> highlight the particular social and legal issues faced by our community as well as the significant additional risk of psychological and physical harm faced by the incarceration of trans and gender diverse people in Victorian prisons.

Transgender Victoria highlighted the importance of improved judicial awareness in this area:

> It is our hope that this small step will go some way to assist judges and magistrates to deal with LGBTIQA+ victims, defendants and witnesses in a respectful and inclusive manner, and to ensure that they give a full consideration of the additional risk factors that trans and gender diverse people face while incarcerated.[34]

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32 Ibid.

33 Transgender Victoria, *Submission 101*, p. 2.

34 Ibid., p. 3.

15.3 Improving judicial education, training and professional development

The Committee acknowledges the importance of ensuring that Victorian courts can independently identify and implement education programs that reflect their needs and requirements. However, considering the courts' role in providing equal protection and treatment of all persons in the maintenance of the rule of law, the views of different groups within the community should be important determining factors in relation to judicial education and training.

The Committee notes that some stakeholders affirmed that the standard of professional development and education activities in Victoria is extremely high, and that judicial officers are suitably qualified and dedicated to continuous improvement in line with emerging best practice. For example, Emeritus Professor Arie Freiberg AM, Chair of the Sentencing Council of Victoria, provided: 'Do not underestimate the knowledge and expertise that judges have. I think there is a danger of being overly critical of judges, knowing the kind of work that they have.'[35]

The Committee's view is that judicial officers are highly qualified professionals who work in a challenging and stressful environment. Nevertheless, concerns were raised with the Committee in relation to the specialist knowledge and skills of some judicial officers. A key issue is that professional development takes place largely behind closed doors, with limited information about practices available to the public.

The Committee welcomes the information provided by the Judicial College in relation to education, training and development opportunities offered by the College. However, it is difficult to determine the adequacy or effectiveness of the program without further information on, for example:

- which courses (if any) are mandatory
- the numbers or proportions of judicial officers that attend each course
- the numbers of judicial officers that attend no, or very few, courses or other educational offerings
- how outcomes are measured, and learnings used to improve future offerings.

It remains unclear as to whether there are any mandatory training and education requirements for judicial officers appointed to Victorian courts. This includes in relation to specialist training for officers presiding over specialist courts, other than cultural awareness training for officers of the Koori Courts. To support the work of the therapeutic courts in providing specialised responses, it is crucial that judicial officers apply best practice approaches and ensure positive therapeutic outcomes for persons appearing in those courts.

35 Emeritus Professor Arie Freiberg AM, Chair, Sentencing Advisory Council, public hearing, Melbourne, 24 August 2021, *Transcript of evidence*, p. 28.

In correspondence to the Committee, the Judicial College provided a 2021 research paper on *Judicial education in Australia: A contemporary overview*. The article—which was prepared for the Australasian Institute of Judicial Administration—sought to clarify the extent of judicial education across Australia. It provided some data and findings on the extent of judicial education in Victoria but mainly in Australia more broadly, noting:

- the Judicial College conducted 70% of the judicial education programs offered in Victoria between 2015–16 to 2017–18[36]
- according to 2010 statistics, 68% of Australian judicial officers exceeded the National Judicial College of Australia's standard for professional development of judicial officers (average of 5-days of professional development each calendar year, achieved over a 3 year period)[37]
  - nearly a quarter of Australian judicial officers completed 10 days or more of education activities between October 2009 and October 2010[38]
- higher rates of participation in Victoria—and New South Wales— compared to other states and territories is likely a result of judicial education being well-funded and the existence of institutions, such as the Judicial College of Victoria devoted to judicial education.[39] However, there was no further breakdown of the participation rates in the report.

As indicated above, data available on the uptake of education programs by judicial officers was from 2010. Therefore, it cannot provide a clear picture of contemporary engagement with judicial education. The article noted that further research into the amount of judicial education undertaken 'would be a timely and worthwhile exercise', particularly given the impacts of COVID-19 on the delivery of education programs. The paper also made several recommendations on improving and standardising data collection related to judicial education. Recommendations included:

- That courts and judicial education bodies adopt a standard format for transparent reporting of judicial education offerings, which should be included in annual reports.
- Further research into the quality of judicial education offerings and the level of participation.[40]

The Committee would welcome greater transparency in relation to the work of the Judicial College and, in particular, how many of the education and training opportunities are taken up and lead to enhanced outcomes across the courts. Transparency is crucial. In order to maintain the confidence of the communities they serve, Victoria's courts must be able to show their commitment to maintaining high standards of professional competency. This includes in areas such as trauma-informed practice,

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36 Professor Gabrielle Appleby, et al., *Judicial education in Australia: A contemporary overview*, Australasian Institute of Judicial Administration, 2021, p. 30.

37 Ibid, p. 19. Statistics from Christopher Roper, *Review of the National Standard for Professional Development for Australian Judicial Officers*, 2010, p. 9.

38 Ibid.

39 Professor Gabrielle Appleby, et al., *Judicial education in Australia*, p. 19.

40 Ibid, p. 5.

cultural awareness and safety, awareness of particular issues experienced by the LGBTIQ+ community and experiences of persons with disability. Without this visibility, community concerns will remain.

As such, the Committee invites the Judicial College of Victoria and Victorian courts with criminal jurisdiction to consider the below findings that reflect evidence received to this Inquiry.

FINDING 72: Judicial officers are highly skilled professionals with significant knowledge and expertise. However, stakeholders considered that there are various issues in relation to which judicial officers would benefit from improved education and training. These issues include:

- trauma-informed practice
  - including an understanding of trauma as it is experienced by those who come before judicial officers in the criminal justice system; and
  - support for judicial officers to deal with vicarious trauma so that it does not adversely influence their decision-making or job performance
- engaging people with lived experience to develop judicial training related to specific cohorts or issues. For example, training areas which could benefit from the perspective of those with lived experience include:
  - increasing cultural competency, in particular in relation to Aboriginal Victorians and culturally and linguistically diverse communities
  - awareness of particular issues experienced by the LGBTIQ+ community
  - experiences of persons with a disability.

In addition, stakeholders believed that certain training should be a requisite of ongoing employment for judicial officers, and particularly for new appointees.

FINDING 73: There is little public information on the extent to which judicial officers undertake regular and comprehensive judicial education and training in the areas outlined above, or in other related areas. While the Judicial College of Victoria provides a suite of high-level training and education programs and services, it is unclear how these are utilised and what their outcomes are. To increase public confidence that judicial officers are engaging in education and training, the College would benefit from improving transparency around training and education across all court jurisdictions.

Adopted by the Legislative Council Legal and Social Issues Committee
Parliament of Victoria, East Melbourne
Thursday 3 March 2022

Appendix A
About the Inquiry

A.1 Submissions

1	Julie Mcleish
2	Paul Exell
3	Confidential
4	Tracie Oldham
5	Paul Murray
6	Dorothy Long
7	Chelsea Tunnicliffe
7a	Chelsea Tunnicliffe
8	Confidential
9	Paul Barker
10	Name withheld
11	Andrew Bradley
12	David Shackles
13	Confidential
14	Tim Hurley
15	Jeynelle Dean-Hayes
16	Andrew Oliver
17	Sentencing Advisory Council
18	Ivan Zarezkij
19	Dr Duncan Rouch
20	Dianne McDonald
21	Community Advocacy Alliance Inc.
21a	Community Advocacy Alliance Inc.
21b	Community Advocacy Alliance Inc.
22	Name withheld
22a	Name Withheld
23	Gregory Howden
24	Drug Free Australia
25	Ana Richardson
26	Australasian Corrections Education Association
27	Professor Amos N Guiora
28	Lee Little
29	Name Withheld
30	Confidential
31	Judy Li
32	Elise Worland
33	Confidential
34	Confidential
35	Shane Sabransky
36	Centre for Forensic Behavioural Science
37	Peter Brown
38	In Good Faith Foundation
38a	In Good Faith Foundation
39	Confidential
40	Confidential
41	Jeff Shaw
42	John Herron
43	Name Withheld
44	Friends of Castlemaine Library
45	Confidential
46	Confidential
47	Confidential
48	Confidential
49	Confidential
50	Royal Victorian Association of Honorary Justices
51	The Youth Junction Inc.
52	Rose McCrohan

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53	Stabilise Pty Ltd
54	Confidential
55	Anthony Gleeson
56	Louise Knight
57	Professor Bronwyn Naylor
58	Human Rights Law Centre
59	Andrew Rattle
60	W P Edwards
61	Arthur Bolkas
62	Confidential
63	Australian Association for Restorative Justice
64	Commission for Children and Young People
65	Name withheld
66	Road Trauma Families Victoria
67	Confidential
68	Ingrid Irwin
69	Confidential
70	Dr Karen Gelb
71	Fighters Against Child Abuse Australia (FACAA)
72	Merri Health
73	Derryn Hinch's Justice Party
74	What Can Be Done Steering Committee
75	Professor Felicity Gerry QC, Jennifer Keene-McCann, Cate Read, Riccardo Pagano and Dr David Ferguson
76	Victorian Womens Guild
77	VACRO
78	Reverend Jim Pilmer PSM OAM OStJ
79	Cameron Russell
80	Peninsula Community Legal Centre
81	Victorian Aboriginal Community Service Association (VACSAL)
82	Centre for Innovative Justice
83	Australian Red Cross
84	ermha365
85	Claire Seppings
86	Professor Felicity Gerry QC, Professor Andrew Rowland, Dr Laura Connelly and Dr Jeannette Roddy
87	Power In You Project
88	Smart Justice for Young People (SJ4YP)
89	Amnesty International
90	Australian Psychological Association
91	Australian Community Support Organisation
92	ACEVic
93	Victorian Government
94	Smart Justice for Women
95	Centre for Multicultural Youth (CMY)
96	Post Sentence Authority
97	Tony Smith
98	Gary Jenkins
99	Victims of Crime Commissioner
100	Australian Drug Foundation
101	Transgender Victoria
102	Justice Action
103	Justice Reform Initiative
104	Dr Diana Johns
105	Uniting Church of Australia, Synod of Victoria and Tasmania
106	Aboriginal Justice Caucus
107	Local Time - University of Melbourne
108	Confidential
109	Confidential
110	Caraniche
111	Douglas Sheridan
112	Law Institute Victoria
113	First Step Legal
114	Amaze Autism Connect
115	Dr Marietta Martinovic and Gabriela Franich
116	Good Shepherd Australia New Zealand
117	Windana
118	Youth Affairs Council Victoria (YACVic)
119	Jesuit Social Services
120	Women and Mentoring
121	Victorian Aboriginal Child Care Agency (VACCA)

