

# YOORROOK

for Justice

**Report into Victoria's  
Child Protection and  
Criminal Justice Systems**



**YOORROOK**  
Justice Commission

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## Acknowledgement of country

The Yoorrook Justice Commission (Yoorrook) acknowledges the Traditional Owners of country of the lands and waters currently known as Victoria, and pays respect to them, their cultures and their Elders past and present.

Yoorrook is required to investigate and report on injustice against First Peoples. Our mandate uses a broad and inclusive definition of First Peoples which includes the Traditional Owners of a place in Victoria, including family and clan groups, and their ancestors. It also includes all Aboriginal and Torres Strait Islander people living in Victoria or who previously lived in Victoria.

Native title and heritage laws have specific legal processes to recognise Traditional Owner groups. Yoorrook acknowledges the creation of these processes are part of the impact of colonisation. Yoorrook is committed to being inclusive and to the promotion of self-determination. The use by Yoorrook of a particular name or word is not an endorsement of a particular view. Yoorrook's mandate states that it cannot inquire into or report on decisions or outcomes in relation to native title or heritage laws. Yoorrook extends deep respect to all Traditional Owners.





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**31 August 2023**

*Your Excellency, Ms Murray and Mr Berg*

*In accordance with the amended Letters Patent dated 4 April 2023, we are pleased to present to you the second interim report of the Yoorrook Justice Commission, examining historical and current systemic injustices in the child protection and criminal justice systems in Victoria.*

*Yours sincerely,*



Professor  
Eleanor A Bourke  
AM  
CHAIR



Adjunct Professor  
Sue-Anne Hunter  
DEPUTY CHAIR



Travis Lovett  
COMMISSIONER



Distinguished  
Professor  
Maggie Walter  
COMMISSIONER



Professor the  
Honourable Kevin  
Bell AM KC  
COMMISSIONER



# CHAIRPERSON'S FOREWORD

Wherever the British flag was raised upon the land of Indigenous people in the world, the story of exploitation and dispossession is depressingly similar ...<sup>1</sup> HEATHER LE GRIFFON

Since the arrival of Europeans in Victoria in the 1830s, First Peoples have been removed from our families and our country and institutionalised at alarming rates as a result of the colonial systems forced upon us. Police and the processes of the criminal law were part of that system with devastating consequences for our people. From the early 'protection' legislation that allowed the government to control and regulate our lives, we have experienced and continue to experience systemic racism, harm and injustice at the hands of the State. Gross human and cultural rights violations occurred which set the pattern for the future.

This second report of the Yoorrook Justice Commission focuses on the past and ongoing systemic injustice experienced by our communities within Victoria's child protection and criminal justice systems. Like our June 2022 Interim Report, *Yoorrook with Purpose*, this report is grounded in the voices of our Elders. We are proud and strong people, with deep connections to each other, to country, to cultural knowledge and to traditions. This report must do justice to those who have guided the Commission's work, those who have appeared before it and those who have suffered harm because of these systems.

The Commission heard powerful evidence from First Peoples, Aboriginal organisations, experts and leaders, as well as senior public servants, Ministers and Victoria Police. Yoorrook undertook hearings, on country visits, yarning circles, prison visits and roundtable discussions. Evidence was also gathered through submissions, Notices to Produce and extensive research.

Witnesses told Yoorrook how the child protection and criminal justice systems have routinely failed our families and communities. Yoorrook heard of a 'pipeline' in which our children are moved from the child protection system into the youth justice system

and ultimately into the adult justice system. There were devastating accounts of the harm caused to our people by these systems. For example, Yoorrook heard of the established process of identifying expectant mothers for the potential removal of their child once born. In effect, this means an Aboriginal child in our community can be in a pipeline to the justice system before being born. It is hard to imagine a scenario that more profoundly demonstrates systemic failure.

Individuals and organisations from our communities gave clear and consistent evidence about the change that is needed. Our people called for a child protection system that supports families in culturally appropriate ways and enables our children to develop, stay safe, connected to culture and community. Our people have called for a criminal justice system that moves away from police and prison expansion and that prioritises investment in stronger communities. We need a justice system that supports people to break the cycle of offending and makes police accountable.

During Yoorrook's public hearings, seven Ministers and senior public servants including the Chief Commissioner of Victoria Police made formal apologies for the historic and ongoing harm caused by the child protection and criminal justice systems against our people. It is important that these apologies are on the public record. It was conceded that human and cultural rights violations occurred and were still occurring. However, what value should be placed on apologies and concessions unless action is taken?

There has been some progress since Yoorrook started this inquiry. On the opening day of hearings in December 2022, Premier Daniel Andrews was questioned in a press conference about the evidence Yoorrook was hearing. The Premier responded by committing to overhaul the child protection system. Similarly, throughout the course of the investigation, there has



been progress regarding Victoria's bail laws, public drunkenness laws and the minimum age of criminal responsibility — all of which disproportionately harm our people. For these reasons, I am optimistic that truth telling works.

However, the most meaningful, transformative change needed is to embed genuine self-determination in Victoria's child protection and criminal justice systems. This is what our people seek. Self-determination means Aboriginal people having decision making power over the issues that affect our lives, including designing, establishing and controlling the systems and services to support our families and communities to thrive. It means that the human and cultural rights of our people are respected and fulfilled. The Victorian Government and the First Peoples' Assembly have created the opportunity to do this through the treaty process. Negotiations will commence shortly, with the Treaty Negotiation Framework including interim, state-wide and local Traditional Owner agreements. This report helps to inform that treaty process. It also recommends measures that should be taken urgently to address critically important issues.

The Yoorrook Justice Commission represents a critical point in Victoria's history. This report must be a catalyst for change. The foundations to create transformational change in Victoria have been laid. Other states, territories and the Commonwealth are watching as they embark on Truth, Treaty and Voice processes.

I want to acknowledge the tireless, unrelenting advocacy of generations of Aboriginal Elders, community and other allies who have brought Victorian First Peoples to this point. I also want to thank the incredibly hardworking and dedicated Yoorrook staff, Solicitors Assisting and Counsel Assisting who have helped bring the critical evidence to light in this report. I also

want to thank my fellow commissioners — Sue-Anne Hunter, Travis Lovett, Maggie Walter and Kevin Bell — for their stewardship of the important findings and recommendations for reform in this report.

Now is the time for action. 2023 should usher in the beginning of the transformation to true self-determination for First Peoples. The past continues to overshadow the present. However, Yoorrook looks forward and makes 46 recommendations in this report for a better future for First Peoples and all Victorians. I urge Premier Andrews and his government to move swiftly to accept and implement all these recommendations.

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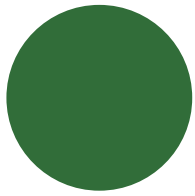
**Professor Eleanor A Bourke AM**

Chairperson, Yoorrook Justice Commission



1. Heather Le Griffon, *Campfires at the Cross: An Account of the Bunting Dale Aboriginal Mission 1839–1851* (Australian Scholarly Publishing, 1 December 2007).





# Executive summary and recommendations

## EXECUTIVE SUMMARY

### Introduction

The Yoorrook Justice Commission is tasked with establishing an official public record of Victorian First Peoples' experiences of systemic injustice and determining their causes and consequences. The timeline extends from 1788 to the present and includes the role of State policies and laws. This report meets these obligations in relation to the child protection and criminal justice systems.

For First Peoples, the child protection and criminal justice systems have long been sites of systemic injustice. The removal of Aboriginal children from their families and the criminalisation of resistance to dispossession were state-sanctioned colonial practices in the lands now known as Victoria. They involved gross human and cultural rights violations.

There is an unbroken line between these actions, laws and policies and current systems. The highly contemporary disparate outcomes for First Peoples are evidence of this. First Peoples children are removed from their families at the highest rate in Australia with around one in 10 now in out of home care.<sup>1</sup> In the justice system First Peoples are around 15 times more likely to be in adult prison.<sup>2</sup> Victorian bail law changes of 2013 and 2018 are linked to a 560 percent increase in the number of First Peoples entering prison unsentenced.<sup>3</sup> In 2021–22, 87 per cent of Aboriginal women who arrived in prison were unsentenced.<sup>4</sup>

The Victorian Government acknowledges that Victoria's laws and policies and their administration are creating systemic injustice for First Peoples. Premier Daniel Andrews told Yoorrook that the over-representation of First Peoples in the child protection and criminal justice systems is 'a source of great shame for the Victorian Government'.<sup>5</sup> He acknowledged that the government is responsible for 'ensuring that racism and injustice are confronted and addressed'.<sup>6</sup>

Dr Jacyntha Krakouer, SAFeST Start Coalition and  
Karinda Taylor, First Peoples' Health and Wellbeing



Systemic racism lies at the heart of much of the systemic injustice affecting First Peoples in both systems. Systemic racism is racial discrimination that occurs through systems and institutions and goes beyond individual racist acts. It refers to laws, policies or practices that may, on their face, look neutral and applied equally, but which in practice unfairly disadvantage certain racial groups and advantage others.

