Ending human rights abuses in Victorian prisons

Submission to the Cultural Review of the Adult Custodial Corrections System

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service is an Aboriginal Community Controlled Organisation that provides culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victoria. VALS' vision is to ensure that Aboriginal people in Victoria are treated equally before the law and that their human rights are respected.

FlatOut

Flat Out is an independent, not for profit, community based organisation that provides homelessness support and advocacy service for women who have had contact with the criminal legal and/or prison system in Victoria.

Fitzroy Legal Service

Fitzroy Legal Service is a community legal centre committed to community driven justice and runs the Prison Advocacy Program, which provides legal information, advice and representation relating to prison conditions and the rights of people in prison. Fitzroy Legal Service also provides advice and representation across a range of legal issues to people who are or who have been in prison.

St Kilda Legal Service and the LGBTIQ Legal Service

The LGBTIQ Legal Service is a state-wide, free community legal service for Victorians provided by St Kilda Legal Service, which aims to improve the lives of LGBTIQ+ people in Victoria by providing safe and inclusive legal services and addressing systemic inequality.

Acknowledgement

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1. Executive summary

Prisons are harmful, closed environments where human rights abuses are frequent and unchecked.

A severe power imbalance exists between people in prison and prison staff which places people in prison at risk of being subjected to serious and systemic wrongdoing, as confirmed earlier this year by the Special Report on Corrections (**Report**) of the Independent Broad-based Anti-corruption Commission (**IBAC**),[1] which prompted this Cultural Review of the Adult Custodial Corrections System (**Review**).

Successive Victorian Governments have created a mass-imprisonment crisis, with the prison population exploding by 58 per cent over the last ten years.[2] This spiralling growth has happened during a time period when the rates of recorded offences and criminal incidents have remained relatively flat.[3]

The Report identified that growth in prison numbers and over-crowding can create a culturally corrosive environment and exacerbate the risk of people in prison being subjected to human rights abuses. There is an urgent need for the Victorian Government to address this by reducing the number of people being pipelined into prisons.

The Report also made a number of alarming findings, including that prison officers used excessive force against two people in prison, one of whom had an intellectual disability; used inappropriate strip-searching practices; and intentionally interfered with camera recordings.[4]

While the Report uncovered particularly egregious conduct identified through its investigations, many 'everyday' prison practices – such as solitary confinement and routine strip searches – undermine basic human rights standards. The impact of harmful practices is not metred out evenly, with communities over-represented in prisons often disproportionately subjected to, and harmed by, human rights abuses in prisons.

The United Nations Standard Minimum Rules for the Treatment of Prisoners – the Mandela rules – set the bare minimum human rights standards for prison conditions around the world. As a progressive state, subject to the standards set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), the Victorian Government should be aiming to have conditions in prison that build upon, rather than just meet, the minimum standard.

Prisons "catchall solutions to social problems" and serving as warehouses for people who the Victorian Government have marginalised and failed to support in the community, including people experiencing poverty, people living with disability, women who are victim/survivors of family violence, people who experience drug addiction, People of Colour and Aboriginal and Torres Strait Islander people.

An erroneous assumption is that prisons support community safety, when they actually undermine it.[5] Prisons can be deeply (re-)traumatising for the people caged in them and pipelining more people into a system that only serves to harm, compound trauma and exacerbate disadvantage directly conflicts with the criminal legal system's goal of increasing community safety and supporting rehabilitation.

As the Victorian Government does not fund a standalone legal service dedicated to meeting the needs of people in prison and has not established a prison inspections body to fulfil the state's obligations pursuant to the United Nations anti-torture protocol – the Optional Protocol to the Convention against Torture (**OPCAT**) – there is limited transparency of what goes on behind prison walls. Too often, the closed environment and the opaqueness of integral, prison decision-making processes makes it impossible for

[1] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021).
[2] Department of Justice and Community Safety - Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 (December 2020) www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20.
[3] Crime Statistics Agency, Recorded Offences: www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crimedata/recorded-offences-2; Crime Statistics Agency, Recorded Criminal Incidents: www.crimestatistics.vic.gov.au/crimestatistics/latest-victorian-crime-data/recorded-criminal-incidents-2.
[4] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021).
[5] See Damon Petrich, Travis Pratt, Cheryl Jonson and Francis Cullen, 'Custodial Sanctions and Reoffending: A Meta-Analytic Review' (2021) 50 *Crime and Justice* (online). See also Victoria Law, '"Prisons Make Us Safer" And 20 Other Myths about Mass Incarceration' (Beacon Press, 2021).

people in prison to shine a light on the systemic human rights abuses they are subjected to and hold governments and prison authorities accountable for them.

To help end human rights abuses in prisons, the Review should recommend that the Victorian Government:

1. stop creating a mass imprisonment crisis by changing laws and policies to substantially reduce the number of people being pushed into prisons;
2. enshrine human rights protections in law, so that the aims of the *Corrections Act 1986* (Vic) and the rights of people in prison are clearly articulated;
3. end torture, cruel, inhuman and degrading treatment and punishment in prisons, including by banning the use of solitary confinement and routine strip searching in prisons;
4. treat people in prison with dignity, including by providing healthcare that is of the same standard that is provided in the community and ensuring that people can contact their families regularly and for free by phone;
5. reform prison disciplinary proceedings, so that people in prison are afforded procedural fairness throughout the process;
6. create a fair parole system that is subject to natural justice principles and not excluded from the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic);
7. implement greater transparency, accountability and oversight of prisons, by enacting its obligations pursuant to OPCAT; and
8. resource a Prisoner's Legal Service dedicated to providing legal advice and representation for people in prison, and properly resource Aboriginal Legal Services to provide such services to Aboriginal and Torres Strait Islander people in prison.

2. Introduction

The Cultural Review of the Adult Custodial Corrections System

This submission is being made to the Review and responds to the terms of reference that focus on the experiences of people in custody and the laws, policies and processes that make prisons harmful and unsafe places.[6] In terms of the list of questions set out in the consultation paper dated October 2021 that the Review has invited stakeholders to respond to, this submission focuses on the following questions:

- What amendments should be made to the *Corrections Act 1986* (Vic) and subordinate instruments to improve culture, safety, integrity and inclusion in the adult custodial corrections system?
- The experiences of Aboriginal and Torres Strait Islander people in the adult custodial correctional system including the nature, extent and impact of racism and racial discrimination?
- How do issues with culture, safety and integrity affect the experience and outcomes for people in custody (with a focus on the experiences of women, people with a disability and Aboriginal and Torres Strait Islander people)?
- What changes are required to improve access to programs and support to assist people in custody work towards rehabilitation and better transition to the community?
- Can the integrity and oversight arrangements be enhanced to support improvements to culture, safety and integrity in the custodial environment?
- What changes should be made to the prison disciplinary processes to support positive culture safety and integrity within the custodial environment?[7]

We note that there is no-one with lived experience of the prison system on the Expert Panel overseeing the Review, and that given the focus of the Review on the experiences of people in prison, it would have been best practice for people with lived experience to be involved in helping to shape the terms of reference, scope of inquiry and plan for engagement with people in prison.