122	Australian Association of Social Workers (AASW)
123	Anglicare Victoria
124	Catholic Social Services
125	Living Positive and Positive Women
126	Mallee Family Care
127	Centre for Excellence in Child and Family Welfare (CFECFW)
128	Victorian Alcohol and Drug Association (VAADA)
129	Uniting Vic. Tas
130	Odyssey House Victoria
131	Brimbank Melton Community Legal (CommUnity)
132	Federation of Community Legal Centres Victoria Inc.
133	Inner Melbourne Community Legal
134	Koorie Youth Council
135	Law and Advocacy Centre for Women
136	Sexual Assault Services Victoria (SASVic)
137	Victorian Council of Social Services
138	Djirra
139	Victorian Aboriginal Legal Service and South Eastern Aboriginal Justice Services
140	Liberty Victoria
140a	Liberty Victoria
141	WEstjustice
142	Prison Network
143	Caterina Politi
144	Dr Karen Hart
145	Professor Felicity Gerry QC, Jennifer Keene-McCann, Isabelle Skaburskis & Simon Thomas
146	Springvale Monash Legal Service Inc.
147	Youth Parole Board
148	Homes Not Prisons
149	Guy Coffey
150	Victorian Greens
151	Council of single mothers and their children
152	Fitzroy Legal Service
153	Office of the Public Advocate
154	Womens Leadership Group
155	Foundation for Alcohol Research and Education (FARE)
156	VALID
157	The Justice Map
158	Justice Connect
159	Victoria Legal Aid
160	Douglas Goulter
160a	Douglas Goulter
160b	Douglas Goulter
160c	Douglas Goulter
160d	Douglas Goulter
160e	Douglas Goulter
161	Confidential
162	Confidential
163	Patricia Dattilo
164	Carmel Benjamin
165	Centre for Drug Use Addictive and Anti-social behaviour Research (CEDAAR)
166	Cathy Oddie
167	Confidential
168	McAuley Services for Women
169	Terence McKay
170	Melbourne City Mission

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A.2 Public Hearings and site visits

Wednesday, 30 June 2021—Wangaratta Performing Arts Centre 33–37 Ford Street, Wangaratta VIC 3677

Name	Title	Organisation
Jane O'Neill	Team Leader for Victims Assistance Program, Hume Region	Merri Health Hume Region
Carolyn Wallace	General Manager	Merri Health Hume Region
Felicity Williams	Chief Executive Officer	The Centre for Continuing Education
Kerri Barnes	Program Manager, Finding Strengths	The Centre for Continuing Education
Lee Little	–	–
Kerry Burns	Chief Executive Officer	Centre Against Violence

Tuesday, 24 August 2021—via videoconference

Name	Title	Organisation
Hope	–	–
Tania Wolff	President	Law Institute Victoria
Mel Walker	Co-Chair of Criminal Law Committee	Law Institute Victoria
Dr Mindy Sotiri	Executive Director	Justice Reform Initiative
Robert Tickner	Chair	Justice Reform Initiative
Ian Gray	Victorian Justice Reform Initiative Patron and former Chief Magistrate of Victoria	Justice Reform Initiative
Emeritus Professor Arie Freiberg AM	Chair	Sentencing Advisory Council
Monique Hurley	Senior Lawyer	Human Rights Law Centre
Amala Ramarathinam	Senior Lawyer	Human Rights Law Centre

Monday, 6 September 2021—via videoconference

Name	Title	Organisation
Emeritus Professor Joe Graffam	Deputy Vice-Chancellor Research	Deakin University
Tiffany Overall	Advocacy and Human Rights Officer at Youth Law and Co-Convenor at Smart Justice for Young People	Youthlaw and Smart Justice for Young People
Anoushka Jeronimus	Co-convenor	Smart Justice for Young People
Julie Edwards	Chief Executive Officer	Jesuit Social Services
Daniel Clements	General Manager Justice Programs	Jesuit Social Services
Charlotte Jones	General Manager	Mental Health Legal Centre
Stan Winford	Associate Director of Research, Innovation and Reform	RMIT Centre for Innovative Justice
Elena Campbell	Associate Director of Research, Advocacy and Policy	RMIT Centre for Innovative Justice
Dr Natalia Antolak-Saper	Fellow	Australian Centre for Justice Innovation, Monash University
Tracie Oldham	–	–
John Herron	–	–

Monday, 20 September 2021—via videoconference

Name	Title	Organisation
Fiona McCormack	Commissioner	Victims of Crime Commissioner
Julie Baron	Policy and Advocacy Manager	Youth Affairs Council Victoria
Indi Clarke	Executive Officer	Koorie Youth Council
Marius Smith	Chief Executive Officer	VACRO
Abigail Lewis	Senior Policy and Advocacy Advisor	VACRO
Jordan Dittloff	Lived Experience Consultant	VACRO
Cameron Lavery	Manager and Principal Lawyer	Justice Connect
Samantha Sowerwine	Principal Lawyer, Justice Connect Homeless Law	Justice Connect
Adjunct Professor Aunty Muriel Bamblett AO	Chief Executive Officer	Victorian Aboriginal Child Care Agency (VACCA)
Carmel Guerra OAM	Director and Chief Executive Officer	Centre for Multicultural Youth
Reverend Jim Pilmer PSM OAM OStJ	–	–

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Tuesday, 21 September 2021—via videoconference

Name	Title	Organisation
Fiona Dowsley	Chief Statistician	Crime Statistics Agency
Aunty Linda Bamblett	Chief Executive Officer	Victorian Aboriginal Community Services Association Ltd (VACSAL)
Julie Bamblett	Homelessness Case Worker and Local Justice Team Leader	Victorian Aboriginal Community Services Association Ltd (VACSAL)
Karin Williams	Team Manager, Bert William's Aboriginal Youth Hostel	Victorian Aboriginal Community Services Association Ltd (VACSAL)
Sergeant Wayne Gatt	Secretary and Chief Executive Officer	The Police Association Victoria
Professor James Ogloff	Professor of Forensic Behavioural Science and Director	Swinburne University of Technology
Ivan Ray	Chief Executive Officer	Community Advocacy Alliance
Kelvin Glare AO APM	Chairman and Former Chief Commissioner of Victoria Police	Community Advocacy Alliance
Tricia Clampa	Executive Officer	Women and Mentoring
Teegan Hartwick	Peer Advisory Group Member	Women and Mentoring
Dianne McDonald	–	–

Tuesday, 19 October 2021—via videoconference

Name	Title	Organisation
Les Twentyman	Founder	Les Twentyman Foundation
Paul Burke	Chief Executive Officer	Les Twentyman Foundation
Jim Markovski	Manager Youth Services	Les Twentyman Foundation
Sean Newton	Team Leader Youth Services	Les Twentyman Foundation
Gum Mamur	Youth Worker	Les Twentyman Foundation
Tekani Perry	Youth Worker	Les Twentyman Foundation
Jazzy-Jane Abas	Youth Worker	Les Twentyman Foundation
Richard Tregear	Outreach Worker	Les Twentyman Foundation
Dr Marietta Martinovic	Senior Lecturer in Criminology and Justice, Australian Inside Out Prison Exchange Program Manager and Australian Prison and Community based Think Tank Leader	RMIT University
Elena Pappas	Co-Convenor	Smart Justice for Women
Elisa Buggy	Member	Smart Justice for Women
Melanie Poole	Director	The Justice Map
Anya Saravanan	Research and Policy Analyst	The Justice Map

Name	Title	Organisation
Rachael Hambleton	Strategy and Research Advisor	The Justice Map
Denham Sadler	Senior Editor	The Justice Map
Anna Cerreto	Communications Advisor	The Justice Map
Louisa Gibbs	Chief Executive Officer	Federation of Community Legal Centres Victoria Inc.
Jill Prior	Principal Legal Officer, Law and Advocacy Centre for Women	Federation of Community Legal Centres Victoria Inc.
Michele Williams QC	Chair	Post Sentence Authority
Stuart Ward	Deputy Chair	Post Sentence Authority

Thursday, 21 October 2021—via videoconference

Name	Title	Organisation
Amy	–	–
Melissa Hardham	Chief Executive Officer	WEstjustice
Anoushka Jeronimus	Director, Youth Law Program	WEstjustice
Louise Glanville	Chief Executive Officer	Victoria Legal Aid
Dan Nicholson	Executive Director, Criminal Law	Victoria Legal Aid
Dr Karen Hart	Senior Lecturer	Victoria University
George Selvanera	Acting Chief Executive Officer	Victorian Aboriginal Legal Service
Kin Leong	Acting Director of Legal Services	Victorian Aboriginal Legal Service
Andreea Lachsz	Head of Policy, Communications and Strategy	Victorian Aboriginal Legal Services
Christopher Harrison	Co-Chair	Aboriginal Legal Caucus
Uncle Robert Nicholls	Hume Regional Aboriginal Justice Advisory Committee Chair and Aboriginal Justice Caucus Member	Aboriginal Justice Caucus
Dr Adele Murdolo	Executive Director	Multicultural Centre for Women's Health

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Friday, 5 November 2021—via videoconference

Name	Title	Organisation
Rebecca Falkingham	Secretary	Department of Justice and Community Safety
Melanie Heenan	Executive Director	Victim Services Support and Reform
Larissa Strong	Acting Commissioner	Corrections Victoria
Kathleen Maltzahn	Chief Executive Officer	Sexual Assault Services Victoria
Shane Patton APM	Chief Commissioner	Victoria Police
Cathy Oddie	–	–
Thomas Wain	–	–
Kevin Mackin	Secretary	Royal Victorian Association of Honorary Justices
Paul Mracek	President	Royal Victorian Association of Honorary Justices
Emily Piggott	Advocacy Coordinator	VALID

Appendix B
Judicial College of Victoria's response to questions from the Committee

PARLIAMENT OF VICTORIA
LEGISLATIVE COUNCIL
Legal and Social Issues Committee

9 November 2021

Samantha Burchell
Chief Executive Officer
Judicial College of Victoria
Level 7, 223 William Street
Melbourne, VIC, 3000

By Email: [redacted]

Inquiry into Victoria's criminal justice system

Dear Ms Burchell,

The Inquiry

The Legislative Council's Legal and Social Issues Committee is conducting an inquiry into Victoria's criminal justice system. The terms of reference for the inquiry, as agreed by the Legislative Council on 3 June 2020, include that the Committee should inquire into, consider and report on various issues associated with the operation of Victoria's justice system, including, but not limited to —

- an analysis of factors influencing Victoria's growing remand and prison populations;
- strategies to reduce rates of criminal recidivism;
- an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime; and
- the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skill-set necessary for judges and magistrates overseeing specialist courts.

The Committee is due to report to the Parliament by 28 February 2022.

Request for information

The Legal and Social Issues Committee requests information from the Judicial College of Victoria on a number of matters related to its terms of reference. This information will assist the Committee to make recommendations to the Victorian Government in its final report.