The impact of systemic racism on the over-representation of First Peoples in the child protection and criminal justice systems is acknowledged by the Victorian Government.<sup>7</sup> The State also acknowledges the individual prejudice and bias of some working within these systems.<sup>8</sup>

Talking about systemic failures risks obscuring the responsibility of the people with the power to address those failures. Laws, policies and decisions are made and administered by people: from Ministers and senior public servants creating the laws and policies through to the public servants, police officers and others implementing them. All, in their respective roles, have the power and responsibility to address systemic injustice. They have human and cultural rights obligations to do so. Yet the evidence heard by Yoorrook shows that too often they have failed to do this.

First Peoples leaders, organisations and lived experience witnesses are united in their call for self-determination to address the systemic harms of the child protection and criminal justice systems. Self-determination is a collective right, with the First Peoples' Assembly of Victoria describing the concept

in the context of government systems as 'the power to shape and make the decisions about the systems, laws, policies and programs that affect our communities, families and children'.<sup>9</sup> For the child protection and criminal justice systems this means a fully realised transfer of power to Victorian First Peoples and, while this is being implemented, urgent immediate measures.



## Why Yoorrook chose to investigate Victoria's criminal justice and child protection systems

The evidence of injustice against First Peoples in the child protection and criminal justice systems is stark. From its inception, First Peoples called on Yoorrook to investigate injustice in these systems as a priority. This was a common theme raised by Elders in yarning circles Yoorrook ran across Victoria in the first half of 2022.

Further, Yoorrook's Letters Patent require it to investigate and report on issues including:

- the forced removal of children and unfair policies and practices relating to child protection, family and welfare matters<sup>10</sup>
- past and ongoing injustices in policing, youth and adult criminal justice, incarceration, detention and the broader legal system.<sup>11</sup>

Yoorrook announced its intention to investigate these issues as a priority when it published its interim report, *Yoorrook with Purpose*, in July 2022.<sup>12</sup> The change in these systems cannot wait until delivery of its Final Report. Yoorrook will continue to monitor injustice in these systems, and the implementation of this report's recommendations, until Yoorrook concludes in June 2025.

## How Yoorrook conducted this inquiry

Yoorrook began receiving evidence about the injustice experienced by First Peoples in the Victorian child protection and criminal justice systems as soon as it started meeting with and hearing from First Peoples in 2021. Yoorrook's dedicated inquiry into injustice in these systems commenced in the second half of 2022 with the publication of two Issues Papers inviting submissions.

Yoorrook received evidence in different ways including:

- **Submissions:** 33 submissions from organisations and other experts in response to the Issues Papers. This was in addition to many broader submissions from individuals which talked about their experiences with either or both systems. Of 88 submissions received from individuals in 2022–23, over three quarters included issues about the child protection or criminal justice systems.
- **Hearings:** 27 days of hearings, receiving evidence from 84 witnesses in Melbourne, on country and from international witnesses.
- **Roundtables and visits:** 12 roundtables across Victoria with experts, people working in the criminal justice and child protection systems and people affected by these systems. This included five visits to adult and youth prisons.
- **Documents:** more than 4000 documents from the Victorian Government in response to Notices to Produce.

Yoorrook heard directly from First Peoples and the community organisations that support them. It received submissions and evidence from academics and researchers. It also received witness statements and oral evidence from Ministers and senior public servants from the Victorian Government and its agencies.

Yoorrook thanks all the people and organisations who gave their valuable time and expertise to this inquiry.

## The past is the present: understanding the connection between contemporary and historic injustice

The present-day failures of Victoria's criminal justice and child protection systems for First Peoples are deeply rooted in the colonial foundations of the State of Victoria. European invasion, and the colonial laws and policies which followed it, were predicated on beliefs of racial superiority. The systemic racism which persists today has its origins in colonial systems and institutions.

Before European invasion, First Peoples were independent and governed by collective decision-making processes with shared kinship, language and culture. They belonged to and were custodians of defined areas of country. First Peoples were self-governing, and wielded economic and political power within their own systems of law, lore, culture, spirituality and ritual.<sup>13</sup>

The purpose of colonisation was land acquisition. Theft of land was achieved by multiple strategies including destruction of culture and language and efforts to eliminate First Peoples through assimilation and violence. Colonial law was imposed on First Peoples. First Peoples were forced off their country and onto reserves and missions where their lives were controlled and cultural practices, spirituality and language suppressed. First Peoples' children were taken.

Police were frequently the agents of injustice. The early criminal justice system was used to criminalise and imprison First Peoples and legitimise violence to respond to First Peoples' resistance. While colonial law prohibited murder and rape of First Peoples, its enforcement was almost entirely absent.

The *Aboriginal Protection Act 1869* (Vic) was the first legislation to explicitly authorise the making of regulations that resulted in the removal of Aboriginal children. It was followed in 1886 by amendments that became commonly known as the 'Half-Caste Act'. Under this legislation, the Victorian Government



tore Aboriginal communities and families apart to weaken collective identity and resistance, furthering the attempted erasure and elimination of First Peoples.

The Stolen Generations refers to First Peoples removed from their families as children and infants under these assimilationist laws and policies which started in 1886 and ended in around 1970. These laws and policies followed the logic of eliminating First Peoples by removing them from their families, culture and language and attempting to shape them according to European culture and values.<sup>14</sup>

Police often carried out forced child removals. Until 1985 police were ‘empowered to forcibly remove children under the child welfare laws’.<sup>15</sup> Justification for child removal under the various Acts was often linked to racist judgments of living conditions in Aboriginal communities.

Even after the explicit assimilationist intent written into child removal policies was finally removed, the administration of the laws was still infected by racial bias. The assimilationist impact continued — Aboriginal children removed from their families and siblings were placed in non-Aboriginal homes, with their Aboriginality often denied or ignored by their carers.

Nationally, awareness of the Stolen Generations grew following the landmark *Bringing Them Home* report in 1997. The report found that Australia’s forced child removal practices involved genocide under international law.<sup>16</sup> Prime Minister Kevin Rudd’s Apology to Australia’s Indigenous Peoples followed in 2008.

For many non-Indigenous Australians, the forced removal of Aboriginal children from their families is considered ‘history’ and consigned to the past. For First Peoples its impact has never ceased.

The removal of Aboriginal children into white society caused immeasurable harm. Children removed from their families were traumatised, disconnected from family, culture and identity, and in many cases criminalised, experiencing homelessness, poverty, poor health and other disadvantage. Families traumatised by the loss of their children spent decades trying to reunite or simply make contact. For others, finding families was beset with obstacles, was not possible, or came too late.

The trauma and harm of child removal policies has had devastating lifelong impacts. It has been passed down across generations and continues today. This history and its impacts are explained further in Chapter 1: The past is the present.

## Self-determination

The right to self-determination of First Peoples is a collective right that is of fundamental importance under international law and especially to realising human and cultural rights. It is recognised by the State of Victoria.<sup>17</sup> It is the foundation of Yoorrook’s Letters Patent and the treaty-making process underway in this state. The Victorian Government has committed to self-determination as the primary driver in First Peoples policy since 2015.<sup>18</sup>

As outlined in the Letters Patent, the Yoorrook Justice Commission is required to:

*identify Systemic Injustice which currently impedes First Peoples achieving self-determination and equality and make recommendations to address them, improve State accountability and prevent continuation or recurrence of Systemic Injustice.*<sup>19</sup>

For Indigenous Peoples, the essence of the meaning of self-determination is the capacity to control their own destiny.<sup>20</sup> The foundation for the assertion of self-determination for First Peoples is inextricably tied to their relationship to country, land and waters.<sup>21</sup> It also requires ensuring all human and cultural rights of First Peoples.