[6] Cultural Review of the Adult Custodial Corrections System, Terms of reference (2021) available online here: https://www.correctionsreview.vic.gov.au/.
[7] See Cultural Review of the Adult Custodial Corrections System, Consultation Paper (October 2021) available online here: https://www.correctionsreview.vic.gov.au/stakeholders-and-advocates/share-your-expertise/.

We also note that, in terms of the Review's focus on 'safety in custody for vulnerable cohorts', people who use drugs shortly before entering prison/are drug dependent/experience drug addiction are not included. Drug use is a health issue, not a criminal legal issue, and given that the criminalisation of drug-related behaviour increases the risk of drug-related harm, and often precludes people receiving support when they need it, people in this cohort often have a particularly risky experience of prison that the Review should examine (and which we understand Fitzroy Legal Service will address directly and in more detail in their submission to the Review).

Addressing Victoria's mass imprisonment crisis

Despite a drop in prison numbers during the Covid-19 pandemic, the prison population in Victoria has increased by 58 per cent over the last ten years.[8] In recent years, Victorians have been locked up at a rate not seen since the late 19th century, with the imprisonment rate going from 50-70 people in prison per 100,000 people between 1909-1974 to 106.8 people in prison per 100,000 people in 2020.[9]

The number of women in Victorian prisons has more than doubled over the past decade[10] and, at points during 2021, over half the women in prison were unsentenced and were yet to be found guilty of the alleged offending they were arrested for.[11]

Due to the ongoing impacts of colonisation, systemic racism and discriminatory policing, the number of Aboriginal and Torres Strait Islander people in prisons has nearly tripled over the last ten years.[12]

There is an urgent need to reduce the number of people being pipelined into prisons, with growth in numbers and over-crowding creating a culturally corrosive environment and exacerbating the risk of people in prisons being subjected to human rights abuses. This has been confirmed by IBAC, which has stated that growth in numbers and overcrowding create challenges in the corrections environment that can result in:

- a reduction in the time people in prisons spend out of their cells;
- increased stress among people which can lead to greater incidents of violence and self-harm;
- negative impacts on mental health, especially for people in prison with existing conditions;
- reduced access to already limited goods and services;
- increased strain on prison infrastructure including heating, cooling and sewerage;
- increased risk of transmission of communicable diseases; and
- strained supervision resources.[13]

There are also several corruption risks associated with prison overcrowding, including that it may:

- disrupt prison routine, allowing corrupt behaviour to be more easily hidden;
- increase the risk of excessive use of force by corrections officers;
- limit availability of resources, causing their value to increase and creating opportunity for corrections staff to misuse their authority;
- limit managerial capacity to supervise and oversee corrections officers to prevent and respond to corruption; and
- lead to policies and practices that have the potential to compromise human rights.[14]

[8] Department of Justice and Community Safety - Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 (December 2020).
[9] Sentencing Advisory Council, Victoria's Imprisonment Rates, accessible online here: https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-imprisonment-rates.
[10] Crime Statistics Agency, Characteristics and offending of women in prison in Victoria 2012-2018 (November 2019).
[11] Department of Justice and Community Safety - Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 (December 2020).
[12] Department of Justice and Community Safety - Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 (December 2020).
[13] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021) 83.
[14] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021) 83.

While the drivers of over-imprisonment are outside the scope of the Review, the culture within, and human rights compliance of, detaining authorities cannot be remedied without substantially reducing the number of people being funnelled into prisons. It is therefore integral that the Victorian Government:

- starts closing prisons rather than building new ones with the money allocated to building prisons invested in support services that divert people away from the legal system; and
- takes urgent steps to reduce the number of people being funnelled into prisons, including by fixing Victoria's harmful and discriminatory bail and parole laws.

3. Recommendations

Reducing the number of people in prion

The Review should recommend that the Victorian Government stop creating a mass-imprisonment crisis by fixing bail and parole laws to substantially reduce the number of people being funnelled into prisons. This starts with fixing Victoria's harmful and discriminatory bail laws.

Enshrining human rights protections in law

The Review should recommend that the Victorian Government enshrine the human rights of people in prison in law by amending the *Corrections Act 1986* (Vic) so that it:

1. includes an objects clause informed by human rights obligations;
2. addresses the over-imprisonment of Aboriginal and Torres Strait Islander people; and
3. sets out prisoner's rights consistent with international human rights law and the Charter.

Ending cruel and degrading treatment in prisons

The Review should recommend that the Victorian Government end cruel and degrading treatment in prisons, including by:

1. banning the use of solitary confinement in prisons by amending the *Corrections Act 1986* (Vic) so that it strictly prohibits the use of solitary confinement, by any name, and clearly defines the limited, narrow and exceptional circumstances in which a person may be lawfully separated from other people in prison; and
2. ending the routine strip searching of people in prison by amending the *Corrections Act 1986* (Vic) so that it strictly prohibits routine strip searching and provides that a strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband.

Treating people in prison with dignity

Equivalency of healthcare

The Review should recommend that the Victorian Government improve access to healthcare in prisons by:

1. calling on the federal government to grant an exemption under section 19(2) of the *Health Insurance Act* 1973 (Cth) to allow health care providers in prisons to claim Medicare and Pharmaceutical Benefits Scheme subsidies;
2. ensuring that people in prison have access to the National Disability Insurance Scheme and are assessed for eligibility for the National Disability Insurance Scheme upon entry to a prison;
3. transitioning the responsibility for delivering healthcare in prisons from Corrections Victoria to the Department of Health; and
4. resourcing and supporting Aboriginal Community Controlled Health Organisations to deliver culturally appropriate health services to Aboriginal and Torres Strait Islander people in prison and to facilitate continuity of care upon release.

Ensuring access to family

The Review should recommend that the Victorian Government improve people's access to their families in prisons by making phone calls to and from prison for free.

Reforming prison disciplinary proceedings

The Review should recommend that the Victorian Government reform prison disciplinary proceedings by removing part 7 of the *Corrections Act 1986* (Vic) and enacting a new disciplinary system that provides for:

1. independent investigations of alleged offending;
2. independent hearings;
3. charge as a last resort;
4. consideration of someone's circumstances, including but not limited to their disability, mental health condition or cognitive impairment, before making any decisions in disciplinary matters (including the decision to charge and decision regarding the imposition of penalties);
5. robust procedural fairness protections;
6. a ban on the imposition of penalties where 'withdrawal of privileges' can result in solitary confinement and/or restricted access to family or professional supports;
7. removal of 'fines' as a penalty option;
8. accessible review pathways, including an independent and impartial review mechanism; and
9. access legal advice and representation in relation to prison disciplinary matters, along with resourcing dedicated legal services for people in prison.