We would appreciate if you could provide a response to the below questions by **5.00pm on Friday, 10 December 2021**.

It is important that any response be provided in a timely manner in order to allow the Committee sufficient time to consider the response alongside other evidence received as part of the Inquiry ahead of the reporting date.

Please send your response to: justiceinquiry@parliament.vic.gov.au.

Questions

1. How does the College identify professional development needs, develop and deliver training for judges, magistrates, coroners and tribunal members?
2. In the view of the College, what knowledge and skills do judges and magistrates need to do their job well?
    a. What programs or other resources could be provided to ensure that judges and magistrates have this knowledge and skills?
    b. How is the performance of judges and magistrates taken into consideration when designing training and education programs?
3. What proportion/number of judges, magistrates, coroners and tribunal members participate in professional development opportunities offered by the College each year?
4. Is there any requirement for judges, magistrates, coroners and tribunal members to participate in training or professional development each year? If so, what are the requirements?
5. What training, professional development and resources does the College provide in relation to:
    a. Trauma-informed practice
    b. Restorative justice
    c. Domestic/family violence
    d. Culturally safe practice (for ATSI and CALD communities)
    e. Dealing with children and youth
6. What proportion/number of judges, magistrates, coroners and tribunal members participate in these opportunities or access resources in relation to these issues each year?
7. What orientation, training and professional development opportunities do new judges, magistrates, coroners and tribunal members have access to immediately following their appointment?
    a. Is there any mandatory training or education that new judges, magistrates, coroners and tribunal members undertake, and if so, what does this include?
8. Is there any specialist education or training available for judicial officers in specialist courts in Victoria? If so, what does this involve?
9. One of the challenges facing the judiciary identified in the College's *Masters of our fate* strategic plan is 'heightened demands of public accountability and transparency'. How is the College addressing this challenge?
10. Can you reflect on the usefulness of the International Framework of Court Excellence? How is this resource being used by the College?
11. How does the College keep track of professional and legal developments in other jurisdictions and apply relevant education or other matters in Victoria? Can you provide an example?
12. How does the College facilitate consistency of knowledge and skills across regional and metropolitan courts?
13. What plans, if any, does the College have to expand its services and resources?

Judicial College of Victoria

22 December 2021

Legislative Council
Legal and Social Issues Committee
Parliament of Victoria
Spring Street
East Melbourne
VIC 3002

Via email:
justiceinquiry@parliament.vic.gov.au

Dear Committee,

Re: Response to the Legislative Council's Legal and Social Issues Committee – the Inquiry into Victoria's Criminal Justice System

Thank you for your letter dated 9 November 2021.

The information you seek is provided below. We trust this information will assist the Committee in formulating its recommendations to the Victorian Government.

Who we are and what we do

Established with bipartisan support in 2002, the Judicial College of Victoria (the College) provides education and ongoing professional development for Victorian judges, magistrates, and VCAT members.

The College exists to inform and enrich the Victorian judiciary. Everything we do, whether in-person, online or digitally, is designed to impart deep knowledge and insight. We support judges, magistrates, coroners, and tribunal members to develop the skills they need to best serve the justice system.

By carefully curating our learning experiences, we help judicial officers maximise every precious hour they can dedicate to education. Consistent with our collegiate foundations, we also bring judicial officers together so they can share their collective wisdom with each other. We also connect them with leaders from an array of other disciplines who can offer different perspectives.

Governance

The College has its own Board under the *Judicial College of Victoria Act* 2001, which is chaired by the Honourable Chief Justice Anne Ferguson and comprises heads of the six main jurisdictions and two Governor-in-Council appointees. The College Board is committed to universal judicial education. Commencing in 2007, the College's Continuing Professional Development (CPD) Scheme for judicial officers was an Australian-first.

William Cooper Justice Centre
Level 7, 223 William Street
Melbourne Victoria 3000

P: +61 3 9032 0555
W: judicialcollege.vic.edu.au
E: info@judicialcollege.vic.edu.au

ABN: 71 688 360 899

Judicial College of Victoria

Our educational offerings

Our events are designed to meet the needs of judicial officers at every career stage. They reflect six key areas of judicial education: Law, Skills, Judicial Life, Social Context, First Nations, and Non-Legal Knowledge.

Attached is a list of events held over the past three years (**Appendix A**) and our planned events for 2022 (**Appendix B**). In particular, you will note from the education calendars, the College provides a wide range of opportunities for judicial officers to participate in programs covering criminal law and sentencing, as well as social context, which includes topics such as family violence, drug court, restorative justice, vulnerable witnesses, and mental health.

In recent years, the College has responded to the needs of specialist and regional Courts with a suite of multidisciplinary education programs. We listened to the voices of those with lived experience and expertise in a range of different disciplines to provide a meaningful understanding of the context in which judicial officers and multidisciplinary teams perform their roles.

Most College events are now delivered online, providing judicial officers across the state greater access and flexibility to participate in programs and to remain connected and up to date.

Contributing to judicial education more widely

When possible, the College contributes to judicial education more widely. We have recently written a criminal charge book for South Australia, and a Guardianship Bench Book for the Queensland Civil and Administrative Tribunal. The College has also given the UNSW School of Law permission to use some of its *Uniform Evidence Act* resources in the University's closed online teaching platform. The Uniform Evidence resources form part of the course materials used by other universities too. Additionally, the Victorian Bar's entrance exam draws heavily on the College's bench books and resources.

In addition to collaborating on education resources, we have also worked in partnership with a range of organisations and jurisdictions to provide a variety of education programs. Our calendars of educational offerings over the past three years (**Appendix A**)

reveals the depth of our fee-for-service work in Victoria, as well as interstate and overseas.

New appointees

Section 6 (2) (b) of the *Judicial College of Victoria Act* 2001 states "In performing its functions under subsection (1)(a), (b) and (c), the College must—

b) have regard to the differing needs of different classes of judicial officers and give particular attention to the training of newly appointed judicial officers;

To this end, since 2002 the College has assisted new appointees in various ways including:

- Designing and implementing induction programs for tribunal members, magistrates, and judges
- Conducting induction mapping in most courts and for VCAT resulting in the creation and refining of induction programs, including reviews of those induction programs
- Providing a range of programs and events that support the transition to judicial life

When new judicial officers are appointed, College staff meet with them one-on-one to provide a general overview of the College and its functions. For some new appointees, this may be the first time they have engaged with the College, while others may already be familiar with their work having accessed the College's digital resources while in legal practice. The one-on-one meeting also allows us to discuss with the new appointee the range of resources and education programs that are available to them and that best suit their needs. The new appointee is also offered a demonstration of the College's digital collection of legal resources, bench books and manuals. Again, this is tailored for each new appointee based on their jurisdiction.

2022 will be unique

As part of the College's renewed strategic direction, the College will refocus on the performance of its functions in accordance with s5(2)(a), giving due emphasis to new appointees (s5(2)(b)).

Judicial College of Victoria

Next year will be unique. Notably, **more than 100 new appointees will transition into judicial life**.

It will be necessary to prioritise the needs of these judicial officers to ensure they receive an appropriate foundation in courtcraft, evidence, law, judicial conduct and ethics, and social context issues affecting persons who interact with the judicial system; including First Nations peoples, those experiencing mental illness and other vulnerable persons.

Additionally, the College recognises the value in having experienced judicial officers take part in collegiate reflections on these matters, as well as the importance of them remaining cognisant of evolving community standards, particularly in relation to judicial conduct and ethics more broadly.

Finally, it is vital that all judicial officers have the knowledge, skills, and collegiate support networks to maintain their wellbeing throughout their judicial life, and to support their fellow judicial officers.

College education programs must meet the needs of judicial officers

At the invitation of the jurisdictions, College staff presently participate in court-based education committees. This assists the College to:

- Better understand each court's education needs
- Obtain input into education calendar development generally
- Obtain strategic guidance on jurisdiction-specific education calendar development
- Establish consultation and approval processes for jurisdiction-specific education offerings

The College presently organises and relies on steering committees – some permanent, and others temporary – to oversee the development of individual education offerings. Steering committees ensure that the education needs of judicial officers are met and assist the College to:

- Obtain content-specific strategic guidance on education calendar development
- Consult with subject-matter experts with respect to individual education offerings
- Obtain approval for all aspects of education offerings within the committee's remit

The existing judicial steering committees presently comprise more than 100 judicial officers from various jurisdictions.

Education Design Principles

The College is committed to ensuring that the form and content of all education offerings is of the highest standard. Ten Education Design Principles (EDPs) guide steering committees and staff when developing education offerings. These EDPs ensure that each education offering embeds opportunities for collegiate interaction, considers ethical and social context aspects of content, and adheres to adult education principles.

A copy of the College's Education Design Principles is attached (**Appendix D**).

Drawing on the EDPs, the College seeks to design an education calendar that is rich in content and measure in time commitment.

In summary, the proposed 2022 education calendar comprises four program formats (**Appendix C**):

- **Fundamentals seminars.** Pre-recorded interview-style videos or podcasts, in which new appointees question experienced judicial officers about key topics; intended to provide new appointees with essential knowledge in an efficient format.
- **New appointee workshops.** Face-to-face workshops in which new appointees will practice new skills under the guidance of experienced judicial officers; intended to be conducted over two to three days.
- **Reflective seminars.** Seminars on important topics, presented either face-to-face or via webcast, followed by in-depth panel discussion with audience interaction; intended to provide experienced judicial officers with the opportunity for collegiate reflection.
- **Podcasts.** Pre-recorded conversations between judicial officers on all aspects of judicial life; intended to promote collegiate learning by sparking conversations.

Judicial College of Victoria

Our Bench Books

The College provides judicial officers with a wide range of relevant, practical, and up to date resources and publications to assist with their day-to-day work on the bench.

The College publishes 14 bench books which cover important areas of criminal and civil law, including 'Family Violence and Coercive Control', and the Children's Court Bench Book. Our two most extensive and most popular bench books are the Criminal Charge Book and the Victorian Sentencing Manual. Recent additions to our suite of publications include 'Guides on Victims of Crime in the Courtroom' and 'How to Work with Vulnerable Witnesses'. The College has recently published the 'Modern Slavery: Guidance for Australian Courts', in collaborative work produced in conjunction with the Judicial Council on Cultural Diversity.

Our bench books are an essential part of the judicial toolkit and most are freely available to the wider legal community and public via the College website. Updated on a daily basis, these publications are designed to assist judicial officers to keep up with legislative reform and the impact of appellate decisions.

Judicial appointments

Judicial appointments in Victoria are made by the Attorney-General of Victoria. The College has no role in judicial appointments.

I hope this information is of assistance to the Committee.