Yoorrook repeatedly heard from First Peoples witnesses and organisations of the need for self-determination in the child protection and criminal justice systems and some of the ways that could work.<sup>22</sup> Many government witnesses spoke about how self-determination should underpin or be at the centre of reform.<sup>23</sup> Accordingly, it is critical that government understands and applies the full meaning of self-determination if the commitments it has made are to be realised. Otherwise, the necessary transformation of the child protection and criminal justice system cannot occur.

Yoorrook also heard that self-determination requires transferring decision-making power, authority, control and resources to First Peoples. It is not merely about consultation or transfer of service delivery responsibilities. It is not about transferring broken systems.<sup>24</sup> Self-determination can be realised through treaty and interim agreements as part of the treaty negotiation process that could include legislative, administrative and other measures for ensuring all human and cultural rights of First Peoples.

In relation to the child protection and criminal justice systems, Victoria has an opportunity to achieve self-determination by transferring decision-making power, authority, control and resources to First Peoples as these systems relate to them. This transformative, structural change could include transferring the power to make decisions about:

- system design
- obtaining and allocating resources
- powers of, and appointments to bodies or institutions.

It could also include the transfer of accountability and oversight functions and the creation of new First Peoples-led bodies, oversight processes and complaints pathways.

## Accountability, capability and compliance with human and cultural rights obligations

This report documents serious deficits in three key areas that are critical to government making good on its commitments to self-determination and to ending the systemic injustices that the State has inflicted and continues to inflict on First Peoples. These span both the child protection and criminal justice systems and have whole of government implications. They are:

- monitoring and accountability
- cultural competence and responsiveness, including human rights capability
- the need to strengthen human and cultural rights compliance.

These lie at the heart of the cultural, practice and institutional changes that must be made to the child protection and criminal justice systems to address the systemic racism and policy failures Yoorrook has identified throughout this report.

## Addressing systemic injustice in the child protection system

Everything is measured through a white lens of how children should be cared for.<sup>25</sup>

Chapters 4 to 8 of this report highlight critical issues that need addressing in Victoria's child protection system.

Yoorrook received evidence showing that as involvement in the child protection system intensifies from an initial report to child removal, Aboriginal children are increasingly over-represented. At 30 June 2022, when compared to non-Aboriginal children, Aboriginal children in Victoria were:

- 5.7 times as likely to be the subject of a report to child protection services<sup>26</sup>
- 7.6 times as likely to have a finalised investigation by child protection services
- 8.5 times as likely to be found to be 'in need of protection' by child protection services
- 21.7 times as likely to be in out of home care.<sup>27</sup>

Yoorrook heard of 'report fatigue' in this area. In the last decade there have been at least 19 inquiries about the child protection system in Victoria.<sup>28</sup> Recurring themes on the performance of the child protection system for First Peoples include:

- poor information gathering
- inadequate risk assessment
- lack of collaboration and information sharing between services
- poor responses to children experiencing family violence
- poor responses to children experiencing poor mental health and cumulative harm
- missed opportunities to provide early supports when receiving an unborn notification
- failures to uphold First Peoples children's cultural rights
- lack of early support for vulnerable mothers.<sup>29</sup>

Yoorrook heard extensive evidence about:

- how systemic failures across multiple systems drive child protection involvement
- how discriminatory attitudes in universal services such as health can lead to unnecessary reports to child protection
- the Victorian Government not supporting First Peoples families who need help to avoid involvement in the child protection system
- the investment needed to ensure access to culturally safe and effective early help.

Yoorrook was told about the urgent need to reform the way child protection authorities are notified of concerns for the welfare of unborn children. Yoorrook heard evidence of systemic racism across health services and the lack of culturally appropriate support to new mothers and how this can result in removal of their babies.

Yoorrook was told that risk assessment tools and decisions were affected by racial bias. Yoorrook further heard that many of the positive laws and policies developed to address systemic injustice in child protection were not working as intended and compliance was often poor. For example, the Victorian Government established the Aboriginal Family Led Decision Making (AFLDM) program to improve family involvement in decision-making about a child, yet in 2021–22 only 24 per cent of First Peoples children in out of home care had an AFLDM meeting.<sup>30</sup> Similarly, the Aboriginal Child Specialist Advice and Support service, which promotes culturally appropriate and effective decisions around the best interests of Aboriginal children, was consulted during the investigation stage in only 63 per cent of relevant cases.<sup>31</sup>

Yoorrook was told that one way to improve compliance with laws and policy was to provide free early legal help for Aboriginal families through a notification system. This would ensure families were aware of their rights and could enforce them. Evidence also highlighted the positive evaluation of Marram-Ngala Ganbu, a specialist Koori court hearing day designed around the cultural needs of Aboriginal children and families, which operates at two locations in Victoria. There were calls to expand the reach of this program statewide.

Yoorrook heard about ongoing failures in the out of home care system for First Peoples children including that:

- too many First Peoples children are still being placed with non-Aboriginal families
- too many First Peoples children are not being placed with their siblings
- there are barriers to First Peoples becoming carers in the child protection system
- there are inequities in the support provided to kinship carers (who are overwhelmingly Aboriginal carers) and foster carers
- First Peoples children are not provided with adequate cultural plans
- First Peoples children's health and disability needs are not being adequately assessed or met
- First Peoples children are being criminalised in residential care and the framework developed to address this is not being implemented.



Yoorrook heard that once a child is removed from their family, the strict time limits for family reunification operate unfairly for Aboriginal parents, who are less likely to be able to access supports needed to address protective concerns within those timeframes.

Yoorrook heard positive evidence that when care and case management of First Peoples children is transferred to Aboriginal Community Controlled Organisations, there are better outcomes for children and families. This includes improved connection to culture and community.

Yoorrook heard about the need to strengthen the legislative basis and powers of the Commissioner for Aboriginal Children and Young People to give certainty to that role and to improve oversight in the child protection and youth justice systems.

## Addressing systemic injustice in the criminal justice system

I believe the system is riddled with racism; the system focuses on punishment and not rehabilitation; and the system needs to change.<sup>32</sup>

Chapters 9 to 14 of this report highlight critical issues that need addressing in Victoria's criminal justice system.

Evidence before Yoorrook shows that:

- First Peoples are subject to racial profiling and over-policing
- cultural awareness training for police is inadequate and, in the case of recruit training, contains offensive content
- police are less likely to issue cautions and recommend diversion for Aboriginal people.

Yoorrook heard that Victoria's police complaints system is failing First Peoples. The system routinely denies or justifies police misconduct and fails to hold officers or management to account. The vast majority of complaints about police are investigated by police

which undermines effectiveness and generates mistrust. There is compelling evidence for the need of a truly independent police complaints system.

Yoorrook received evidence about the long overdue decriminalisation of public drunkenness that will occur in November 2023. Evidence was heard about the need for independent evaluation to ensure that police do not use other existing powers to detain intoxicated people after the public drunkenness offence is repealed.

Yoorrook heard evidence about a serious gap in the protection offered by Victoria's anti-discrimination laws, meaning that if a police or prison officer mistreats someone because of their race, the person is unlikely to be able to bring a racial discrimination complaint in the Victorian jurisdiction. Yoorrook was also advised of ways this problem has been fixed in other Australian jurisdictions.

Children and young people involved in the criminal justice system are particularly vulnerable and face multiple forms of disadvantage. This includes being victims of abuse, trauma, neglect or family violence, having a history of substance abuse, having cognitive difficulties and mental health issues and being disengaged from education.<sup>33</sup> Yoorrook heard that this reinforces the need for justice responses that help children and young people instead of harsh, punitive responses that are likely to lead to greater criminal justice involvement.

Yoorrook received evidence about ongoing problems with the over-representation of First Peoples children and young people in the youth justice system but heard that there has been recent success in reducing this rate and that the Victorian Government has a goal of zero involvement.

Yoorrook also heard about the need for improved cautioning and diversion programs for First Peoples children and young people, and the need to stop harmful conditions in youth prisons including the use of solitary confinement.

There is an urgent need to raise the age of criminal responsibility to at least 14. Victoria's laws allow children as young as 10 to be arrested, charged, prosecuted and imprisoned. The Victorian Government

has committed to raise the age to 12 within the next year and to 14 by 2027. Yoorrook heard that this is too slow.

Punitive changes to Victoria's bail laws in 2013 and 2018 led to a dramatic rise in the number of First Peoples imprisoned on remand, waiting for their trial or sentence. Yoorrook heard that Aboriginal women were hardest hit by these changes and were often denied bail and imprisoned for repeat low level non-violent offending. Yoorrook received evidence that government ignored the concerns and advice of First Peoples about the inevitable impact of its bail reforms, making a mockery of government commitments to self-determination and reducing over-imprisonment and eroding the trust that had been generated through the justice-related forums established to listen to and consult with Aboriginal people.