Creating a fairer parole system

The Review should recommend that the Victorian Government reform parole laws by:

1. introducing a system of automatic release for certain categories of sentences, similar to what exists in NSW, whereby people are automatically granted parole once their non-parole period has been reached;
2. for people not eligible for automatic release, introducing a presumption in the *Corrections Act 1986* (Vic) that an application for parole automatically be made at the earliest eligibility date;
3. mandating that, when required programs have not been completed due to their unavailability or cultural inappropriateness, this cannot be a bar to parole;
4. repealing regulation 5 of the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) which exempts the Parole Board from the operation of the Charter. This should be accompanied by repealing section 69(2) of the *Corrections Act 1986* (Vic) which provides that, in exercising its functions, the Parole Board is not bound by the rules of natural justice;
5. repealing section 77C of the *Corrections Act 1986* (Vic), which provides the Parole Board with discretion to direct that some or all of the period during which a parole order that is cancelled or taken to be cancelled was in force is regarded as time served in respect of the prison sentence, and replacing it with a new section that provides time served on parole, prior to a parole order being cancelled, counts as time served; and
6. amending the *Corrections Act 1986* (Vic) to provide that people in prison have a right to access legal advice and representation in relation to their parole matters, along with resourcing dedicated legal services for people in prison.

The Review should also recommend that the *Corrections Act 1986* (Vic) prohibit the Parole Board from considering the outcomes of disciplinary proceeding when making parole decisions.

Implementing greater transparency, accountability and oversight of prisons

The Review should recommend that the Victorian Government implement its obligations pursuant to OPCAT by:

1. urgently engaging with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations on how it plans to implement OPCAT as a matter of priority; and

2. establishing and resourcing a National Preventative Mechanism dedicated to independent oversight of prisons as part of implementing Victoria's obligations to prevent torture and cruel, inhuman or degrading treatment or punishment in all places of detention pursuant to the United Nation's anti-torture protocol – the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.

Resourcing legal services for people in prison

The Review should recommend that the Victorian Government create and resource a legal service dedicated to providing legal advice and representation for people to prison, and properly resource Aboriginal Legal Services to provide such services to Aboriginal and Torres Strait Islander people in prison.

4. Enshrining human rights in law

International human rights law clearly states that a person imprisoned for committing a criminal offence should not suffer any punishment or treatment over and above the deprivation of liberty which imprisonment itself entails. All other basic human rights must remain protected. Yet as evidenced by IBAC's Report, too often in Victoria this is not the case.

Need for an objects clause

While a stated purpose of the *Corrections Act 1986* (Vic) is to "provide for the establishment management and security of prisons and the welfare of prisoners",[15] the legislation is lacking an objects clause which is critical to articulating the overarching aims of the legislation and to provide guidance as to the scope and nature of the powers conferred by the law.

An objects clause, informed by human rights obligations, should be included in the *Corrections Act 1986* (Vic). Consistent with international human rights obligations and the Charter, the objects clause should provide for people in prison to be treated humanely while deprived of liberty and prohibit people in prison from being subjected to torture or cruel, inhuman or degrading treatment.

An overarching and inclusive objects clause should commit to culturally relevant and gender responsive service provision, and should expressly provide for the rehabilitation of people in prison. It should state that, correctional policies, programs and practices should respect gender, cultural and linguistic differences, and are responsive to the particular needs of women, Aboriginal and Torres Strait Islander people, and people with a disability, people with cognitive impairment and people who require mental health care. A similar provision exists in the *Corrective Services Act 2006* (Qld), which recognises "the need to respect an offender's dignity, and the special needs of offenders by taking into account: an offender's age, sex or cultural background; and any disability an offender has."[16]

The objects clause should also clearly state that, correctional policies, programs and practices should be designed and delivered in ways aimed at increasing the successful rehabilitation of people in prison and their transition back to the community. The *Corrections Management Act 2007* (ACT) relevantly provides that two of its main objects are to ensure people in prison "are treated in a decent, humane and just way" and to promote "the rehabilitation of offenders and their reintegration into society."[17]

[15] *Corrections Act 1986* (Vic) s 1.
[16] *Corrective Services Act 2006* (Qld) s 3(3).
[17] *Corrections Management Act 2007* (ACT) s 7.

Need to address over-imprisonment

To address the over-representation of Aboriginal and Torres Strait Islander people in Victorian prisons, a specific provision should be enacted to acknowledge the ongoing impacts of colonisation and systemic racism that drives this over-imprisonment.

By way of example, in recognition of the need to remedy the over-incarceration of Indigenous people, the *Canadian Corrections and Conditional Release Act (1992)* (**Canadian Act**) contains a requirement for corrective services to take the following into consideration when making any decisions pursuant to the Canadian Act involving an Indigenous person:

a. systemic and background factors affecting Indigenous peoples of Canada;
b. systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender's involvement in the criminal justice system; and
c. the Indigenous culture and identity of the offender, including his or her family and adoption history.[18]

Need to protect the rights of people in prison

Currently, section 47 of the *Corrections Act 1986* (Vic) articulates a number of 'prisoner's rights' that are unenforceable. The Review should look at how these rights can be made enforceable so that people in prison who have their rights breached have access to a remedy, beyond making a complaint. As part of this, the Review should undertake a detailed and thorough consultation with people in prison and people with lived experience of prison to ascertain whether these rights are sufficient and reflective of the human rights protections that people in prison need.

Further, the Review should review section 47 for consistency with international human rights standards and the Charter and consider how relevant Charter obligations can be referenced in the *Corrections Act 1986* (Vic), including the prohibition of torture and cruel, inhuman or degrading treatment, the right to humane treatment when deprived of liberty, the right to privacy, the right to protection of cultural rights and the right to protection of families.

5. Ending cruel and degrading treatment behind bars

The use of archaic and harmful prison practices – like routine strip searching and solitary confinement – undermine any rehabilitative function that prisons might hope to serve and raise serious questions about Victoria's compliance with its human rights obligations, given that such practices regularly amount to cruel, inhuman or degrading treatment, and sometimes even torture.

Ending routine strip searching

Routine strip searches involve forcing people in prison to remove their clothing on a regular basis and can be humiliating and degrading for anyone, particularly people in prison who are survivors of past trauma and abuse.

The *Corrections Act 1986* (Vic) should be amended to expressly prohibit the routine strip searching of people in prisons. A strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband.

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[18] *Canadian Corrections and Conditional Release Act (1992)* s 79.1.