Kind regards,

Samantha Burchell
Chief Executive Officer

Judicial College of Victoria

Appendices

Appendix A – 2019, 2020 and 2021 Education Calendars

2019 Curriculum				
Duration	**Program Name**	**Date**	**Location**	**Delivery**
January 2019				
No programs held in January 2019				
February 2019				
Half Day	Drug Court in the Community: Local and International Views - The Foundations	1/02/2019	Metro	FTF
Multi Day	Drug Court in the Community: Local and International Views	7/02/2019-8/02/2019	Metro	FTF
1-hour	Family Violence Lead Magistrates' Workshop: Leading through Frustration with Professor Peter Shaw	8/02/2019	Metro	FTF
1.5 hours	Leading the Justice System: Matters for Judgement Outside the Courtroom - Lunch with Dr Peter Shaw	8/02/2019	Metro	FTF
Twilight	County Court: Judge Peggy Hora Information Session	8/02/2019	Metro	FTF
Multi Day	OPP 360 Degree Individual Feedback	11/02/2019-14/02/2019	Metro	FTF
Twilight	Commercial CPD Seminar: Technological Innovations in Corporate Financing	13/02/2019	Metro	FTF
Full Day	Sorry Business Cultural Competency Program - Coroners Court	15/02/2019	Metro	FTF
Full Day	Motivational Interviewing with Helen Mentha	23/02/2019	Metro	FTF
March 2019				
Twilight	Judgments and Journalism - Court Reporting: Can we build a narrative of trust?	7/03/2019	Metro	FTF
Full Day	It Takes a Village (Youth Justice Morwell)	8/03/2019	Regional	FTF
Multi Day	NZ District Court Judicial Wellness Programs	11/03/2019-15/03/2019	International	FTF
Half Day	Family Violence Lead Magistrates' Workshop: Affecting Court Culture	15/03/2019	Metro	FTF
Half Day	Working with respondents and accused in family violence matters	15/03/2019	Regional	FTF
Half Day	County Court PD Workshop: Experts in Your Courtroom	15/03/2019	Metro	FTF
Twilight	Commercial CPD Seminar: Technological Innovation and Commercial Law - Part 2	27/03/2019	Metro	FTF
Multi Day	The Intimate Terrorism of Family Violence	28/03/2019-29/03/2019	Metro	FTF
Multi Day	Back to Country - A Journey to Gariwerd	29/03/2019-31/03/2019	Regional	FTF

Judicial College of Victoria

Duration	Program Name	Date	Location	Delivery
Full Day	Motivational Interviewing	30/03/2019	Metro	FTF
April 2019				
Full Day	Family Drug Treatment Program: Working with a common purpose	3/04/2019	Metro	FTF
Multi Day	County Court Conference - The Brain: Time, Trauma and Memory	15/04/2019-17/04/2019	Regional	FTF
Full Day	NZ District Court Judicial Wellness Programs	18/04/2019	International	FTF
Half Day	Everything you need to know to conduct Ground Rules Hearings	29/04/2019	Metro	FTF
May 2019				
Full Day	VCAT: Civil List PD Day - Family Violence Awareness Session	3/05/2019	Metro	FTF
Full Day	Shepparton Specialist Family Violence Court Training - Day 2	3/05/2019	Regional	FTF
Twilight	Koori Twilight: Intergenerational trauma & family violence in Aboriginal & Torres Strait Islander communities	7/05/2019	Metro	FTF
Multi Day	Applying Family Law to Parenting and Property	20/05/2019-21/05/2019	Metro	FTF
Half Day	County Court Appeals Workshop	24/05/2019	Metro	FTF
June 2019				
Full Day	Family Violence Lead Magistrates' Workshop: The role of motivational interviewing in disrupting family violence	7/06/2019	Metro	FTF
Twilight	Commercial CPD Seminar: Updates in Commercial Leasing	12/06/2019	Metro	FTF
Full Day	Insight into Trauma	17/06/2019	Metro	FTF
Twilight	Film Screening: The Judge	19/06/2019	Metro	FTF
Twilight	Law and Literature: Bruce Pascoe	26/06/2019	Metro	FTF
Multi Day	Judicial Peer Support	27/06/2019-28/06/2019	Metro	FTF
July 2019				
Full Day	It Takes a Village (Youth Justice Ballarat)	10/07/2019	Regional	FTF
Twilight	Power, Control and Domestic Abuse - Jess Hill in Conversation with President Maxwell	11/07/2019	Metro	FTF
Twilight	Family Violence Twilight: Language, Sentencing and Public Discourse	23/07/2019	Metro	FTF
Half Day	Shepparton Specialist Family Violence Court: What does it mean for lawyers?	25/07/2019	Regional	FTF
Full Day	Ballarat Specialist Family Violence Court Training (Day 1)	25/07/2019	Regional	FTF

Judicial College of Victoria

Duration	Program Name	Date	Location	Delivery
August 2019				
1-hour	Guidance Notes: Victims of Crime in the Courtroom	1/08/2019	Metro	FTF
Twilight	Koori Twilight: Recognising and Responding to Foetal Alcohol Syndrome Disorder	13/08/2019	Metro	FTF
Multi Day	Coroners Court Conference: What is a preventable death?	14/08/2019-16/08/2019	Regional	FTF
Twilight	Modern Forensic Evidence Series: Child Sexual Abuse and Non-accidental Injury	26/08/2019	Metro	FTF
Multi Day	Drug Court Education: See, Hear, Witness	28/08/2019-30/08/2019	Metro	FTF
Full Day	Shepparton Specialist Family Violence Court Training - Day 3	30/08/2019	Regional	FTF
Half Day	County Court Appeals Workshop	30/08/2019	Metro	FTF
Full Day	Family Violence Lead Magistrates' Workshop: Visit to Shepparton Law Courts and the Shepparton Specialist Family Violence Court Training	30/08/2019	Regional	FTF
September 2019				
Twilight	Presentation by Post Sentence Authority (Supreme Court)	10/09/2019	Metro	FTF
Full Day	Leading the Justice System: Ethics in Practice	12/09/2019	Metro	FTF
Full Day	The Self-Represented Litigant: Skills and Strategies	20/09/2019	Metro	FTF
October 2019				
Multi Day	Judgment Writing: Good, Clear, Fast	9/10/2019-11/10/2019	Metro	FTF
Twilight	Koori Twilight (The Prison Population)	14/10/2019	Metro	FTF
Multi Day	Children's Court Conference 2019: Informing Excellence in Decision Making in a Specialist Jurisdiction	16/10/2019-17/10/2019	Regional	FTF
Full Day	Ballarat Specialist Family Violence Court Training (Day 2)	18/10/2019	Regional	FTF
Twilight	Modern Forensic Evidence Series: Forensics and Identity - Dealing with DNA	23/10/2019	Metro	FTF
Multi Day	Leading the Change: Specialist Family Violence Court Magistrates	29/10/2019-30/10/2019	Metro	FTF
November 2019				
1-Hour	County Court Lunch Session: Toxicology	7/11/2019	Metro	FTF
Twilight	Law and Literature Summer Reading	7/11/2019	Metro	FTF
Full Day	Self Represented Litigants: Skills and Strategies for VCAT members	8/11/2019	Metro	FTF
1-Hour	County Court Lunch Session: Own Motion Intervention Orders	13/11/2019	Metro	FTF

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Duration	Program Name	Date	Location	Delivery
Multi Day	The Intimate Terrorism of Family Violence	14/11/2019-15/11/2019	Metro	FTF
Twilight	Commercial CPD Seminar: Privacy Law in the Era of Disruption	20/11/2019	Metro	FTF
Half Day	County Court Appeals Workshop	22/11/2019	Metro	FTF
Full Day	Ballarat Specialist Family Violence Court Training (Day 3)	22/11/2019	Regional	FTF
Half Day	Family Violence Lead Magistrates' Workshop - Achievements, reflections and future priorities	22/11/2019	Metro	FTF
Half Day	Judges and the Academy	29/11/2019	Metro	FTF
December 2019				
Twilight	Courts Council Finance Seminar	11/12/2019	Metro	FTF

Judicial College of Victoria

2020 Curriculum					
Duration	**Program Name**	**Date**	**Location**	**Delivery**	**Notes**
January 2020					
Full day	Moorabbin Specialist Family Violence Court Program (Day 1)	15/01/2020	Regional	FTF	
Full day	Moorabbin Specialist Family Violence Court Program (Day 2)	22/01/2020	Regional	FTF	
February 2020					
Multi day	Vision, Values, Value-Added & Vitality: Leadership Consultations with Dr Peter Shaw	3/02/2020 - 8/02/2020	Metro	FTF	
Full day	Moorabbin Specialist Family Violence Court Program (Day 3)	5/02/2020	Regional	FTF	
Full day	It Takes a Village: Geelong Children's Court	11/02/2020	Regional	FTF	
Twilight	Cyber, Courts and Community: Judges, Ethics and Social Media	18/02/2020	Metro	FTF	
Full day	Drug Court Education: Foundations	26/02/2020	Metro	FTF	
Multi day	Drug Court Training: How we communicate in Drug Court - The Power of Words	27/2/2020 - 28/2/2020	Regional	FTF	
1.5 hours	Lunch with Dr Peter Shaw – The Four Vs of Leadership: An Enduring Framework	28/02/2020	Metro	FTF	
March 2020					
Half day	VCAT Group Leadership Seminar: Dr Peter Shaw	2/03/2020	Metro	FTF	
2-hours	County Court Media training	2/03/2020	Metro	FTF	
Multi day	Leading the Change – Specialist Family Violence Court Magistrates	2/03/20 - 3/02/20	Metro	FTF	
Half day	Judicial Registrars – Effective Leadership with Dr Peter Shaw	4/03/2020	Metro	FTF	
Twilight	Koori Twilight: Voice, treaty, Truth - The Long Road to Recognition with Professor Megan Davis	12/03/2020	Metro	FTF	
Full day	County Court Media training	13/03/2020	Metro	FTF	
Half day	Family Violence Lead Magistrates' Workshop: Assessing and Managing Risk in the Courtroom	13/03/2020	Metro	FTF	
April 2020					
No programs held in April					
May 2020					
1-hour	VCAT Facilitated Peer Group Session 1	7/05/2020	N/A	Online	
Twilight	Judge Alone Trials	13/05/2020	N/A	Online	
1.5 hours	Family Violence Lead Magistrates' Workshop: The impact of COVID-19 on the family violence sector	20/05/2020	N/A	Online	