What eventuated was a stark reminder that the State retains power and control over the fate of First Peoples, even when it adopts the language of 'partnership', 'working together', 'respect' and 'self-determination'. It highlights why treaty is so critical to realising First Peoples' fundamental right to self-determination. Yoorrook heard that the government is now willing to wind back many of the punitive changes it made and that legislation to do this is imminent.

Yoorrook received evidence about the need for sentencing reforms to reduce the rate of imprisonment of First Peoples. This included reforms to take into account the unique systemic and individual background factors affecting First Peoples. Mandatory sentencing laws which limit the ability of courts to ensure that each sentence is fair and appropriate need to be repealed.

Yoorrook heard evidence about failures in Victoria's prison system including:

- systemic failures in prison health care
- lack of cultural connection and programs
- poor access to rehabilitation programs
- cruel, inhuman and degrading treatment in prison through the use of solitary confinement and strip searching
- barriers to reporting abuse and misconduct
- lack of independent oversight

- non-compliance with human and cultural rights obligations
- non-compliance with inspection processes that Australia has agreed to under an international treaty.

Yoorrook also received evidence about problems accessing parole. Parole is the system that allows some people to be released from prison into the community under supervision after they have served their minimum term of imprisonment. The best evidence is that supervised and supported release on parole reduces the risk that someone will reoffend. As a result of reforms in 2013 which made it harder to get parole, the number of people accessing parole has fallen significantly. First Peoples are less likely to be granted parole. This denies them the benefits of parole, increases the risk of reoffending and contributes to over-imprisonment, as more First Peoples will be in prison for longer.

Finally, Yoorrook heard evidence about the acute and ongoing pain and trauma of deaths in custody for First Peoples. First Peoples are dying at higher rates in custody not because they are more likely to die once they are in custody, but because of the staggering rates at which governments are arresting and jailing Aboriginal people. Evidence shows that the key to reducing First Peoples deaths in custody is reducing the rate at which they are put in custody by police, courts and governments.

## Yoorrook's recommendations for change

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Yoorrook makes 46 recommendations across five categories:

- transformative change to the child protection and the criminal justice systems through the treaty process (recommendations 1 to 2)
- urgent actions across both the child protection and criminal justice systems relating to accountability, cultural competency and responsiveness, and strengthening compliance with human and cultural rights obligations (recommendations 3 to 6)
- urgent reforms to the child protection system (recommendations 7 to 26)
- urgent reforms to the criminal justice system (recommendations 27 to 44)
- legislative reforms required to enable Yoorrook to fulfill its mandate for truth telling (recommendations 45 to 46).

Yoorrook expects that the Victorian Government immediately commence work to implement the urgent recommendations made in this report so that they can be achieved over the next 12 months. Yoorrook recognises that work to fulfil these urgent recommendations may be supplemented by consultations within the treaty process due to commence before the end of 2023. This must not be used as an excuse for delay given the evidence Yoorrook has presented. Yoorrook also notes that the treaty framework allows the negotiation of interim agreements.

Where Yoorrook makes recommendations that require oversight agencies and Aboriginal organisations to assume additional responsibilities or functions, it is essential that the government provide adequate resources to those organisations. Similarly, where Yoorrook makes recommendations that require or improve compliance with laws, policies and cultural and human rights obligations, the State must adequately resource this. Lack of resources must not be used as an excuse for failing to act.

Some of Yoorrook's legislative recommendations will benefit all Victorians in addition to addressing the significant injustices that First Peoples continue to experience in the child protection and criminal justice systems. Examples include recommendations to improve the *Children, Youth and Families Act 2005* (Vic) and to improve bail, sentencing and other criminal justice laws. It is normal practice that government considers full implications of any legislative change, however in doing so this must not be an excuse for delay or deferral. First Peoples cannot wait for these injustices to be addressed and nor should other Victorians be denied the positive changes that will flow from them.

Yoorrook will monitor the implementation of the recommendations made in this report and will require the State to report on the status of implementation during the remainder of this royal commission. ■





# KEY FACTS: CHILD PROTECTION



the number of First Peoples children **in out of home care** increased from

922 **TO** 2595<sup>1</sup>

Aboriginal children are **over-represented** in the child protection system by



**LESS THAN 12%** of assessments of the **child's wellbeing and progress** met the target to be conducted annually<sup>7</sup>

Only **67%** of First Peoples children in care **have a cultural plan** as required<sup>5</sup>



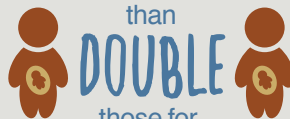
**83%**

of First Peoples children are **reunited with their parents or family** when case managed by an ACCO under a section 18 authorisation **compared to**



rate of First Peoples children in out of home care is the **worst in the country**<sup>3</sup>

**Reports to child protection** for unborn First Peoples children are more than **DOUBLE** those for non-Aboriginal children<sup>4</sup>



**64%**

when case managed by the Department of Families, Fairness and Housing Child Protection<sup>6</sup>

1. Australian Government Productivity Commission, 'Part F, Section 16 Child Protection Services', *Report on Government Services 2023* (2023), Table 16A.2.
2. Over-representation rate ratio calculated from data at AIHW, *Child Protection Australia 2020-21*, Cat No. CWS 87, Table S2.3.
3. Productivity Commission, *Report of Government Services 2023*, Table 16A.2, Rate per 1000 children in at least one OOHC placement during 2021-22.
4. Witness Statement of Argiri Alisandratos, 21 March 2023, 138 [631].
5. Department of Families, Fairness and Housing, Response questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 2, 12 [40], 14 [58]-[59].
6. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [46]. Section 18 authorisation refers to s18 *Children, Youth and Families Act 2005* (Vic).
7. 2018-2020 data: Victorian Auditor-General's Office, *Kinship Care Independent assurance report to Parliament*, June 2022, 1.

# KEY FACTS: CRIMINAL JUSTICE

Aboriginal Victorians accused of a crime are **more likely to be**

**ARRESTED**,<sup>11</sup>



and less likely to be given a caution or warning than other Victorians accused of a crime<sup>12</sup>



Aboriginal **women** are

**13.2 TIMES**

as likely than non-Aboriginal women to be in prison<sup>9</sup>

**64%**



of Aboriginal young people **subject to Victorian youth justice supervision** have also had child protection involvement<sup>15</sup>



Aboriginal children **aged 10–17** are

**11 TIMES**

more likely than non-Aboriginal children to be under youth justice supervision (in custody or under community supervision)<sup>14</sup>



Aboriginal **men** are

**13.6 TIMES**

as likely than non-Aboriginal men to be in prison<sup>8</sup>

**BETWEEN 2010 AND JUNE 2019**

the number of **Aboriginal women in prison on remand** increased by

**475%**

the number of **Aboriginal men in prison on remand** increased by

**598%**<sup>13</sup>



There have been

**34 DEATHS**



of Aboriginal people **in custody** in Victoria since 1991<sup>10</sup>

8. Allowing for differences in structural age distributions between the Aboriginal community and non-Aboriginal Victorians, the age-standardised imprisonment rate for Aboriginal men at 30 June 2022 was 3048.9 per 100,000 compared to 223.5 per 100,000 for non-Aboriginal men. On 30 June 2022, Aboriginal men were 13.6 times more likely to have been held in prison custody than non-Aboriginal men in Victoria: Australian Bureau of Statistics (ABS), 'Prisoners in Australia: Table 17', Crime and Justice (Web page, 24 February 2023) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>>.
9. Age standardised rate per 100,000 as at 30 June 2022. *ABS Prisoners in Australia, 2022*. Table 17.
10. Transcript of Minister for Corrections, Youth Justice and Victim Support, the Hon. Enver Erdogan, 15 May 2023, 857 [29]-[33].
11. Crime Statistics Agency, 'Indigenous Data Tables' (Data release, December 2022) Table 06. <[https://files.crimestatistics.vic.gov.au/202303/Indigenous\\_Data\\_Tables\\_Alleged\\_Offender\\_Incidents\\_Visualisation\\_Year\\_Ending\\_December\\_2022.xlsx](https://files.crimestatistics.vic.gov.au/202303/Indigenous_Data_Tables_Alleged_Offender_Incidents_Visualisation_Year_Ending_December_2022.xlsx)>.
12. Department of Justice and Community Safety, 'Response to NTP-002-014 — Agency response to the Yoorrook Justice Commission', 22 [65], produced by the State of Victoria in response to the Commission's Notice to Produce