This approach would be consistent with the Mandela Rules, which provide that strip searches should be undertaken "only if absolutely necessary".[19] Yet currently, overly broad laws permit the practice of regular and routine strip searching in circumstances significantly less than this in Victorian prisons with the *Corrections Act 1986* (Vic) providing that the Governor of a prison may, for the security or good order of the prison or the people in it, at any time order a prison officer to search any person in the prison.[20]

Routine strip searches are "a very powerful weapon of social control used by the state"[21] and mean that "prison is not and cannot be a therapeutic community, as prisons are built on an ethos of power, surveillance and control, yet trauma sufferers require safety in order to begin healing."[22]

This was confirmed by IBAC in their Report, which reported that the General Manager of Port Phillip Prison told its investigators that strip searches were "one of the options available to assert control" over people in prison.[23] The Report also documented specific incidents of prison officers at Port Phillip Prison using inappropriate strip-searching practices and found that prison staff had a poor understanding of relevant human rights standards.[24]

The Victorian Ombudsman has previously found that the routine strip searching of women before and after contact visits breached women's rights to privacy, to protection from cruel, inhuman or degrading treatment and to humane treatment while deprived of liberty pursuant to the Charter.[25]

We understand that wands and body scanning technology have been deployed in some Victorian prisons and that this has resulted in a decline in the rates at which women are being strip searched in prisons. This is confirmed by the data, obtained over the years by the Human Rights Law Centre via Freedom of Information laws, which has shown that:

- during a 6-month period during 2015 and 2016, there were 6,200 strip searches conducted on women at Tarrengower and the Dame Phyllis Frost women's prison. 6 items of contraband were identified (including tobacco-related items (cigarettes, tobacco and nicotine patches), small quantity of chewing gum, foreign object in the vaginal area);
- for the period of December 2019, there were 623 strip searches conducted on women at Tarrengower and the Dame Phyllis Frost women's prison. Only 3 items were identified (including one cigarette and two unknown items); and
- during the 7-month period between June 2020 to December 2020, there were 1,598 strip searches conducted on women at the Dame Phyllis Frost women's prison. Only 10 items were identified. There were no details provided about the nature of the contraband found. There were no strip searches at Tarrengower during this time.[26]

There is still significant room to reduce the rates at which women are being strip searched in Victorian prisons, especially given that strip searching does not appear to be effective in identifying contraband entering prisons and can be characterised as "unlawful assaults verging on systemic sexual assault".[27]

Men in Victorian prisons are also subject to regular and routine strip searching, as highlighted in the case of *Minogue v Thompson* [2021] VSC 56. In that case, Justice Richards observed that being subjected to a strip search is "inherently demeaning"[28] and found that the strip searching Dr Minogue was subjected to before urine testing was a breach of his right to privacy and dignity and humane treatment pursuant to the

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[19] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 52.
[20] *Corrections Act 1986* (Vic) s 45. See also *Corrections Regulations 2009* (Vic) reg 69.
[21] Debbie Kilroy, 'Strip-Searching: Stop the State's Sexual Assault of Women in Prison' (2003) 12 *Journal of Prisoners on Prisons* 32.
[22] Flat Out Inc, Submission No 980 to Victoria, Royal Commission into Family Violence (29 May 2015).
[23] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021) 53.
[24] Independent Broad-based Anti-corruption Commission, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021) 9.
[25] Victorian Ombudsman, Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre (November 2017) 5, 10, 59-60.
[26] Freedom of Information documents obtained by the Human Rights Law Centre.
[27] Debbie Kilroy, 'Strip-Searching: Stop the State's Sexual Assault of Women in Prison' (2003) 12 *Journal of Prisoners on Prisons* 34-37.
[28] *Minogue v Thompson* [2021] VSC 56 (16 February 2021) [139].

Charter.[29] Her Honour held that government authorities failed to properly consider relevant human rights when making policies regarding urine testing and strip searching and that the Manager of Barwon prison did not provide reasonable grounds for his belief that strip searches before urine tests were necessary for the security and welfare of the prison.[30] There was no evidence that alternatives, such as x-ray scanners used in other prisons, were considered, or that the strip searches were "necessary or even conducive" to achieving their purpose.[31]

Evidence from Australia and around the world has consistently shown that routine strip searching does not have a deterrent effect, and that reducing strip searches does not increase the amount of contraband in prisons. In the United Kingdom, the use of alternative search measures has not had negative impacts on safety or security[32] and, in Australia, the reduction in strip searching at two women's prisons in Western Australia did not lead to an influx of contraband being brought into these facilities.[33]

There is no reason to subject people in prison to a practice that can scar them for life – and that reinforces an environment characterised by violence, dominance and control – when prison authorities can instead use safer, less invasive and more effective search methods.

Stopping solitary confinement

Solitary confinement is a damaging and barbaric yet widespread prison practice that is used as a tool to control, punish and/or manage people in prison. The *Corrections Act 1986* (Vic) should be amended to strictly prohibit the use of the solitary confinement in prisons, and clearly define the limited, narrow and exceptional circumstances in which a person may be lawfully separated from other people in prison.

The Mandela rules define 'solitary confinement' as the confinement of people in prison for 22 hours or more a day without meaningful human contact and 'prolonged solitary confinement' as solitary confinement for a period more than 15 consecutive days.[34]

While the words 'solitary confinement' are not used explicitly in Victorian laws, overly broad laws permit several practices have the potential to amount to the solitary confinement including separation orders made pursuant to the *Corrections Regulations 2019 (Vic),* lockdowns and withdrawal of a person's privileges to associate with other people and to access full out-of-cell hours through the prison disciplinary process.[35]

Section 47 of the *Corrections Act 1986* (Vic) provides that every person in prison has the right to be in the open air for at least one hour per day, weather permitting. This is not consistent with the Mandela rules and still allows for people to be detained in solitary confinement for 23 hours per day.

Solitary confinement is a practice that causes irreparable harm to the people who are subjected to it. It is "strikingly toxic to mental functioning"[36] and virtually everyone exposed to it is affected in some way, with disturbances often observed in person who have had no prior history of any mental illness.[37]

The practice has been found to have a particularly detrimental impact on people living with disability and Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody finding that it is "undesirable in the highest degree" for Aboriginal and Torres Strait Islander people to be detained in isolation or segregation.[38]

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[29] *Minogue v Thompson* [2021] VSC 56 (16 February 2021) [144].
[30] *Minogue v Thompson* [2021] VSC 56 (16 February 2021) [142].
[31] *Minogue v Thompson* [2021] VSC 56 (16 February 2021) [143].
[32] See, eg, Lord Carlile, An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes, 2006 The Howard League for Penal Reform, 173.
[33] See, eg, the Office of the Inspector of Custodial Services, Strip searching in Western Australian Prisons (March 2019) 9.
[34] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 44.
[35] Victorian Ombudsman, OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people (September 2019). 86.
[36] Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 WASH. U. J. L. & POL'Y 325, 354.
[37] Craig Haney and Mona Lynch,' Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement' (1997) 23 N.Y.U. Rev. L. & Soc. Change 477, 500.
[38] Royal Commission into Aboriginal Deaths in Custody (Final report, 1991) [25.7.12].