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Duration	Program Name	Date	Location	Delivery	Duration
1-hour	VCAT Facilitated Peer Group Session 2	21/05/2020	N/A	Online	
June 2020					
1-hour	VCAT Facilitated Peer Group Session 3	4/06/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 1, Group A)	18/06/2020	N/A	Online	
1-hour	VCAT Facilitated Peer Group Session 4	18/06/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 1, Group B) - AM	22/06/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 1, Group C) - PM	22/06/2020	N/A	Online	
Twilight	Connecting with Science: Drug screens and how they support FDTC goals	24/06/2020	N/A	Online	
Twilight	Koori Twilight Series - Voices from the inside: Aboriginal Women in Custody	25/06/2020	N/A	Online	
July 2020					
1-hour	VCAT Facilitated Peer Group Session 5	16/07/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 2, Group A)	16/07/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 2, Group B) - AM	20/07/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 2, Group C) - PM	20/07/2020	N/A	Online	
Full day	Trauma-informed Practice in Family Violence - Shepparton Magistrates workshop	23/07/2020	Regional	FTF	
1-hour	Presentation at Stress, Vicarious Trauma and the Work of Government Lawyers Seminar	30/07/2020	N/A	Online	
1-hour	VCAT Facilitated Peer Group Session 6	30/07/2020	N/A	Online	
1.5 hours	Family Violence Lead Magistrates Workshop	30/07/2020	N/A	Online	
August 2020					
1.5 hours	Family Violence Lead Magistrates Workshop	6/08/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 3, Group A)	10/08/2020	N/A	Online	
Twilight	Cyber, Courts and Community: Cyber facilitated abuse	11/08/2020	N/A	Online	
1-hour	2020 Interrupted – Judicial Wellbeing in Trying Times (County Court)	12/08/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 3, Group B)	13/08/2020	N/A	Online	
1-hour	VCAT Leading Member Wellbeing (Forum 3, Group C)	17/08/2020	N/A	Online	
1-hour	Coroners Court Leading Wellbeing Conversations (Forum 1)	18/08/2020	N/A	Online	
1-hour	Technology tips - Lessons Learned in Covid (County Court Webinar Series)	20/08/2020	N/A	Online	

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Duration	Program Name	Date	Location	Delivery	Duration
1.5 hours	Judicial Wellness - Webinar 1: Leaders (South African Free State High Court)	21/08/2020	N/A	Online	
1-hour	Preserving the intention of the Koori Court: How the County Court Koori Court has adapted to virtual hearings (County Court Webinar Series)	26/08/2020	N/A	Online	
1-hour	VCAT Facilitated Peer Group Session 7	27/08/2020	N/A	Online	
1.5 hours	Judicial Wellness - Webinar 2: Judges (South African Free State High Court)	28/08/2020	N/A	Online	
September 2020					
1-hour	Coroners Court Leading Wellbeing Conversations (Forum 2)	1/09/2020	N/A	Online	
1-hour	Judicial Stress: The Unmentionable and the Undeniable (Northern Ireland judiciary)	15/09/2020	N/A	Online	
1-hour	County Court Staff Webinar: Health and Wellbeing	17/09/2020	N/A	Online	
1-hour	Managing the challenges of COVID-19 in Victoria's prisons (County Court Webinar Series)	17/09/2020	N/A	Online	
1-hour	Tuning In to Switching Off – Coroners Court (1 of 2)	21/09/2020	N/A	Online	
N/A	Reflections on transitions	24/09/2020	N/A	Podcast	Launched 24/03/2021
1-hour	Tuning In to Switching Off – Coroners Court (2 of 2)	28/09/2020	N/A	Online	
October 2020					
N/A	The Kaleidoscope of Humanity: Working in family violence	5/10/2020	N/A	Podcast	Launched 24/03/2021
N/A	The Reading Life of Judges.	7/10/2020	N/A	Podcast	Launched 24/03/2021
1-hour	From Avoidance to Zeal: Ethical considerations in judges' use of social media (County Court Webinar Series)	7/10/2020	N/A	Online	
N/A	Knowing the Unknowns: Legal perspectives on forensic evidence.	15/10/2020	N/A	Podcast	Launched 24/03/2021
Twilight	Koori Twilight: Speaking up for Budj Bim	15/10/2020	N/A	Online	
Twilight	Leading Wellbeing Conversations (Supreme Court)	20/10/2020	N/A	Online	
Twilight	Identifying Communication Issues with Vulnerable Witnesses	21/10/2020	N/A	Online	
1-hour	Impacts of COVID-19 in the Sphere of Youth Justice (County Court Webinar Series)	22/10/2020	N/A	Online	
Full day	VCAT Tribunal Craft	22/10/2020	N/A	Online	
1.5 hours	Leading Excellence and Wellbeing - Magistrates Court (1 of 2)	27/10/2020	N/A	Online	

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Duration	Program Name	Date	Location	Delivery	Duration
November 2020					
1.5 hours	Leading Excellence and Wellbeing - Magistrates Court (2 of 2)	5/11/2020	N/A	Online	
Twilight	2020 Interrupted: Judicial Wellbeing in Trying Times (Supreme Court)	10/11/2020	N/A	Online	
N/A	From Lake Tyers to Koori Court Elder	13/11/2020	N/A	Podcast	Launched 24/03/2021
Full day	Motivational Interviewing	13/11/2020	N/A	Online	
Twilight	Understanding Electronic Monitoring: A New Sentencing Option for Magistrates	16/11/2020	N/A	Online	
1-hour	2020 Interrupted: Judicial Wellbeing in Trying Times (NSW Judicial Commission)	18/11/2020	N/A	Online	
1-hour	CISP: Complex cases, further options (County Court Webinar Series)	18/11/2020	N/A	Online	
Twilight	Family Violence in an Online Environment: Practice Issues for Magistrates	23/11/2020	N/A	Online	
1.5 hours	2020 Interrupted: Maintaining Wellbeing in Trying Times (Human Rights Law Centre)	24/11/2020	N/A	Online	
Full day	Motivational Interviewing	27/11/2020	N/A	Online	
December 2020					
Half day	Drug Court Education: Communication, Connection & Collaboration in Challenging Environments	4/12/2020	N/A	Online	
Full day	Heidelberg Specialist Family Violence Court Program - Unit 1	9/12/2020	N/A	Online	

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2021 Curriculum					
Duration	**Program Name**	**Date**	**Location**	**Delivery**	**Notes**
January 2021					
Full day	Frankston SFVC Unit 1	29/01/2021	N/A	Online	
1-hour	Lawyer Stress: The Unmentionable and the Undeniable (Four Jurisdictions Family Law Conference UK)	31/01/2021	N/A	Online	
February 2021					
1-hour	Vicarious Trauma: Managing the Impact (SCV Associates & Tipstaves)	16/02/2020	N/A	Online	
Half day	Stalking: Targeted Violence (Lead FV Magistrates Workshop)	19/02/2021	N/A	Online	
1-hour	Koori Twilight: 30 Years and Counting	25/02/2021	N/A	Online	
Half day	Drug Court Education Program: Working with Values (AM)	26/02/2021	N/A	Online	
Half day	Drug Court Foundations (PM)	26/02/2021	N/A	Online	
March 2021					
Full day	Drug Court Education Program: Engaging with Emerging Issues and Complexity	5/03/2021	N/A	Online	
Full day	VCAT Tribunal Craft	11/03/2021	N/A	Online	
Full day	Frankston SFVC Unit 2	19/03/2021	N/A	Online	
1-hour	Managing Stress and Maximising Wellbeing (South Australian Employment Tribunal)	19/03/2021	N/A	Online	
N/A	Release of Judicial Life conversation series	22/03/2021	N/A	Podcast	
Full day	County Court Commercial Division Planning Day	26/03/2021	Metro	FTF	
Full day	Heidelberg SFVC Unit 2	31/03/2021	N/A	Online	
April 2021					
1-hour	Where stress presides: Latest research findings	20/04/2021	N/A	Online	
Full day	Coroners Court Conference	22/04/2021	N/A	Online	
May 2021					
Half day	Appeals Workshop - County Court	14/05/2021	Metro	FTF	
Full day	Frankston SFVC Unit 3	21/05/2021	N/A	Online	

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Duration	Program Name	Date	Location	Delivery	Duration
1.5 hours	Judicial Wellbeing and its implications for Judicial Integrity (United Nations ODC - Global Judicial Integrity Network)	21/05/2021	N/A	Online	
Full day	Intimate Terrorism of Family Violence	25/05/2021	N/A	Online	
2-hours	Judicial Wellbeing: Latest research findings and current experiences (State Courts of Singapore)	31/05/2021	N/A	Online	
June 2021					
1-hour	Koori Twilight: Restorative Justice with Aunty Lois Peeler	3/06/2021	N/A	Online	
Half day	Emerging Family Violence Practice Issues (Lead FV Magistrates Workshop)	11/06/2021	N/A	Online	
Full day	Heidelberg SFVC Unit 3	16/06/2021	N/A	Online	
1-hour	Sentencing: What's in a name?	17/06/2021	N/A	Online	
1.5 hours	Judicial wellbeing: The work of judicial registrars (Federal Court of Australia)	21/06/2021	Metro	FTF	
1-hour	VCAT: What is Coercive Control?	22/06/2021	N/A	Online	
1-hour	Evidence Law Essentials: Procedural Considerations Twilight	24/06/2021	N/A	Online	
1-hour	Coroners Court: Trends in obesity and chronic disease with Professor Stephen Simpson	24/06/2021	N/A	Online	
N/A	Supreme Court 360 Degree Pilot Program	April-June	Metro	FTF	
July 2021					
1.5 hours	PJSI Judicial Wellbeing for the Pacific Partner Courts Webinar	29/07/2021	N/A	Online	
August 2021					
N/A	Sexual Harassment in Courts: What does the Szoke Report mean for you?	19/08/2021	N/A	Podcast	Launched 10/11/2021
1-hour	Koori Twilight: Age of criminality: neuro-developmental implications	12/08/2021	N/A	Online	
Half day	Family violence and young people (Lead FV Magistrates Workshop)	13/08/2021	N/A	Online	
1-hour	Fundamentals of evidence: Relevance and the hearsay rule	19/08/2021	N/A	Online	
Full day	VCAT Evidence Law: Why it matters	31/08/2021	N/A	Online	
September 2021					
N/A	John Champion and Audrey Jamieson: On Vicarious Trauma	2/09/2021	N/A	Podcast	
N/A	Gabriele Cannon and Charles Tan: Why wellbeing matters	6/09/2021	N/A	Podcast	