- dated 15 March 2023. See also Figure 4 from Supplement to the Department of Justice and Community Safety, Agency response to the Yoorrook Justice Commission's 71 Questions, 22 May 2023, 18. Updated to December 2022 using Crime Statistics Agency, 'Indigenous Data Tables' (Data release, December 2022) Table 06. <[https://files.crimestatistics.vic.gov.au/202303/Indigenous\\_Data\\_Tables\\_Alleged\\_Offender\\_Incidents\\_Visualisation\\_Year\\_Ending\\_December\\_2022.xlsx](https://files.crimestatistics.vic.gov.au/202303/Indigenous_Data_Tables_Alleged_Offender_Incidents_Visualisation_Year_Ending_December_2022.xlsx)>.
13. Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2009–10 to 2019–2020: Table 1.9', *Corrections, Prisons & Parole* (Web Page, Undated) <[https://files.corrections.vic.gov.au/2021-06/Annual\\_Prisoner\\_Stats\\_profile\\_2009%20to\\_2019%20to\\_2020.xlsx](https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%20to_2019%20to_2020.xlsx)>.
14. That is 53 per 10,000 compared with five per 10,000: *Youth Justice in Australia 2020–2021*, 19, Table S130a. From 1 July 2022 to 31 December 2022, there were 42 Aboriginal children and young people aged 10–17 under youth justice supervision on an average day: Department of Justice and Community Safety, 'Client Relationship Information System (DJCS CRIS)', cited in Department of Justice and Community Safety, 'First Nations Facts and Figures', May 2023.
15. Australian Institute of Health and Welfare, *Young People under Youth Justice Supervision and Their Interaction with the Child Protection System 2020–2021* (Report, 2022) 79–80 Table S4.



# RECOMMENDATIONS

## Transformative change through the Treaty process

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### 1. The Victorian Government must:

- a) transfer decision-making power, authority, control and resources to First Peoples, giving full effect to self-determination in the Victorian child protection system. Transferring or creating decision-making power includes but is not limited to:
  - i. system design
  - ii. obtaining and allocating resources
  - iii. powers of, and appointments to bodies or institutions, and
  - iv. accountability and oversight functions including new First Peoples led bodies, oversight processes or complaints pathways
- b) negotiate this through the Treaty process including through potential interim agreements
- c) in doing so, go beyond the transfer of existing powers and functions under the *Children, Youth and Families Act 2005* (Vic), which will require new, dedicated legislation, developed by First Peoples, for the safety, wellbeing and protection of First Peoples children and young people, and
- d) recognising the urgent need for immediate reform and without delay, take all necessary steps to begin and diligently progress the establishment of a dedicated child protection system for First Peoples children and young people supported by stand-alone legislation based on the right of First Peoples to self-determination and underpinned by human and cultural rights to be developed by the First Peoples' Assembly of Victoria which must be sufficiently resourced by government for this purpose.

### 2. The Victorian Government must give full effect to the right of First Peoples to self-determination in the Victorian criminal justice system as it relates to First Peoples. This includes negotiating through the Treaty process, including through potential interim agreements, the transfer of decision-making power, authority, control and resources in that system to First Peoples. Transferring or creating decision-making power includes but is not limited to:

- a) system design
- b) obtaining and allocating resources
- c) powers of, and appointments to bodies or institutions, and
- d) accountability and oversight functions including new First Peoples led oversight processes or complaints pathways.

## Urgent reforms: accountability, cultural competence and compliance with human and cultural rights

### Open monitoring and evaluation underpinning accountability

#### 3. To ensure State accountability for First Peoples related programs and policies by those responsible for their development and delivery:

- a) government bodies must ensure that First Peoples related programs and policies are rigorously monitored and evaluated
- b) monitoring and evaluation must be designed alongside the development of the program or policy so that it is built into the program or policy (and commences at the same time as implementation) with measurement focused on real outcomes
- c) where programs or policies have existing commitments to monitoring and evaluation, but little or no progress has been made, these must be actioned within six months
- d) where programs or policies do not have monitoring or evaluation included, the inclusion of these must be actioned urgently, and
- e) these monitoring and evaluation processes must be in accordance with the Burra Lotjpa Dunguludja (AJA4) Monitoring and Evaluation Framework including:
  - i. being consistent with First Peoples values
  - ii. reflecting First Peoples priorities for what is measured and how it is measured
  - iii. having an approved regular reporting cycle, and
  - iv. having a commitment to the open reporting of results.

#### 4. The Victorian Government must as an urgent priority, having regard to the right of First Peoples to self-determination, negotiate in good faith with the First Peoples' Assembly of Victoria:

- a) the establishment of an independent and authoritative oversight and accountability commission for the monitoring and evaluation of First Peoples related policies and programs
- b) the detailed functions and membership of the commission, and
- c) to give the commission the necessary resources and authority to hold responsible government ministers, departments and entities to account for the success or failure of the programs they develop and deliver.

## Strengthening cultural competence and responsiveness

**5. The Victorian Government must as soon as possible significantly upscale the capability, competence and support in relation to human rights, including Aboriginal cultural rights, of all persons appointed to work or working in:**

- a) the child protection system
- b) the corrections system, including prisons
- c) the youth justice system, including youth detention and like facilities and the bail system
- d) the adult justice system including the bail system
- e) Victoria Police, and
- f) the forensic mental health system,

to ensure that they have that capability, competence and support necessary for them to carry out their obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) and other human and cultural rights laws, and in particular for this purpose the government must:

- g) review and revise all relevant policies, procedures, protocols, administrative directions, guidelines and like documents
- h) review all relevant training courses and programs, and
- i) ensure that Victorian First Peoples businesses or consultants participate on a paid basis in the review and revision of training courses and programs, and the delivery of these, wherever possible.

## Strengthening human rights and cultural rights compliance

**6. Drawing on (but not confined to) the recommendations of the 2015 Review of the Charter and its response to that review, the Victorian Government, following a public consultation process that includes the First Peoples' Assembly of Victoria and other First Peoples organisations, must clarify and strengthen the Charter so that it more effectively:**

- a) requires public authorities to act in a way that is and make decisions that are substantively compatible with human rights including Aboriginal cultural rights, and
- b) ensures that public authorities are held accountable for acting or making decisions incompatibly with human rights including Aboriginal cultural rights, including by:
  - i. enabling individuals to bring a legal proceeding in the Victorian Civil and Administrative Tribunal for a remedy (including compensation) against public authorities who have made decisions or acted incompatibly with human rights including Aboriginal cultural rights under the Charter, and
  - ii. enabling individuals to rely upon the human rights including Aboriginal cultural rights in the Charter in any legal proceedings, as provided (for example) in section 40C of the *Human Rights Act 2004* (ACT).



# Urgent reforms: child protection system

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## Oversight

### 7. The Victorian Government must amend the *Commission for Children and Young People Act 2012 (Vic)* to:

- a) specifically establish the role of the Commissioner for Aboriginal Children and Young People in the same way that the Principal Commissioner for Children and Young People's role is provided for in the legislation
- b) provide the Commissioner for Aboriginal Children and Young People with the same statutory functions and powers as the Principal Commissioner insofar as these powers relate to Aboriginal children and young people in Victoria
- c) expressly provide the Commissioner for Aboriginal Children and Young People the function to receive and determine individual complaints from or relating to First Peoples children and young people concerning their treatment in child protection, including out of home care, and
- d) give the Commissioner for Aboriginal Children and Young People and the Principal Commissioner rights of intervention in legal proceedings relating to a child or young person's rights under the Charter to be exercised at their discretion.

These roles and powers must be appropriately resourced.

## Early help, prevention and intervention

### 8. The Victorian Government must:

- a) work with Aboriginal organisations to develop a consistent definition of early help, early intervention and prevention that aligns with the perspectives of First Peoples. This definition should be adopted across the Victorian Government
- b) enshrine prevention and early help/intervention as a guiding principle in the *Children, Youth and Families Act 2005 (Vic)* and take all necessary steps to implement this principle in the administration of the Act
- c) as an immediate action, substantially increase investment in Aboriginal Community Controlled Organisation prevention and early help/intervention services to keep First Peoples children out of the child protection system and to prevent their involvement from escalating when it does occur, and
- d) review the governance model for implementing target 12 of the Closing the Gap Agreement, with a view to broadening the responsibility to achieve this target beyond the Department of Families, Fairness and Housing.