The Mandela rules provide that solitary confinement should only be used in exceptional cases as a last resort, for as short a time as possible and subject to independent review.[39] Solitary confinement should never be permitted in the case of people with mental or physical disabilities when their conditions would be exacerbated by such measures,[40] with it increasingly accepted that the imposition of solitary confinement "of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment."[41]

Despite this, people experiencing mental illness or disability (which is a significant proportion of the prison population) are far more likely to have their 'behaviour managed' through the use of solitary confinement, with Human Rights Watch finding that people with psychosocial or cognitive disabilities are disproportionately represented in the solitary confinement cells they visited as part of their report on *Abuse and Neglect of Prisoners with Disabilities in Australia*.[42]

As discussed in further detail below, proper healthcare can be challenging to access in prisons. Lack of options leaves people with psychosocial disability at increased risk of internal prison discipline and management processes.[43] As a result, people with disability are placed in more restrictive settings or being subjected to highly restrictive management conditions due to their unmet needs and so-called 'challenging' behaviours, including solitary confinement.[44]

In 2017, the Victorian Ombudsman conducted an OPCAT style inspection of the Dame Phyllis Frost women's prison and found that the use of separation practices at the prison may amount to treatment that is cruel, inhuman or degrading under the Charter and is incompatible with the Mandela rules.[45]

The following year, in 2018, the Victorian Ombudsman investigated the placement of a woman in prison whose disability made her unfit to stand trial – Rebecca (a pseudonym) – where she was locked in a cell for 22-23 hours a day for more than 18 months. The Victorian Ombudsman concluded that these arrangements were not compatible with the right to humane treatment when deprived of liberty, the prohibition on cruel, inhuman and degrading treatment or the right to enjoy human rights without discrimination under the Charter.[46] The Victorian Ombudsman also observed that Rebecca's case was not isolated.[47]

Following this, in 2019, the Victorian Ombudsman conducted another OPCAT style investigation focused on practices related to solitary confinement of children and young people in Victorian prisons.[48] The Victorian Ombudsman's report detailed experiences of young people detained at Port Phillip Prison in effective solitary confinement for over 100 days.[49] This prompted the Victorian Ombudsman to recommend that the Victorian Government "establish a legislative prohibition on 'solitary confinement', being the physical isolation of individuals for '22 or more hours a day without meaningful human contact.'"[50]

The Victorian Government are yet to act on this recommendation and, instead, appear committed to ongoing use of the practice with the expansion of the Dame Phyllis Frost women's prison including two new 20-bed 'Management Units' which are code for solitary confinement cells.[51]

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[39] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 45. See also United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) UN Doc A/C 3/65/L. 5, rule 22.
[40] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 45.
[41] Juan E. Méndez, Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/66/26 (5 August 2011).
[42] See, eg, Human Rights Watch, "In needed help, instead I was punished": Abuse and Neglect of Prisoners with Disabilities in Australia" (2018) 40.
[43] Fitzroy Legal Service, Submission No 0002.0032.0021 to the Royal Commission into Victoria's Mental Health System (5 July 2019) 34.
[44] Victoria Legal Aid, Submission No 0002.0030.0217 to the Royal Commission into Victoria's Mental Health System (July 2019) 41.
[45] Victorian Ombudsman, Implementing OPCAT in Victoria: Report and inspection of the Dame Phyllis Frost Centre (November 2017) 47.
[46] Victorian Ombudsman, 'Investigation into the imprisonment of a woman found unfit to stand trial' (Investigation Report, 16 October 2018) 43.
[47] Victorian Ombudsman, 'Investigation into the imprisonment of a woman found unfit to stand trial' (Investigation Report, 16 October 2018) 65.
[48] Victorian Ombudsman, OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people (September 2019).
[49] Victorian Ombudsman, OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people (September 2019).
[50] Victorian Ombudsman, OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people (September 2019) 254.
[51] See Homes Not Prisons campaign accessible online here: https://homesnotprisons.com.au/.

During the pandemic, the Victorian Government also increased the circumstances in which people can be subjected to solitary confinement. Instead of taking the safer approach of reducing prison populations, all people entering prison are subject to 14-days arbitrary detention in 'quarantine' regardless of their Covid-19 risk. Some people in 'quarantine' have only been permitted out of their cells for 15 minutes a day.[52] Practices that amount to cruel, inhuman and degrading treatment should never have formed part of the public health response to the Covid-19 pandemic in prisons, and cannot become the new norm.[53]

6. Treating people in prison with dignity

Equivalency of healthcare

People in Victorian prisons have a right to "access to reasonable medical care and treatment necessary for the preservation of [their] health"[54] and the Mandela rules provide that people in prison should have the same standards of health care that are available in the community and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.[55]

Equivalency of healthcare is important for people in prison because they are forced to rely on prison authorities for access to healthcare and are disproportionately likely to live with a disability and have pre-existing health conditions. Almost one-third of people entering prison report a history of at least 1 of the following chronic physical health conditions – arthritis, asthma, cancer, cardiovascular disease or diabetes – and about 2 in 5 people entering prison (40%) report a previous diagnosis of a mental health condition.[56]

Equivalency of healthcare is particularly important for Aboriginal and Torres Strait Islander people, who suffer higher rates of cardiovascular disease than non-Indigenous people.[57] This was recognised by the Royal Commission into Aboriginal Deaths in Custody more than thirty years ago, which recommended that "health care available to persons in correctional institutions should be of an equivalent standard to that available to the general public."[58] The Royal Commission further recommended that corrective services, in conjunction with Aboriginal Community Controlled health services, review and report on health service provision to Aboriginal and Torres Strait Islander people in prisons and that the review include involvement of Aboriginal health services in providing mental and physical health care in custody.[59]

Yet people in Victorian prisons are not able to access the same standard of healthcare as they would in the community because they are not able to access the Medicare Benefits Schedule (**Medicare**), the Pharmaceutical Benefits Scheme (**the PBS**) or the National Disability Insurance Scheme (**NDIS**).

People in prison cannot access Medicare or the PBS because state governments are responsible for funding prison health services and section 19(2) of the *Health Insurance Act 1973* (Cth) prevents health services from receiving federal government funding if they receive funding from another level of government.