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Duration	Program Name	Date	Location	Delivery	Duration
N/A	John Carmody and Fiona Hayes: Judicial work in regional Victoria	8/09/2021	N/A	Podcast	
1-hour	Cryptocurrency: What you need to know	9/09/2021	N/A	Online	
Half day	A shared understanding of Family Violence (Office of Public Prosecutions)	10/09/2021	N/A	Online	
N/A	Peter Almond, Arushan Pillay and Tara Hartnett: On what to expect from the first three years	16/09/2021	N/A	Podcast	
N/A	Mary-Jane Ierodiaconou, Mark Gamble and Lesley Fleming: On thriving in the judicial role	20/09/2021	N/A	Podcast	
1-hour	Coroners Court: Dignity of risk principles and general ethics with Professor Justin Oakley	23/09/2021	N/A	Online	
October 2021					
N/A	Sustaining and Growing as a VCAT Member: Genevieve Nihill and Charles Powles	1/10/2021	N/A	Podcast	
N/A	Neville Owen and Jennifer Coate: Reflections on a life in the law	8/10/2021	N/A	Podcast	
1.5 hours	Family violence and the legal system: In conversation (Lead FV Magistrates Workshop)	8/10/2021	N/A	Online	
N/A	Wendy Wilmoth, Elisabeth Wentworth and Don Watson: Procrastination, perfectionism, and performance anxiety	13/10/2021	N/A	Podcast	
1-hour	Your Future Self: Life Beyond the Bench	14/10/2021	N/A	Online	
Half day	Assessing risk and best practice communication with victims of family violence (Office of Public Prosecutions)	15/10/2021	N/A	Online	
1-hour	Fundamentals of evidence: Hearsay exceptions and opinion evidence	27/10/2021	N/A	Online	
45 Mins	Overview of College resources (Victoria Legal Aid)	29/10/2021	N/A	Online	
November 2021					
1-hour	Oral Decisions Twilight	10/11/2021	N/A	Online	
30 mins	Scholarship for the Legal Community	10/11/2021	N/A	Online	
1-hour	Coroners Court: Complex issue of methamphetamine use with Professor Paul Dietze	17/11/2021	N/A	Online	
1-hour	Koori Twilight: Shadowboxing: Tony Birch on growing up in Melbourne	18/11/2021	N/A	Online	
1-hour	Leadership Excellence for Judicial Wellbeing (Magistrates' Court of Victoria)	19/11/2021	N/A	Online	
Full day	Balancing the Demands of Judicial Life	30/11/2021	N/A	Online	

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Duration	Program Name	Date	Location	Delivery	Duration
December 2021					
Full day	Balancing the Demands of Judicial Life	2/12/2021	N/A	Online	
Full day	Lead FV Magistrates Workshop	3/12/2021	N/A	Online	

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Appendix B – 2022 education calendar by content area

Content area	Description
Courtcraft	1x Fundamentals seminar 1x New appointee workshop 1x Reflective seminar
Significant legal developments	1x Fundamentals seminar 1x New appointee workshop 1x Reflective seminar
Judicial conduct and ethics	1x Fundamentals seminar 1x New appointee workshop 1x Reflective seminar
Sexual offences (including vulnerable persons)	1x Fundamentals seminar 1x New appointee workshop 1x Reflective seminar
First Nations	1x Fundamentals seminar 1x New appointee workshop 1x Reflective seminar 1x 'On Country' event as per previous years (subject to funding)
Judicial wellbeing	1x Fundamentals seminar 1x New appointee workshop 1x Reflective seminar **Plus** additional content previously developed, including 'BDJL,' 'MCTJO' and 'YFS'
Judicial Life podcast	6x New episodes
Special programming	This year, additional programming will be provided in the strategic priority area of improving courts as workplaces. Refer to the Board paper for Item 2.3 for further details.
Jurisdiction-specific programming	Deferred to 2023

Judicial College of Victoria

Appendix C – 2022 Education calendar by format

Format	Description
Fundamentals seminars	Pre-recorded interview-style videos or podcasts, where new appointees question experienced judicial officers about key topics; intended to provide new appointees with essential knowledge in an efficient format.
New appointee workshops	Face-to-face workshops where new appointees will practice new skills under the guidance of experienced judicial officers; intended to be conducted over 2 to 3 days.
Reflective seminars	Seminars on important topics, presented either face-to-face or via webcast, followed by in-depth panel discussion with audience interaction; intended to provide experienced judicial officers with the opportunity for collegiate reflection.
Podcasts	Pre-recorded conversations between judicial officers on all aspects of judicial life; intended to promote collegiate learning by sparking conversations.

Judicial College of Victoria

Appendix D –Education Design Principles

The 10 Education Design Principles ('EDPs') provide guidance for steering committees and staff when developing education offerings, to ensure that the College remains true to its purpose of delivering collegiate and evidence-led education.

Principle	Explanation
EDP1. Collegiality in design. Offerings are designed by and for judicial officers, so that the education is genuinely collegiate.	'Collegiality in design' is a core purpose of the College.
EDP2. Collegiality in delivery. Offerings support the formation and maintenance of collegiate relationships amongst judicial officers across all jurisdictions.	'Collegiality in delivery' is a core purpose of the College. Transmissive education – where judicial officers are merely 'lectured at' by 'experts' – cuts across this purpose; further, there is evidence that merely transmissive education offerings are less effective for adult learners.
EDP3. Multiple modalities. Offerings are accessible in multiple alternative modes/formats (online text, online video, online audio).	The 'multiple modalities' principle recognises that judicial officers are time-poor and have different learning preferences, so that education offerings should leverage the time-saving aspects of alternative modes of delivery.
EDP4. Jurisdictional neutrality. Offerings make no unnecessary distinctions between jurisdictions.	The requirement for 'jurisdictional neutrality' is intended to promote opportunities for cross-jurisdictional collegiate interaction through education, but is not intended to detract from jurisdiction-specific offerings where appropriate.
EDP5. Clearly identified audiences. Offerings are targeted at identified audiences, eg new appointees, mid-career judicial officers, judicial leaders.	The requirement for 'clearly identified audiences' ensures that offerings are engaging for each audience, so that time-poor judicial officers can readily identify offerings appropriate to their career stage. For instance, a 'reflection on …' seminar would be more appropriate to a later career judicial officer than a 'fundamentals of …' seminar.
EDP6. Stackability. Offerings can be efficiently curated to meet the needs of different audiences and evolve in response to external requests or requirements.	The 'stackability' requirement recognises that valuable content should be preserved in a way that it may be readily repurposed or adapted for future offerings. This ensures efficient use of the College's resources and of presenter time.

Judicial College of Victoria

Principle	Explanation
EDP7. Judicial conduct and ethics aspects. Offerings address judicial conduct and ethics aspects in relation to substantive content where possible.	The 'judicial conduct and ethics aspects' requirement recognises simultaneously the importance of ethics to judicial life, and that ethics is best understood and inculcated in context, rather than as a discrete learning topic (for example, a seminar on hearsay may include consideration of how the rules have been used to silence victims of sexual crimes).
EDP8. Social context aspects. Offerings address social context in relation to substantive content.	The 'social context aspects' requirement recognises simultaneously the importance of social context to legal aspects, and that social context is best understood and in its legal context, rather than as a discrete learning topic.
EDP9. Adult education principles. Offerings are designed in accordance with established adult education principles.	The 'adult educational principles' requirement recognises that there is an established body of research on how adults learn, and that the College's offerings – particularly innovations such as online learning – should have a sound evidence base.
EDP10. Evaluation. Offerings are systematically evaluated by participants and others against established criteria.	The 'evaluation' principle requires that steering committees give consideration at the outset to the systematic evaluation of the offering, to permit continuous improvement of all College offerings.

PARLIAMENT OF VICTORIA

LEGISLATIVE COUNCIL
Legal and Social Issues Committee

7 February 2022

Samantha Burchell
Chief Executive Officer
Judicial College of Victoria
Level 7, 223 William Street
Melbourne, VIC, 3000

By Email: [redacted]

Inquiry into Victoria's criminal justice system

Dear Ms Burchell,

Thank you for your reply to the Legislative Council's Legal and Social Issues Committee's request for information about the College's processes in relation to matters raised in the terms of reference for our Inquiry into the Criminal Justice System.

The information you have provided will assist the Committee to make recommendations to the Victorian Government in its final report. However, some of the questions remain unanswered which has impeded our ability to properly discuss several of the issues the Committee has identified as important.

We have attached the list of original questions from the Committee to the College, and indicated which questions remain unanswered.

We would appreciate if you could provide information in relation to the unanswered questions by **5.00pm on Friday, 11 February 2022**. We have

It is important that we receive a response as soon as possible so that we can incorporate any additional evidence in our report and acknowledge the College's contribution. The Committee plans to table the report in early March.

Please send your response to: justiceinquiry@parliament.vic.gov.au.

Yours sincerely

Fiona Patten

Chair
Legislative Council, Legal and Social Issues Standing Committee

Questions

1. How does the College identify professional development needs, develop and deliver training for judges, magistrates, coroners and tribunal members?
2. In the view of the College, what knowledge and skills do judges and magistrates need to do their job well?
    a. What programs or other resources could be provided to ensure that judges and magistrates have this knowledge and skills?
    b. How is the performance of judges and magistrates taken into consideration when designing training and education programs?

No explanation as to skills the JCV believes are required to perform the role, or information in relation to 2.b.

3. What proportion/number of judges, magistrates, coroners and tribunal members participate in professional development opportunities offered by the College each year?

No response provided.

4. Is there any requirement for judges, magistrates, coroners and tribunal members to participate in training or professional development each year? If so, what are the requirements?

No response provided.

5. What training, professional development and resources does the College provide in relation to:
    a. Trauma-informed practice
    b. Restorative justice
    c. Domestic/family violence
    d. Culturally safe practice (for ATSI and CALD communities)
    e. Dealing with children and youth
6. What proportion/number of judges, magistrates, coroners and tribunal members participate in these opportunities or access resources in relation to these issues each year?

No response provided.

7. What orientation, training and professional development opportunities do new judges, magistrates, coroners and tribunal members have access to immediately following their appointment?
    a. Is there any mandatory training or education that new judges, magistrates, coroners and tribunal members undertake, and if so, what does this include?
8. Is there any specialist education or training available for judicial officers in specialist courts in Victoria? If so, what does this involve?

No response provided. No reference to Masters of our fate *strategic plan.*

9. One of the challenges facing the judiciary identified in the College's *Masters of our fate* strategic plan is 'heightened demands of public accountability and transparency'. How is the College addressing this challenge?

No response provided.

10. Can you reflect on the usefulness of the International Framework of Court Excellence? How is this resource being used by the College?

No response provided. No reflection on International Framework of Court Excellence or use/integration by the College.

11. How does the College keep track of professional and legal developments in other jurisdictions and apply relevant education or other matters in Victoria? Can you provide an example?

No response provided.

12. How does the College facilitate consistency of knowledge and skills across regional and metropolitan courts?

13. What plans, if any, does the College have to expand its services and resources?

No response provided.

From:	Samantha BURCHELL (CSV)
To:	justiceinquiry
Cc:	Lilian Topic; Office of the CEO (JCV)
Subject:	JCV: Inquiry into Victoria"s criminal justice system | Judicial College of Victoria | Follow Up
Date:	Wednesday, 16 February 2022 2:08:09 PM
Attachments:	image002.png image003.png image004.png image005.png image006.png image007.png image008.png

Dear Ms Smith

Thank you for forwarding the correspondence from the Chair of the Inquiry requesting further information from the College.