**9. The Victorian Government must publicly report annually on the amount and proportion:**

- a)** of total child protection and family services funding allocated to early intervention (family and parenting services) compared to secondary and tertiary services (community delivered child protection services, care services, transition from care services and other activities), and
- b)** of funding allocated to Aboriginal Community Controlled Organisations compared to mainstream services for early intervention (family and parenting services), secondary and tertiary services.

**10. The Victorian Government must immediately give a direction to health services (including perinatal, maternal and child health services) that:**

- a)** clinical and allied health staff working with pregnant women must undertake appropriate training to address bias and build expertise in working safely and effectively with First Peoples women and families to address their social and emotional needs, and
- b)** this training must be designed and delivered by a Victorian First Peoples business or consultants on a paid basis, and completion rates of this training must be publicly reported.

**11. The Department of Families, Fairness and Housing must ensure that:**

- a)** when a child protection worker is considering making a pre-birth report, that prior to birth, and with the consent of the pregnant Aboriginal women, organisations (including Aboriginal Community Controlled Organisations or Aboriginal Community Controlled Health Organisations) are informed of the rationale for and intention to make a pre-birth report so that they can:
  - i. provide input into that decision
  - ii. ensure people with appropriate training and expertise are involved, and
  - iii. offer culturally safe supports to the mother, father and/or significant others in the family network
- b)** when DFFH receives a pre-birth report from any source, that pregnant Aboriginal women are informed of the report by a person(s) with the appropriate expertise to hold such a sensitive discussion and who has the skills to respond appropriately and offer a range of culturally safe support options, including a referral to a supporting organisation (including an Aboriginal Community Controlled Organisation or Aboriginal Community Controlled Health Organisation), and
- c)** pre-birth reports that are assessed as not requiring further action are to be excluded from this scheme.

## Child removal

### 12. Whenever:

- a) the Department of Families, Fairness and Housing receives a pre-birth report regarding a pregnant Aboriginal woman, or
- b) a child protection report is substantiated regarding an Aboriginal child,  
then:
- c) subject to the consent of the person to whom the report relates, the Department must automatically notify a Victorian Aboriginal legal service provider to be funded by the Victorian Government so that the child's parents and/or primary care giver are offered legal help and, where appropriate non-legal advocacy.

### 13. The Victorian Government must ensure that an impact evaluation of the Child Protection Risk Assessment Framework (SAFER) is commenced within 12 months, and in the case of First Peoples children:

- a) is First Peoples led and overseen by a First Peoples governance group
- b) has methodology that includes a review of individual cases by the Commissioner for Aboriginal Children and Young People, and
- c) makes recommendations that include actions to reduce child protection practitioner racial bias when applying the Framework.

### 14. The Department of Families, Fairness and Housing must ensure that:

- a) all incoming child protection staff, as part of their pre-service education, complete cultural awareness and human and cultural rights training covering issues including:
  - i. the history of colonisation and in particular the impact of 'protection' and assimilation policies
  - ii. the continuing systemic racism and paternalism inherent in child protection work today that must be identified, acknowledged and resisted
  - iii. the value of First Peoples family and child rearing practice
  - iv. upholding human rights including Aboriginal cultural rights, and
  - v. the strength of First Peoples families and culture and culturally appropriate practices
- b) all child protection staff and Department executives undertake regular, mandatory cultural safety training, to be designed and delivered by a Victorian First Peoples business or consultants on a paid basis, and
- c) completion rates for training are published by the Department annually.



**15. In relation to determining the identity of First Peoples children:**

- a) the Department of Families, Fairness and Housing, in consultation with the Commissioner for Aboriginal Children and Young People and relevant Aboriginal Community Controlled Organisations, must improve how they identify and deidentify First Peoples children in the Victorian children protection system, and
- b) the Commissioner for Aboriginal Children and Young people must undertake regular audits and publish the results to ensure child protection practitioners are correctly identifying and deidentifying First Peoples children and doing so in a timely way.

**16. The Department of Families, Fairness and Housing must urgently take steps to ensure full compliance with its obligations to:**

- a) convene an Aboriginal Family Led Decision Making meeting before making any significant decision about an Aboriginal child, and record the outcome, and
- b) consult with the Aboriginal Child Specialist Advice and Support Service on all significant decisions affecting an Aboriginal child and record the outcome.

**17. The Victorian Government must amend the *Children, Youth and Families Act 2005 (Vic)* to:**

- a) specify that priority be given to keeping siblings together in placement decisions (both in out of home care and permanent placements)
- b) include in the decision-making principles a presumption that removal of a First Peoples child from their family or community causes harm
- c) provide that a child protection practitioner must record how they have considered the presumption of harm caused by removal in their decision to remove a First Peoples child, and
- d) provide that the Children's Court is required to include in its reasons for a removal decision how the presumption of harm caused by removal has been considered.

These amendments must be made urgently while a new First Peoples led child protection system and accompanying Act is designed and implemented in accordance with recommendation 1.

**18. The Victorian Government must:**

- a) ensure Children's Court of Victoria judicial officers determine child protection matters state-wide, and
- b) abolish the current practice of having non-specialist magistrates determining child protection matters in some rural and regional court locations.

**19. The Victorian Government must as soon as possible expand and sufficiently resource the Marram-Ngala Ganbu (Koori Family Hearing Day) state-wide.**

## Out of home care

- 20. The Victorian Government must address barriers to First Peoples becoming carers for First Peoples children in the child protection system by:**
- a)** simplifying application and vetting processes and improving support for people navigating the process
  - b)** ending the substantive inequality between kinship carers and foster carers by removing the automatic commencement of kinship payments at level one such that payments are made at a rate that reflects the complexity of kinship care, and
  - c)** ensuring kinship carers have appropriate access to training, support, and services at a level that is at least equivalent to the training, support and services offered to foster carers.
- 21. The Victorian Government must amend the *Children, Youth and Families Act 2005 (Vic)* to require the Department of Families, Fairness and Housing to ensure that all children who are placed in out of home care receive a developmental disability assessment and health assessment consistent with the National Out of Home Care Standards and in a timely way.**
- 22. The Victorian Government must amend the *Children, Youth and Families Act 2005 (Vic)* to provide the Children’s Court with greater powers to ensure that cultural plans are developed, implemented and monitored, particularly when out of home care orders are being extended and children’s separation from their families is prolonged.**
- 23. The Victorian Government must urgently:**
- a)** ensure that the Framework to Reduce Criminalisation of Young People in Residential Care is applied in all cases
  - b)** establish a mechanism within the Commission for Children and Young People through which young people can report that a residential care provider or Victoria Police has failed to apply the Framework, so that the Commissioner can advocate for that young person, including (in the case of police) by referring the matter to an independent police oversight body
  - c)** ensure that, when the Commissioner for Aboriginal Children and Young People is placed on a statutory footing, these functions are performed by that Commissioner with respect to those children and young people, and
  - d)** fund the development and delivery of training to residential care providers and Victoria Police on implementing the Framework in practice.

**24. The Commission for Children and Young People and Commissioner for Aboriginal Children and Young People must:**

- a) monitor compliance with the Framework to Reduce Criminalisation of young people in residential care current 18-month action plan
- b) review individual cases
- c) specify targets for reduced police contact, and
- d) publicly report on outcomes.

**Permanency and reunification**

**25. The Victorian Government must amend the *Children, Youth and Families Act 2005* (Vic) to allow the Children's Court of Victoria to extend the timeframe of a Family Reunification Order where it is in the child's best interest to do so.**

**26. The Victorian Government must:**

- a) recognise that the human and cultural rights of First Peoples children in permanent care to have, express, develop and maintain their culture, and to maintain contact with their Aboriginal family, kin and community, are not presently adequately respected and ensured in practice, and
- b) urgently work with the First Peoples' Assembly of Victoria and relevant Aboriginal organisations to formulate and implement all necessary legislative, administrative and other means for respecting and ensuring those rights, including by authorising Aboriginal Community Controlled Organisations to monitor the cultural care plans of Aboriginal children who are the subject of permanent care orders.

## Urgent reforms: criminal justice system

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### Police

**27. The Victorian Government must establish and adequately resource a new independent police oversight authority, headed by a statutory officer who has not been a police officer, to:**

- a) investigate and determine all complaints about police (except for minor customer service matters)
- b) investigate and report on all police contact deaths and serious incidents
- c) conduct independent monitoring of and reporting on police custody and detention
- d) on its own motion, monitor, audit, systemically review and report on the exercise of police powers and interactions with the public including customer service matters



- e) undertake own motion, public interest investigations, and
- f) publish reports in the public interest.