This means that healthcare services in prisons are also often poorly integrated with community health services, creating serious reintegration risks, and too often do not meet the needs of people with disability and Aboriginal and Torres Strait Islander people in custody. For example, Aboriginal Community Controlled Health Organisations are not being able to access rebates to support in-reach services and complete annual health checks for Aboriginal and Torres Strait Islander people, which are crucial to ensuring continuity of care.[60]

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[52] Victorian Aboriginal Legal Service, Submission No 87 to Inquiry into the Victorian Government's Response to the COVID-19 Pandemic (2020); Freedom of Information documents obtained by the Human Rights Law Centre.
[53] See Andreea Laschz and Monique Hurley, 'Why practices that could amount to torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021) Current Issues in Criminal Justice 33(1) 54.
[54] *Corrections Act 1986* (Vic) s 47(f).
[55] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 24.
[56] Australian Institute of Health and Welfare 2019. The health of Australia's prisoners 2018. Cat. no. PHE 246. Canberra: AIHW.
[57] Australian Institute of Health and Welfare 2019. The health of Australia's prisoners 2018. Cat. no. PHE 246. Canberra: AIHW.
[58] Royal Commission into Aboriginal Deaths in Custody (Final report, 1991) recommendation 150.
[59] Royal Commission into Aboriginal Deaths in Custody (Final report, 1991) recommendation 152.
[60] Stuart Kinner, Witness Statement to the Royal Commission into Victoria's Mental Health System (21 July 2020) 13.

This is compounded by the fact that healthcare in prisons is currently delivered through Corrections Victoria, not the Department of Health. Health provision in prisons must be provided independent of detaining authorities. This is a particularly acute issue for people who use drugs shortly before entering prison/are drug dependent/experience drug addiction, and a significant portion of people are in prison for drug-related offending, with the same 'department' responsible for punishing them for their drug use also responsible for treating their drug dependence.[61] Better outcomes for people leaving prison begin with access to appropriate healthcare in prison. The Review should therefore recommend that the Victorian Government call for the federal government to:

- grant an exemption under section 19(2) of the *Health Insurance Act 1973* (Cth) to allow health care providers in prisons to claim Medicare and PBS subsidies;
- ensure that people in prison have access to the NDIS and are assessed for eligibility for NDIS upon entry to a prison;
- transition the responsibility for delivering healthcare in prisons from Corrections Victoria to the Department of Health; and
- resource and support Aboriginal Community Controlled Health Organisations to deliver culturally appropriate health services to Aboriginal and Torres Strait Islander people in prison and to facilitate continuity of care upon release.

Ensuring access to family

Many people in prison are parents and are separated from their children, causing harm to the parents inside and the children left behind. This has been compounded by the pandemic, with in-person visits suspended for significant periods of time over the past two years (and which remain suspended to date).[62] To help ensure that people in prison can maintain ongoing connection with their families:

- there should be greater transparency about the cost of phone calls in prison;
- phone calls made by people in prison should be free (or at least equivalent to the costs that would be incurred making equivalent phone calls in the community);
- emails to and from people in prison should be free;
- the option of video visits should be retained beyond the Covid-19 pandemic, in addition to in-person visits (which should resume as a matter of priority); and
- phone numbers for free legal assistance services, including Community Legal Centres, should be accessible to people in prison without the need for pre-approval.

Disconnection from family - particularly for mothers separated from their children and First Nations people with unique cultural needs - can have profound, damaging and long-lasting impacts on people's lives.[63] For example, children of incarcerated mothers are more likely to be in out-of-home care, often permanently, and children in out-of-home care are more likely to have contact with the criminal legal system.[64]

Section 17 of the Charter recognises the family unit as a fundamental part of our society and the Mandela rules provide that prison authorities should be encouraged to help people in prison maintain relationships with persons or agencies outside the prison that may promote the person's rehabilitation and the best interests of his or her family.[65]

Yet considerable barriers exist to people in prison remaining connected with their families and support networks, despite the overwhelming evidence that damaging these relationships can lead to or entrench patterns of behaviour that are criminalised and increase the risk of the person committing further offending on release from prison.

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[61] Fitzroy Legal Service, Submission to the Parliamentary Inquiry into Victoria's Criminal Justice System (24 September 2021) 17-18.
[62] Corrections, Prisons & Parole, Contacting and visiting prisoners, website accessible here: https://www.corrections.vic.gov.au/prisons/contacting-and-visiting-prisoners.
[63] Aimee Pitt, 'The Functions of Incarceration and Implications for Social Justice' (2021) 4(1) *Social Work & Policy Studies: Social Justice, Practice and Theory* 1, 7 and 9.
[64] Australian Institute of Health and Wellbeing, The health of Australia's prisoners (2018) 72. Canberra: AIHW.
[65] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 107.

One barrier to maintaining connection with family is the high costs associated telephone calls. Information from people in prison provided to the Human Rights Law Centre indicates that calls from people in prison to mobile phone numbers can cost around $7 per call.

We have, however, been informed by email from Corrections Victoria that the cost of telephone calls made by people in prison through the Prisoner Telephone System (**PTS**) is "commercial in confidence, and as such cannot be disclosed outside of the contract held between Corrections Victoria and the service provider". In response to being asked what information is provided to people in prison regarding the cost of making phone calls, we have been informed by email from Corrections Victoria that people in prison are not informed of the cost of phone calls. Rather:

> Upon entry into the prison system, prisoners are provided the opportunity to have telephone credit credited to their phone so that they may make at least one initial call to a loved one. This provides an opportunity for a prisoner to determine how long this set amount of credit lasts, before they then can allocate funds for telephone credit moving forward.
>
> Prisoners receive an income while in custody. The Prisoner Pay Rate (daily prisoner pay rates) is reviewed annually by the Secretary - this review takes into account the cost of personal items purchasable at the prisoner canteen and the cost of telephone calls.
>
> When determining the cost of phone calls, prisoners can be provided with a general sense of call costs from other prisoners, including induction billets and Peer Support Listeners, who have knowledge of the general cost of calls from their own experience.

The lack of transparency regarding the costs that people in prison must pay to make phone calls is potentially unlawful, particularly given that people in prison by virtue of their confinement have no choice but to use the PTS.

This is compounded by the fact that many people in prison experience poverty and are unemployed or homeless before being incarcerated and are only able to earn between $3.95 and $8.95 per day 'working' in prison.[66] Forcing people to pay more for phone calls than they would in the community is manifestly wrong and can undermine people's ability to remain connected with their families and to community.

Additional barriers to making phone calls also exist, with people in prison only being permitted to make telephone calls to the people they nominate on their approved phone list, with a maximum of 10 people allowed on the list at any one time.[67] A 12-minute time limit applies to all calls, with all calls monitored or recorded except for legal calls and calls to exempt agencies.[68] The Covid-19 pandemic has increased access to technology for people in prison, which has enabled people to have video visits and email their family. But emailing people in prison also costs money, costing $0.95 to send an email, $0.75 to request a reply and $0.65 to attach a photo.[69]

7. Reforming prison disciplinary proceedings

The prison disciplinary process is set out in the *Corrections Act 1986* (Vic) and deals with people in prison who break prison rules. The consequences can be incredibly significant and impact on parole eligibility and can result in the loss of 'privileges' (such as telephone calls with family or out of cell time, resulting in people being subjected to solitary confinement as punishment for their offending).[70]

Overall, the disciplinary process is unfair, opaque and fails to embed substantive equality in its processes. It undermines attempts to create a positive culture in prisons by pitting incarcerated people against prison staff, with prison staff wielding remarkable power through being involved in investigating and hearing

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[66] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 37.
[67] Corrections, Prisons & Parole, Communication, accessible online here: https://www.corrections.vic.gov.au/prisons/going-to-prison/communication.
[68] Corrections, Prisons & Parole, Communication, accessible online here: https://www.corrections.vic.gov.au/prisons/going-to-prison/communication.
[69] Corrections, Prisons & Parole, Communication, accessible online here: https://www.corrections.vic.gov.au/prisons/going-to-prison/communication.
[70] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 4.

prison disciplinary matters. There is significant scope for these powers to be abused in a way that impacts on people's human rights – including the right to liberty – and hidden by an opaque process that is not subject to independent oversight.