We have considered the information you have sought (previously and again most recently) and have no further comment.

As to recent research into judicial education in Australia, you may be assisted by a Report prepared for the Australasian Institute of Judicial Administration and published in December 2021. You can find the Report here: Judicial-education-in-Australia-a-contemporary-overview-2021.pdf (aija.org.au)

Kind regards

Samantha

Samantha Burchell | Chief Executive Officer
Judicial College of Victoria

William Cooper Justice Centre | Level 7, 223 William Street Melbourne VIC 3000
T 03 9032 0555 **E** [redacted] **W** www.judicialcollege.vic.edu.au

Judicial College of Victoria | Wisdom shared.

PARLIAMENT OF VICTORIA
LEGISLATIVE COUNCIL
Legal and Social Issues Committee

17 February 2022

Samantha Burchell
Chief Executive Officer
Judicial College of Victoria
Level 7, 223 William Street
Melbourne, VIC 3000

By email: [redacted]

Dear Ms Burchell,

Inquiry into Victoria's criminal justice system

Thank you for your reply to the Legislative Council's Legal and Social Issue Committee's follow-up request, for information about the College's processes in relation to matters raised in the terms of reference for our Inquiry into the criminal justice system.

We note that you have no further comment.

Section 19 of the *Judicial College of Victoria Act 2001 (Vic)* empowers the houses of parliament and by extension, parliamentary committees, to request information from the Judicial College. The intention of that Act, as outlined in the explanatory memorandum for this bill states that s 19 'requires the College to provide specific information to Parliament or a Parliamentary Committee when requested.'

We appreciate you providing the article entitled 'Judicial education in Australia: A contemporary overview'. However, we note that the article is based on outdated statistics and primarily relates to the federal jurisdiction. This does not give us a contemporary overview of judicial education in Victoria, including engagement.

The final report for this inquiry will refer to the lack of information about judicial education available to the Committee as a barrier to a robust examination of this issue.

Yours sincerely,

Fiona Patten
Chair
Legislative Council, Legal and Social Issues Standing Committee

Extracts of proceedings

Legislative Council Standing Order 23.27(5) requires the Committee to include in its report all divisions on a question relating to the adoption of the draft report.

All Members have a deliberative vote. In the event of an equality of votes, the Chair also has a casting vote.

The Committee divided on the following questions during consideration of this report. Questions agreed to without division are not recorded in these extracts.

Committee Meeting 100—25 February 2022

Chapter 3

The Chair moved, that Recommendation 5 be adopted and stand part of the report.

> That the Victorian Government fund the expansion of relevant programs and the provision of youth workers and youth mentors to young people in primary and secondary schools in disadvantaged communities across Victoria.

The Committee divided.

Ayes [3]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Erdogan
Ms Maxwell	Ms Watt

There being an equality of votes, the Chair gave her casting vote with the ayes.

Question agreed to.

The Chair moved, that Recommendation 10 be adopted and stand part of the report.

> That the Victorian Government amend section 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the minimum age of criminal responsibility in Victoria to at least 14 years old regardless of the proposal for reform developed by the Meeting of Attorneys-General.

The Committee divided.

Ayes [1]	Noes [5]
Ms Patten	Dr Kieu
	Ms Burnett-Wake
	Ms Maxwell
	Mr Erdogan
	Ms Watt

Question negatived.

Dr Kieu moved, that his proposed new Recommendation 10, stand part of the report.

> That the Victorian Government raise the minimum age of criminal responsibility, noting that this issue is being considered by several jurisdictions via the Meeting of Attorneys-General.

The Committee divided.

Ayes [4]	Noes [2]
Ms Patten	Ms Burnett-Wake
Dr Kieu	
Ms Maxwell	
Mr Erdogan	
Ms Watt	

Question agreed to.

Ms Maxwell moved, that on page 134 the words 'should occur alongside', be **omitted** and the words 'must be accompanied by' be **inserted**.

> In the Committee's view this important reform should occur alongside an expansion in the community-based support services required to address the factors underpinning children's criminal behaviours.

The Committee divided.

Ayes [2]	Noes [4]
Ms Patten	Dr Kieu
Ms Maxwell	Ms Burnett-Wake
	Mr Erdogan
	Ms Watt

Question negatived.

Committee Meeting 102—2 March 2022

Chapter 6

Dr Cumming moved, that Recommendation 33 stand part of the report.

> That the Victorian Government review the funding provided to the Victims of Crime Assistance Tribunal as part of the 2021/22 State Budget to determine if it is sufficient in reducing the backlog of pending applications before the Tribunal.

The Committee divided.

Ayes [4]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt
Mr Ondarchie	

Question agreed to.

Ms Maxwell moved, that Recommendation 34 stand part of the report.

> That the Victorian Government make the new victims of crime financial assistance scheme a prescribed agency under the *Victims of Crime Commissioner Regulations 2020* (Vic), to ensure that the scheme falls within the oversight and compliance functions of the Victims of Crime Commissioner.

The Committee divided.

Ayes [4]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt
Mr Ondarchie	

Question agreed to.

Chapter 7

Dr Cumming moved, that Recommendation 39 stand part of the report.

> That the Victorian Government provides funding, where necessary, to Victorian courts to update their facilities to improve standards in victim safety and wellbeing. Facility updates could include:
>
> - dedicated entrances and exits for victims of crime
> - dedicated waiting spaces and interview rooms for victims of crime, as well as specific spaces such as:
>   - child friendly spaces
>   - culturally safe spaces
>   - quiet or sensory rooms
> - increased number of remote witness facilities.

The Committee divided.

Ayes [4]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt
Mr Ondarchie	

Question agreed to.

Chapter 8

Ms Maxwell moved, that Recommendation 44 stand part of the report.

> That the Victorian Government expand the Victims' Legal Service to include legal support for victims of crime on procedural matters. Example matters which should be included in the remit of the Victims' Legal Service are advice on:
>
> - the role of victims in criminal proceedings, including giving evidence and any entitlements for alternative arrangements or special protections
> - making victim impact statements
> - a victim of crime's rights to be consulted during criminal proceedings.

The Committee divided.

Ayes [4]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt
Mr Ondarchie	

Question agreed to.

Dr Cumming moved, that Recommendation 45 be adopted and stand part of the report.

That the Victorian Government:

- introduce a right to review scheme under the *Victims' Charter Act 2006* (Vic) which allows victims of sexual offences to request an internal review of decisions made by police or a prosecuting agency to not file charges or discontinue prosecution
- direct the Victorian Auditor-General's Office to evaluate existing internal review schemes open to victims of crime to determine if an external right to review scheme should be open to all victims of crime.
  - the evaluation should assess the frequency of decisions being altered or revoked based on an internal review, including whether this impacts the number of cases going to or progression through a criminal trial.

The Committee divided.

Ayes [4]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt
Mr Ondarchie	

Question agreed to.

Chapter 9

Dr Cumming moved, that Recommendation 52 be adopted and stand part of the report.

That the Victorian Government urgently examine the operation of the *Bail Act 1977* (Vic) with a view to considering, at a minimum, amendment to:

- repeal the reverse onus provisions, in particular, in relation to the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and Schedules 1 and 2)
- introduce a broad presumption in favour of bail except in circumstances where the prosecution can prove there is a specific and immediate 'unacceptable risk' to the safety of another person or the community or of non-appearance in court

- include an explicit provision that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment
- repeal certain offences in conjunction with bail, including committing an indictable offence while on bail (s 30B), breaching bail conditions (s 30A) and failure to answer bail (s 30).

The Committee divided.

Ayes [1]	Noes [6]
Ms Patten	Dr Kieu
	Ms Burnett-Wake
	Ms Maxwell
	Mr Ondarchie
	Mr Tarlamis
	Ms Watt

Question negatived.

Dr Kieu moved, that Recommendation 52, as amended, be adopted and stand part of the report.

> That the Victorian Government review the operation of the *Bail Act 1977* (Vic), drawing on previous reviews by the Victorian Law Reform Commission and former Supreme Court judge Paul Coghlan, with a view to amendments to simplify the bail tests, make presumptions against bail more targeted to serious offending and serious risk, and ensure that bail decision makers have discretion to consider a person's circumstances when deciding whether to grant bail. This review should ensure that the views of victims and law enforcement are taken into account.

The Committee divided.

Ayes [4]	Noes [3]
Ms Patten	Ms Burnett-Wake
Dr Kieu	Ms Maxwell
Mr Tarlamis	Mr Ondarchie
Ms Watt	

Question agreed to.

Ms Watt in chapter 9, moved that Recommendation 54 be omitted from the report.

> That the Victorian Government investigate potential mechanisms for independent oversight of police decision-making with regard to bail.

The Committee divided.

Ayes [3]	Noes [4]
Dr Kieu	Ms Patten
Mr Tarlamis	Ms Burnett-Wake
Ms Watt	Ms Maxwell
	Mr Ondarchie

Question negatived.

Mr Ondarchie moved that, Recommendation 55 be adopted and stand part of the report.

> That Victoria Police consider implementing measures to improve transparency and accountability with regard to bail decision-making. This should include consideration of the introduction of a requirement to record reasons for any refusal of bail, and for this to be provided to an accused person.

The Committee divided.

Ayes [4]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt
Mr Ondarchie	

Question agreed to.

The Chair moved that, Recommendation 57 be adopted and stand part of the report.

> That the Victorian Government consider amending the *Residential Tenancies Act 1997* (Vic) to explicitly provide that a person cannot be evicted from a rental property for 'illegal purposes' if that person has not yet been convicted or sentenced.

The Committee divided.

Ayes [3]	Noes [2]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	

Question agreed to.

Committee Meeting 103—2 March 2022

Chapter 10

The Chair moved that, Recommendation 71 stand part of the report.

> That the Victorian Government amend the *Sentencing Act 1991* (Vic) to provide for courts to impose a sentence of a home detention order. Home detention orders should be accompanied by electronic monitoring, incorporate conditions to promote community safety and enable access to rehabilitative and other support services.

The Committee divided.

Ayes [2]	Noes [4]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
	Ms Maxwell
	Ms Watt

Question negatived.

Chapter 11

The Chair moved, that Recommendation 73 stand part of the report.

> That the Department of Justice and Community Services include in its annual reports information outlining all healthcare services offered in all Victorian prisons during the reporting period, and de-identified statistics relating to incarcerated peoples' access to and take up of these services.

The Committee divided.

Ayes [3]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt

There being an equality of votes, the Chair gave her casting vote with the ayes.

Question agreed to.