The new authority must:

- g) have powers to arrest, search property and compel the production of information including from Victoria Police, and
- h) include a dedicated division for complaints from First Peoples that is under First Peoples leadership.

**28. Access to pre-charge cautions in the adult criminal legal system in appropriate cases should be increased by all necessary legislative, administrative and others means including by:**

- a) legislating a positive duty upon Victoria Police to:
  - i. take into account an Aboriginal person's unique background and systemic factors when making decisions on cautioning or diversion
  - ii. demonstrate the steps taken to discharge this obligation, and
  - iii. record reasons for their decisions
- b) introducing a legislative presumption in favour of alternative pre-charge measures in appropriate cases (for example, verbal warnings, written warnings, cautions and referrals to cautioning programs), and
- c) Victoria Police publishing cautioning data its Annual Report, including specific data comparing cautioning rates for Aboriginal and non-Aboriginal people.

**29. The *Equal Opportunity Act 2010 (Vic)* must urgently be amended to prohibit race and other forms of discrimination in the administration of State laws and programs, including all functions performed by Victoria Police, Corrections Victoria and child protection authorities.**

**30. In relation to the decriminalisation of public intoxication:**

- a) the Chief Commissioner of Police must ensure that Victoria Police conduct is closely monitored to ensure police members do not use existing powers to unnecessarily take intoxicated people into custody, for example by 'up-charging', and
- b) the Victorian Government's planned independent evaluation of the monitoring of police conduct must:
  - i. be First Peoples led, with appropriate governance by them
  - ii. cover at least the first 12 months and then three years of implementation, and
  - iii. have results that are made public.

**31. The following mandatory criteria must be introduced for the selection and appointment of the Chief Commissioner of Police and when undertaking annual executive performance reviews of the Commissioner:**

- a)** knowledge, experience, skills and commitment to changing the mindset and culture of Victoria Police, to end systemic racism and to ensure the human rights of First Peoples are respected, protected and promoted in all aspects of police operations
- b)** understanding of the history of colonisation and in particular the role of Victoria Police in the dispossession, murder and assimilation of First Peoples, and the ongoing, intergenerational trauma and distrust of police this has caused
- c)** recognition of ongoing systemic racism within Victoria Police and the need for this to be identified, acknowledged and resisted, and
- d)** experience, skills in, and commitment to, changing the culture of Victoria Police to end systemic racism and to ensure the human rights of First Peoples are respected, protected and promoted in all aspects of police operations and the organisation.

## **Bail**

**32. The *Bail Act 1977 (Vic)* must immediately be amended to:**

- a)** create a presumption in favour of bail for all offences with the exception of murder, terrorism and like offences
- b)** place the onus on the prosecution to prove that bail should not be granted due to a specific, serious or immediate risk to the safety of a person or to the administration of justice, with the exception of murder, terrorism and like offences
- c)** prohibit remand if a sentence of imprisonment is unlikely if there is a finding of guilt (unless it is necessary to protect the safety of a person or the proper administration of justice pending hearing)
- d)** repeal the bail offences contained in current sections 30, 30A and 30B
- e)** require all bail decision-makers to explain what information they have considered to understand how a person's Aboriginality is relevant, and provide the reasons for any refusal to grant an application for bail made by an Aboriginal person, and
- f)** require the Victorian Government and Victoria Police to publicly report, at least annually, bail and remand rates for Aboriginal people, and summary data of the reasons given by bail decision-makers for refusing bail.

**33. The Victorian Government must:**

- a)** develop, deliver and publicly report on a cultural change action plan to ensure all bail decision-makers exercise their powers and functions on the basis that imprisonment on remand (including that of First Peoples) is used only as a last resort, and
- b)** ensure that the development and ongoing monitoring of performance of the action plan is First Peoples led.

**34. The Victorian Government must ensure access to culturally safe and appropriate bail hearings for Aboriginal people, and culturally safe support for First Peoples on bail.**

### **Youth justice**

**35. The Victorian Government must urgently introduce legislation to raise the minimum age of criminal responsibility in Victoria to 14 years without exceptions and to prohibit the detention of children under 16 years.**

**36. The Victorian Government’s planned new Youth Justice Act must:**

- a)** explicitly recognise the paramountcy of human rights, including the distinct cultural rights of First Peoples, in all aspects of the youth justice system
- b)** embed these rights in the machinery of the Act, and
- c)** require all those involved in the administration of the Act to ensure those rights.

### **Courts, sentencing and classification of offences**

**37. The Victorian Government must:**

- a)** amend the *Sentencing Act 1991* (Vic) to include a statement of recognition acknowledging:
  - i. the right of First Peoples to self-determination
  - ii. that First Peoples have been disproportionately affected by the criminal justice system in a way that has contributed to criminalisation, disconnection, intergenerational trauma and entrenched social disadvantage
  - iii. the key role played by the criminal justice system in the dispossession and assimilation of First Peoples
  - iv. the survival, resilience and success of First Peoples in the face of the devastating impacts of colonisation, dispossession and assimilationist policies, and
  - v. that ongoing structural inequality and systemic racism within the criminal justice system continues to cause harm to First Peoples, and is expressed through decision-making in the criminal justice system and the over-representation of First Peoples in that system
- b)** amend the *Sentencing Act* to require courts to, in appropriate cases, consider alternatives to imprisonment for all offenders, with particular attention to the circumstances of Aboriginal offenders
- c)** amend the *Sentencing Act* to, in relation to sentencing:
  - i. require courts to take into account the unique systemic and background factors affecting First Peoples, and
  - ii. require the use of Gladue-style reports for this purpose, and



- d) ensure that:
  - i. there is comprehensive cultural awareness training of lawyers and the judiciary to support the implementation of these requirements, and
  - ii. the design and delivery of such training must be First Peoples led and include education about the systemic factors contributing to First Peoples over-imprisonment.

**38. The Victorian Government must amend the *Criminal Procedure Act 2009 (Vic)* and the *Children, Youth and Families Act 2005 (Vic)* to remove the requirement that the prosecution (including police) consent to diversion and replace it with a requirement that the prosecution be consulted.**

**39. The Victorian Government must:**

- a) where appropriate decriminalise offences linked with disadvantage arising from poverty, homelessness, disability, mental ill-health and other forms of social exclusion, and
- b) review and then reform legislation as necessary to reclassify certain indictable offences (such as those kinds of offences) as summary offences, and for this purpose, by 29 February 2024, refer these matters to the Victorian Law Reform Commission (or similar independent review body) for urgent examination which includes consultation with the First Peoples' Assembly of Victoria and relevant Aboriginal organisations.

The Victorian Government must promptly act on the review's recommendations.

## **Prisons**

**40. The Victorian Government must:**

- a) amend relevant legislation to expressly prohibit routine strip searching at all Victorian prisons and youth justice centres, and
- b) ensure that data on the use of strip searching is made publicly available and used to monitor compliance with the prohibition on routine use.

**41. Noting that cooperation with the Australian Government is required, the Victorian Government must immediately take all necessary legislative, administrative or other steps to designate an independent body or bodies to perform the functions of the National Preventive Mechanism of monitoring the State's compliance with the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment in places of detention*.**

**42. The Victorian Government must immediately take all necessary steps to ensure prisoners (whether on remand or under sentence and whether in adult or youth imprisonment or detention) including Aboriginal prisoners can make telephone calls for free or at no greater cost than the general community.**

**43. The Victorian Government must, as soon as possible and after consultation with the First Peoples' Assembly of Victoria and relevant Aboriginal organisations, take all necessary steps to structurally reform the Victorian prison system based on the recommendations of the Cultural Review of the Adult Custodial Corrections System and in particular the following recommendations:**

- a)** a new legislative framework for the adult custodial corrections system which focusses on rehabilitation, safety, cultural and human rights (recommendation 2.1)
- b)** a new independent Inspectorate of Custodial Services including an Aboriginal Inspector of Adult Custodial Services (recommendation 2.3)
- c)** enhanced data capability and information management system (recommendation 2.6), but which must apply Indigenous Data Sovereignty principles in relation to data of First Peoples
- d)** improved professional development for the custodial workforce (recommendation 3.9), but taking into account the above recommendations for strengthening capability, competence and support in relation to human and cultural rights, and
- e)** other recommendations in relation to Aboriginal prisoners (see recommendations 5.3 to 5.16).