The Mandela rules provide detailed requirements for prison disciplinary processes,[71] including that "[n]o prisoner shall be sanctioned except in accordance with.... the principles of fairness and due process."[72] The Mandela rules also relevantly provide that "disciplinary sanctions... shall not include the prohibition of family contact."[73]

While prison staff involved in disciplinary hearings are bound by the Charter, earlier this year, the Victorian Ombudsman found that prison disciplinary hearings in Victorian prisons are carried out "in the dark" with insufficient scrutiny, oversight or transparency.[74] This followed a previous Victorian Ombudsman investigation into disciplinary processes at four prisons between 2010 and 2011.

The Victorian Ombudsman documented issues throughout the prison disciplinary process and found that there is a distinct lack of information, independent specialist legal advice and assistance.[75] The *Corrections Act 1986* (Vic) does not expressly permit a person in prison to be represented by a lawyer at a disciplinary hearing, and alarmingly General Managers have observed that advice is generally provided to people by disciplinary and hearing officers.[76] The lack of information and support was found to disproportionately impact people with an intellectual disability, who are overrepresented in disciplinary processes.[77]

The Victorian Ombudsman identified potential failures to afford people procedural fairness, including:

- real perceptions of bias, with no independent people involved in the process. Unit supervisors are involved in investigating alleged offending and hearings are conducted by a delegate of the General Manager of the prison – in other words, a prison officer;[78]
- widespread use of undocumented pre-hearing discussions, with many people in prison alleging that prison officers discuss the likely outcome of disciplinary hearings with them before the hearing;[79]
- no requirement for written reasons for a decision, which contrasts with other jurisdictions such as South Australia where written reasons must be provided to people in prison;[80] and
- limited review options – if a person is unhappy with the outcome of the hearing, their only option is to seek judicial review in the Supreme Court of Victoria which can be complicated, expensive and inaccessible.[81]

If a person is found guilty or pleads guilty to an offence, they can receive a reprimand, a fine of no more than one penalty unit (currently equivalent to $181.74) and/or withdrawal of one or more of the person's privileges for up to 14 days per offence (to a maximum of 30 days).[82]

The potential for unfairness is rife at every interval in the prison disciplinary process and there is a need for significant reform. In order to support integrity within the custodial environment, such reform should include removing part 7 of the *Corrections Act 1986* (Vic) and enacting a new disciplinary system that provides for:

- independent investigations of alleged offending;
- independent hearings;

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[71] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rules 36-46.
[72] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 39.
[73] United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) UN Doc E/CN.15/2015/L.6/Rev (17 December 2015) rule 43(3).
[74] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 74.
[75] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 33.
[76] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 34.
[77] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 56.
[78] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 24 and 40.
[79] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 31.
[80] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 76.
[81] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 52: the Victorian Ombudsman also noted that applications for judicial review of disciplinary hearing outcomes are extremely rare – just two people in prison have taken up this option in the past five year.
[82] See *Corrections Act 1986* (Vic) s 53.

- charge as a last resort;
- consideration of someone's circumstances, including but not limited to their disability, mental health condition or cognitive impairment, before making any decisions in disciplinary matters (including the decision to charge and decision regarding the imposition of penalties);
- robust procedural fairness protections, including a requirement for hearing officers to document the content of any pre-hearing discussions and record written reasons for all decisions (including reasons to deny calling of particular witnesses, for the outcome of the hearing and for any penalties imposed) and automatically provide these to people in prison;
- consistent with the Mandela rules, a ban on the imposition of penalties where 'withdrawal of privileges' can result in solitary confinement and/or restricted access to family or professional supports;
- to avoid arbitrariness, a requirement that penalties imposed be proportionate to the nature of the misconduct, and in recognition of the fact that too many people in prison experience financial hardship, 'fines' should be removed as a penalty option;
- accessible review pathways, including an independent and impartial review mechanism; and
- access to legal advice and representation in relation to prison disciplinary matters, along with resourcing legal services for people in prison (discussed in greater detail below).

Further, it is inappropriate that negative and potentially disproportionate outcomes in disciplinary hearings can be considered by the Parole Board and have a direct impact on depriving someone of their liberty. This is an opaque process where procedural fairness is not guaranteed and where non-judicial officers determine someone's guilt in matters not serious enough to warrant criminal charge and the involvement of Victoria Police. It is double punishment and entirely inappropriate for a person's liberty to be impacted for conduct that does not amount to a criminal offence – let alone a criminal offence punishable by imprisonment. The Victorian Ombudsman highlighted this, finding in one case that the "outcome of the disciplinary hearing was disproportionate to the alleged conduct and was likely to unfairly influence [the person's] future parole applications".[83] As such, the *Corrections Act 1986* (Vic) should also prohibit the Parole Board from considering the outcomes of disciplinary proceeding when making parole decisions.

8. Creating a fair parole system

Current restrictive parole laws and practices are contributing to a bloated prison population, which in turn increases the risk of a culturally corrosive environment and people in prisons being subjected to human rights abuses, by making it increasingly difficult for people to access parole.[84] As fewer people are being released on parole, this means that more people are serving their full sentence in prison and then transitioning from prison back to the community at the end of their sentence without support services.

The parole laws are also having a discriminatory impact on women and Aboriginal and Torres Strait Islander people in prison. The number of women granted parole has fallen dramatically over the past decade, both as a percentage of women released and in overall numbers,[85] and only 5 per cent of the total number of people on parole are Aboriginal and Torres Strait Islander people,[86] despite Aboriginal and Torres Strait Islander people making up approximately 10 per cent of the Victorian prison population.