Dr Kieu moved, that Recommendation 75 be amended to **omit** 'involve a sample prison population which is representative of the demographics of people incarcerated in Victoria', and stand as part of the report

> That the Victorian Government conduct a trial screening program assessing all people entering incarceration—on remand or a custodial sentence—for physical, cognitive and

intellectual disability, to inform the provision of reasonable adjustments and support in prison and following release. The trial should:

- involve a sample prison population which is representative of the demographics of people incarcerated in Victoria
- connect people identified with disability during screening to appropriate social supports and inform the implementation of reasonable adjustments within the prison to aid that person to better engage with rehabilitative programs
- connect people identified with disability during screening to appropriate social supports including the National Disability Insurance Scheme prior to release back into the community with follow up after release
- assess how identifying disability upon entry to prison benefits the incarcerated individual, the operation of the prison and society more broadly, including any impacts on recidivism
- determine the costs and resources involved in routinely screening people entering incarceration for a disability
- publish the findings of the trial on the Department of Justice and Community Safety website.

The Committee divided.

Ayes [3]	Noes [3]
Dr Kieu	Ms Patten
Mr Tarlamis	Ms Burnett-Wake
Ms Watt	Ms Maxwell

There being an equality of votes, the Chair gave her casting vote with the noes.

Question negatived.

The Chair moved, that Recommendation 80 stand part of the report.

That the Victorian Government ensure that funding for Aboriginal Wellbeing Officers remains commensurate to the number of Aboriginal Victorians incarcerated on remand or on custodial sentences. This necessitates an immediate increase in these positions to meet the demands of the rapidly increasing prison population.

The Committee divided.

Ayes [3]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt

There being an equality of votes, the Chair gave her casting vote with the ayes.

Question agreed to.

The Chair moved, that Recommendation 81 stand part of the report.

> That the Department of Justice and Community Safety review and publicly report on the management of COVID-19 in publicly- and privately-operated Victorian prisons with a view to identifying the impact of control measures on:
>
> - prison conditions, the wellbeing of incarcerated people and their families
> - incarcerated people's access to rehabilitative programs, health and legal services, and the court system
> - application of emergency management days
> - Staff wellbeing, access to resources and safety
> - The review should inform the ongoing management of the COVID-19 pandemic, if required, by identifying how to minimise disruption caused by control measures through:
> - examining how other institutions which manage vulnerable people, such as prisons in other jurisdictions, hospitals and nursing homes, manage the risks related to COVID-19 for residents and staff
> - identifying how best to ensure that control measures remain proportionate to relevant levels of risk at any time posed by COVID-19, and are balanced with ensuring that prison facilitates the rehabilitation of incarcerated people and reduces recidivism.

The Committee divided.

Ayes [3]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt

There being an equality of votes, the Chair gave her casting vote with the ayes.

Question agreed to.

Chapter 14

Ms Maxwell moved, that Recommendation 97 stand part of the report.

> That the Victorian Government establish a clear recruitment process for identifying and appointing judicial officers to Victoria's courts and tribunals. This process should:
>
> - establish clear principles which govern the process for judicial appointments in Victoria. These principles should emphasise the importance of an open and transparent process for recruiting and appointing judicial officers.
> - establish clear and consistent selection criteria for each judicial position. The criteria should be informed by the qualities identified in the Judicial College of Victoria's Framework of Judicial Abilities and Qualities for Victorian Judicial Officers.

- facilitate the use of advisory panels to assist the Attorney-General in identifying appropriate candidates, in accordance with any statutory requirements. Panels should be made up from a diverse group of stakeholders from legal and non-legal backgrounds.
- promote transparency by making the recruitment process publicly available on the Department of Justice and Community Safety's website, including advertising vacancies.

The Committee divided.

Ayes [3]	Noes [3]
Ms Patten	Dr Kieu
Ms Burnett-Wake	Mr Tarlamis
Ms Maxwell	Ms Watt

There being an equality of votes, the Chair gave her casting vote with the ayes.

Question agreed to.

Minority report

Minority Report

Inquiry into Victoria's Criminal Justice System

Background

On 3 June 2020, the Legislative Council agreed to the following motion:

> That this House requires the Legal and Social Issues Committee to inquire into, consider and report, by no later than 28 February 2022, on various issues associated with the operation of Victoria's justice system, including, but not limited to —
>
> (1) an analysis of factors influencing Victoria's growing remand and prison populations;
>
> (2) strategies to reduce rates of criminal recidivism;
>
> (3) an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime; and
>
> (4) the consideration of judicial appointment processes in other jurisdictions, specifically noting the particular skill-set necessary for judges and magistrates overseeing specialist courts.

The reporting date for this inquiry has been extended from 28 February 2022 to 7 April 2022.

We the undersigned members of the Legal and Social Issues Committee (LSIC) submit this following minority report pursuant to Standing Order 23.28 for the consideration of the House.

Our support for this Inquiry was in response to rapidly rising crime and recidivism rates under the Andrews Labor Government.

There is no quick fix to many issues within the criminal justice system, as this Inquiry has demonstrated. However, the overrepresentation of Indigenous Australians in the prison system, growing remand numbers, police powers and the impact on victims were all incredibly deserving issues brought to light through this process.

This Inquiry has involved an enormous amount of work.

We thank stakeholders who took the time to make detailed submissions that have formed the basis of these findings and recommendations. We thank victim-survivors of crime who came forward and gave evidence and acknowledge how difficult that would have been.

Thank you to the Secretariat and everyone involved in the preparation of this report.

Below are additional points we believe should be highlighted.

Improving data collection, accessibility, and transparency

We support the principle of Recommendation 1, in Chapter 2: that the Victorian Government work with key stakeholders across the criminal justice system to improve data collection, accessibility, and transparency throughout the system. However, we do have concerns about how such data is collected.

Racial profiling from biased and discriminatory policing is a critical concern, particularly given the vast over-representation of Indigenous Australians in our criminal justice system. There are practicalities that have been overlooked by this Inquiry. Firstly, Victoria Police were not consulted on how collecting demographics would work in the real world. The impact on resourcing and the task of collating data was not considered nor discussed. Victoria Police were considering the collection of racial data in 2016 after scrapping the stop-and-search receipting program. It has not yet been implemented as the force was uncertain as to whether it would increase transparency or create more harm.[1] NSW collects data on ethnicity, as do many overseas jurisdictions. However, concerns remain as to the accuracy of police assuming ethnicity, particularly in cases where someone identifies with more than one ethnical background. Having statistical reporting based on the opinion of officers is not necessarily accurate. Furthermore, the Victoria Police Deputy Commissioner Wendy Steendam told the ABC in 2016 that:

> *"On one hand people think it would create more community harm by asking the question of ethnicity, and the very asking of the question makes people think they are being racially profiled."*

It is our view that the Victorian State Government should undertake further inquiries into how the accuracy of 'perceived ethnicity' data will be verified by Victoria Police and how the collection of data will impact on resourcing within the police force.

Raising the age of criminal responsibility

Our current position is that we should await the Council of Attorneys-General who in their meeting of 12 November 2021 supported development of a proposal to increase the minimum age of criminal responsibility from 10 to 12, including with regard to any carve outs, timing and discussion of implementation requirements.[2]

We believe that we should not pre-empt the Council of Attorneys-General proposal.

Amendments to the Bail Act 1977 (Vic)

The impact of inadequate bail laws can be seen through the likes of James Gargasoulas and the Bourke St rampage, and the horrific murder committed by Adrian Bayley while on bail.

The current bail system has been informed by the evidence given to the Coghlan Bail Review.

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[1]Sarah Farnsworth, 'Race data collection considered as Victoria Police scrap receipts', *ABC* (online, 20 December 2016) para 1 <https://www.abc.net.au/news/2016-12-20/victoria-police-consider-introducing-race-data-collection/8101430>.

[2]'Meeting of Attorneys-General (MAG) Communique' (November 2021) 4.

The Bail Review was undertaken by the former Director of Public Prosecutions and Supreme Court Justice, the Hon Paul Coghlan QC, following the Bourke Street tragedy on 20 January 2017.

The Bail Review received 115 submissions and involved 39 consultation sessions with 34 different stakeholder groups.

The review made 37 recommendations. Of those adopted, the most far-reaching change was that known as the "reverse onus test" in which a suspected offender now has to demonstrate a "compelling reason" for why bail should be granted. The change emphasised the community's right to safety over a suspected offender's right to liberty. The Hon. Justice Coghlan also stated in his review that "a significant problem with the bail system at present is the apparent lack of public confidence in the system". The Hon. Justice Coghlan recommended the reverse onus tests, because they were: "more likely to enhance public confidence in the bail system … and removal of these provisions may be seen by the community as weakening the current law by making it easier for accused persons to be granted bail."

The Police Association of Victoria supports the current bail requirements. Mr Wayne Gatt, the Secretary of the Police Association Victoria publicly stated:

> *"keeping our community safe does come at a price. 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."*[3]

Mr Gatt has also said that the previous laws were:

> *"being misapplied and were too weak…* [the laws] *need to be really clear and put the community first."*[4]

We believe that any changes to bail or parole laws must be informed by clear, objective, expert advice that does not diminish community safety.

Strip Searches and Solitary Confinement

We note the commentary around removing strip searches and ceasing solitary confinement practices in prisons and appreciate that these rules can be confronting and degrading.

However, this Inquiry did not hear submissions on the safety or health implications of removing strip searches and ceasing solitary confinement practices in prisons.

We are of the view that evidence on the full impact of removing strip searches and ceasing solitary confinement practices must be heard before considering any changes.

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[3]Tammy Mills, Royce Millar and Chris Vedelago, 'Keep tough bail laws, says police union, as Greens try to wind them back', *The Age* (online, 17 May 2021) para 6 < https://www.theage.com.au/national/victoria/keep-tough-bail-laws-says-police-union-as-greens-try-to-wind-them-back-20210513-p57rki.html>.

[4]'Victoria's bail system to become most onerous in Australia after review, State Government says', *ABC* (online, 8 May 2017) para 29 <https://www.abc.net.au/news/2017-05-08/victoria-set-to-tighten-bail-justice-system-after-review/8505506 >.

Judicial education and training

The Judicial College provided this Inquiry with a comprehensive list of training it has offered. We acknowledge that the Judicial College of Victoria is a statutory authority set up under the Judicial College of Victoria Act 2001 (Vic), however, we are of the view that amending the legislation so the College *must* comply with any information requirement is an overreach. There is already a mechanism to obtain information by way of subpoena.

The College exists to support, magistrates, coroners and tribunal members develop the skills they need to perform their duties to the best of their ability. The College is made up of adept professionals who are eminently qualified to determine training needs offered by the organisation. All of which is overseen by the Board, that is chaired by the Chief Justice and includes the heads of the Victorian jurisdictions along with two members of the public appointed by the Attorney General.

Ms Cathrine Burnett-Wake MLC

Mr Craig Ondarchie MLC

10 March 2022