**44. The Victorian Government must:**

- a)** take all legislative, administrative and other steps to implement the *United Nations Standard Minimum Rules for the Treatment of Prisoners* in relation to the use of solitary confinement at all Victorian prisons and youth justice centres, including an express prohibition on the use of solitary confinement on children and on the use of prolonged or indefinite solitary confinement on adults, and
- b)** ensure that Victorian prisons and youth justice centres are adequately funded and properly operated so that the common practice of locking down prisoners in their cells for prolonged periods for administrative or management reasons in violation of their human and cultural rights is ended.

## Law reform to enable truth telling

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**45. By 29 February 2024 the Victorian Government must legislate to create new statutory protection for public records that ensure that information shared on a confidential basis with Yoorrook will be kept confidential for a minimum of 99 years once Yoorrook finishes its work and its records are transferred to the Victorian Government.**

**46. The Victorian Government must:**

- a)** review section 534 of the *Children, Youth and Families Act 2005* (Vic) to identify a workable model that:
  - i. places clear time limits on the operation of section 534 so that where the only individuals identified in a publication are adults who have provided their consent, and the Children’s Court matter is historical in nature, then the prohibition does not apply, and
  - ii. enables a Royal Commission or similar inquiry to publish information about a child who is subject to protection proceedings or a protection order, where the child provides that information, is capable of understanding the consequences of losing anonymity and provides their consent, and
  
- b)** ensure that any review of section 534 of the *Children, Youth and Families Act* is First Peoples led insofar as the proposed reforms affect First Peoples.

## Endnotes

1. Australian Government Productivity Commission, *Report on Government Services 2023* (Report, 2023), Part F, Section 16, Child Protection Services, Table 16A.2 ('*Report on Government Services 2023*').
2. Age standardised rate per 100,000 population as at 30 June 2021: Australian Government Productivity Commission, 'Socioeconomic Outcome Area 10', *Closing the Gap Information Repository* (Web page, March 2023) Table CtG10A.3 <<https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10>>.
3. Between 2009-10 and 2019-20: State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 21 [73].
4. Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2009-10 to 2019-2020', *Corrections, Prisons & Parole* (Web page, Undated) Table 2.3 <[https://files.corrections.vic.gov.au/2021-06/Annual\\_Prisoner\\_Stats\\_profile\\_2009%2010\\_%20to\\_2019%2020.xlsx](https://files.corrections.vic.gov.au/2021-06/Annual_Prisoner_Stats_profile_2009%2010_%20to_2019%2020.xlsx)>; Department of Justice and Community Safety, Corrections Victoria, 'Annual Prisons Statistical Profile 2012-13 to 2021-22', *Corrections, Prisons & Parole* (Web page, 5 May 2021) Table 2.3 <<https://www.corrections.vic.gov.au/annual-prisons-statistical-profile>>.
5. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, Cover Letter from Premier Daniel Andrews.
6. *Ibid.*
7. State of Victoria, Response to Issues Paper 1: Call for Submissions on Systemic Injustice in the Criminal Justice System, 12 [37], [40]. State of Victoria, Response to Issues Paper 2: Call for Submissions on Systemic Injustice in the Child Protection System, [26], [30]. See also, in regards to the child protection system: Children and Health Legislation Amendment (Statement of Recognition, Aboriginal Self-determination and Other Matters) Bill 2023 (Vic).
8. Transcript of Chief Commissioner of Police, Shane Patton, 8 May 2023, 496 [44]–[46], 500 [8]–[29]; Transcript of Minister for Corrections, the Hon Enver Erdogan, 15 May 2023, 921 [16]–[41], 924 [45]; Transcript of Ryan Phillips, 3 May 2023, 385 [7]–[9].
9. First Peoples' Assembly of Victoria, Submission 43, 2.
10. Victoria, *Yoorrook Justice Commission*, Letters Patent, paras 3(a)(v), 3(a)(viii), 3(b)(ii).
11. *Ibid* paras 3(a)(vii), 3(b)(i).
12. Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) 65–66 ('*Yoorrook with Purpose*').
13. See, eg, Chris Keeler and Vicki Couzins (eds), *Meerreeeng-an Here Is My Country: The Story of Aboriginal Victoria Told through Art* (Koorie Heritage Trust, 2010); Iris Lovett-Gardiner, *Lady of the Lake: Aunty Iris' Story* (Koorie Heritage Trust Inc, 1997) 12; Gary Presland, *First People: The Eastern Kulin of Melbourne, Port Phillip & Central Victoria* (Museum Victoria Publishing, 2017) 37, 65, 67.
14. See Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387; Patrick Wolfe, *Traces of History: Elementary Structures of Race* (Verso, 2016) 48, 58; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Final report, 1997) ('*Bringing Them Home Report*')
15. *Ibid* 62.
16. *Bringing Them Home Report* (n 14) 260, 270–275. See also *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2(e); *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 7(2) ('*UNDRIP*'); Colin Tatz, *Australia's Unthinkable Genocide* (Xlibris, 2017) 32–36, 57, 64, 109, 113–116.
17. *UNDRIP* (n 16). Self-determination is also common article 1 in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
18. Victorian Government, *Victorian Aboriginal Affairs Framework 2018–2023* (2018).
19. Victoria, *Yoorrook Justice Commission*, Letters Patent, 2(g).
20. S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) 98.
21. Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 173, relying on *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) 79 Inter-Am Court HR (ser C) [144], [148]–[149].
22. See, eg, Victorian Aboriginal Child Care Agency, Submission 77, 22; Transcript of Chris Harrison, 3 March 2023, 101 [5]– [8].

23. Victoria's Minister for Child Protection told Yoorrook, 'The Victorian Government recognises the critical role of self-determination in addressing the over-representation of First Peoples children in the Child Protection system ... I recognise that successful reforms are built on good foundations, are gradual and iterative, and are underpinned by self-determination': Witness Statement of Minister for Child Protection, the Hon Elizabeth (Lizzie) Blandthorn MLC, 24 March 2023, [25]. Victoria's Attorney-General also told Yoorrook, '... it is clear that systemic injustices faced by Aboriginal peoples can only be properly addressed where self-determined solutions are fostered and embedded': Witness Statement of Attorney-General, the Hon Jaclyn Symes, 31 March 2023, 11 [54].
24. Transcript of Attorney General, the Hon Jaclyn Symes, 5 May 2023, 434 [4]–[9].
25. Outline of Evidence of Lisa Thorpe, 9 December 2022, 6 [30].
26. *Report on Government Services 2023* (n 1) Table 16A.1. Further government evidence is that at 31 December 2022, Aboriginal children were five times more likely than non-Aboriginal children to be reported to child protection in the prior year: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.8].
27. *Report on Government Services 2023* (n 1) Table 16A.1, Table 16A.2. See also Witness Statement of Argiri Alisandratos, 21 March 2023, 30 [89]. Note further government evidence is that at 31 December 2022, Aboriginal children were 24 times as likely to be in care than non-Aboriginal children: Department of Families, Fairness and Housing, Response to questions taken on notice by Argiri Alisandratos, Acting Associate Secretary, Department of Families, Fairness and Housing on 27 and 28 April 2023, 6 May 2023, Attachment 1, 7 [16.8].
28. These, along with main findings can be found at Appendix C (Child protection policy frameworks, oversight bodies and previous reviews).
29. Statement of Commissioner Meena Singh, 2 December 2023, 31 [103].
30. Department of Families, Fairness and Housing, 'Response to NTP-002-001 — *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*', 9, produced by the Department of Families, Fairness and Housing in response to the Commission's Notice to Produce dated 3 November 2022.
31. Department of Families, Fairness and Housing, 'Response to NTP-002-001 — *Tranche 2 data response supplied by the Performance and Analysis, System Reform and Workforce Division*', 9, produced by the State of Victoria in response to the Commission's Notice to Produce dated 3 November 2022. The data provided by the Department of Families, Fairness and Housing does not differentiate whether the consultation occurred during the investigation or where a decision has been made to substantiate. Consultation is required at both points: Department of Health and Human Services, Victorian Government, *Program Requirements for the Aboriginal Child Specialist Advice and Support Service* (2019) 27.
32. Transcript of Aunty Jill Gallagher AO, 6 December 2022, 119 [34]–[36].
33. Department of Justice and Community Safety, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032* (2022) 20.