The parole laws are making it harder for people to access parole because:

- there is no automatic date where release on parole will be considered, the onus rests on people in prison making an application to be considered for release on parole. This is despite the Australian Law Reform Commission recommending that court-ordered parole be introduced, as an automatic

[83] Victorian Ombudsman, Investigation into good practice when conducting prison disciplinary hearings (Final report, 6 July 2021) 9.
[84] Corrections Victoria, Infographic: Prison Discharges (State Government of Victoria, 2020).
[85] Corrections Victoria, Annual Prisoner Statistical Profile 2006-7 to 2018-19, (2020) State Government of Victoria, Table 3.10: 'All Prisoner Discharges, By Sex and Discharge Type': in 2006/2007, 26 per cent of women released from prison were released on parole but by 2018/2019, only 4 per cent of women released from prison in Victoria were released on parole.
[86] Adult Parole Board, Annual Report 2020-2021 (2021), State Government of Victoria, 28.

date for release on parole "provides a solution for the set of circumstances when Aboriginal and Torres Strait Islander [people in prison] prefer to avoid coming before a parole authority."[87]

- Compounding this, people in prison have no right to legal representation in parole matters. This places the burden on the individual person to navigate the parole laws and, in effect, has abrogated the State's responsibility for advance planning and preparation for parole applications. In other jurisdictions – notably NSW and Queensland – the Legal Aid and the Prisoner's Legal Service provides legal assistance to people in prison for their parole matters.
- To be eligible for parole, people must complete programs which the Court or Corrections has ordered, directed or believes that the person should engage with. There has, however, been limited availability of pre-parole programs - significantly exacerbated by Covid-19, during which time access to programs has been further curtailed - and a general lack of gender responsive and culturally appropriate programs available in prisons, which makes it harder for women, particularly Aboriginal and Torres Strait islander women, to access parole.
- The Parole Board considers access to suitable and stable accommodation necessary to be granted parole. Many people in prison experience housing instability (often compounded by imprisonment and unfair social security laws), and this too often punishes people – overwhelmingly women who are victim/survivors of family violence – who do not have access to housing.

People who are released on parole also need to meet several 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 and overly strict parole conditions that do not consider a person's intersectional experiences of disadvantage result in conditions that 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 originally sentenced to. A significant number of people choose not to apply for parole in Victoria, which is likely due to the possibility of receiving a harsh punishment for breach of parole including that, if the Parole Board cancels a person's parole, none of the time that the person spent on parole is counted as part of their sentence, unless the Board directs otherwise.[88] 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.[89]

To assist people in prison work towards rehabilitation and better transition to the community, parole laws need to be reformed so that more people can access parole and not fear disproportionate punishment for potentially minor breaches of parole. Victoria's parole laws should therefore be amended by:

- introducing a system of automatic release for certain categories of sentences, similar to what exists in NSW,[90] whereby people are automatically granted parole once their non-parole period has been reached;
- for people not eligible for automatic release, introducing a presumption in the *Corrections Act 1986* (Vic) that an application for parole automatically be made at the earliest eligibility date;
- mandating that, when required programs have not been completed due to their unavailability or cultural inappropriateness, this cannot be a bar to parole;
- repealing regulation 5 of the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) so that the Parole Board is subject to the operation of the Charter consistent with the approach adopted in the ACT and Queensland. This should be accompanied by repealing section 69(2) of the *Corrections Act 1986* (Vic) which provides that, in exercising its functions, the Parole Board is not bound by the rules of natural justice;

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[87] Australian Law Reform Commission, Pathways to Justice -Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (2017) Australian Government, Chapter 9: Prison Programs and Parole, Australian Government.
[88] Adult Parole Board, Annual Report 2020-2021 (2021), State Government of Victoria, 30: 51 per cent of people who had their parole cancelled did not have their time spent on parole counted towards their sentence.
[89] See *Corrective Services Act 2006* (Qld) s 211.
[90] See, eg, *Crimes (Administration Sentences) Act 1999* (NSW) s 158(1).

- repealing section 77C of the *Corrections Act 1986* (Vic), which provides the Parole Board with discretion to direct that some or all of the period during which a parole order that is cancelled or taken to be cancelled was in force is regarded as time served in respect of the prison sentence, and replacing it with a new section that provides time served on parole, prior to a parole order being cancelled, counts as time served; and
- amending the *Corrections Act 1986* (Vic) to provide that people in prison have a right to access legal advice and representation in relation to parole matters, along with resourcing legal services for people in prison (discussed in greater detail below).

9. Implementing greater transparency, accountability and oversight

To enhance oversight and support improvements to culture, safety and integrity, the Victorian Government must urgently establish and adequately resource a National Preventive Mechanism dedicated to overseeing conditions and the treatment of people in prisons as part of implementing their obligations pursuant to the United Nation's anti-torture protocol - OPCAT.

OPCAT builds on and guides countries like Australia in how to meet their obligations under the Convention Against Torture to prevent torture and cruel, inhuman or degrading treatment, and aims to prevent serious violations of human rights in places where people are deprived of their liberty by shining a light on the conditions experienced by people in detention.

The Australian federal government signed OPCAT in 2009 and ratified the protocol in 2017. By ratifying OPCAT, Australia has agreed to be bound by the treaty. OPCAT allows for progressive realisation and governments across Australia – including the Victorian Government – have until January 2022 to implement their obligations.

An OPCAT-compliant mechanism is necessary to provide oversight of Victoria's prisons, and to highlight systemic issues which require governmental responses. To help inform discussions about OPCAT's implementation in Victoria, the Victorian Ombudsman has conducted two OPCAT style inspections referenced throughout this report – one on the Dame Phyllis Frost women's prison and the other on practices related to solitary confinement of children and young people in Victorian prisons. While this has been invaluable and important work, it is no substitute for regular, OPCAT-compliant inspections and monitoring.

In order to be OPCAT-compliant, a mechanism must:

- be established with full and transparent consultations with civil society, with Aboriginal and Torres Strait Islander people and others as recommended by the Subcommittee on Prevention of Torture;
- include Aboriginal and Torres Strait Islander representation at all levels;
- have a statutory basis and be independent of government and the institutions they oversee;
- be empowered to undertake regular and preventative visits, and have free and unfettered access to all prisons;
- be adequately and jointly resourced by federal, state and territory governments;
- have the power to make findings and recommendations publicly available and require responses from governments and detaining authorities; and
- be afforded appropriate privileges and immunities to ensure there are no sanctions or reprisals for communicating with the body.

The Office of the Inspector of Custodial Services (**OICS**) is an example of an independent mechanism that conducts regular inspections and reviews of prisons in Western Australia. While not completely OPCAT-compliant, there are many strengths to the OICS model including that it:

- is structurally independent of government, established by standalone statute, has its own budget and staff, with the Inspector, are officers of the Parliament;
- publishes its own reports and standards;
- has strong powers to access prisons and conduct unannounced inspections; and
- carries out a preventative, continuous schedule of inspections across all prisons.

It is, however, important to note that the OICS was established without adequate civil society consultation and that there is no requirement for the Minister for Corrections or responsible detaining authority to

respond to findings and recommendations made by the OICS. It is crucial, that in establishing or designating a body, that the Victorian Government does not replicate the shortfalls of the OICS model.

The current approach in Victoria, where the Justice Assurance and Review Office "drives continuous improvement in Victoria's critical justice systems"[91] is inadequate and not OPCAT-compliant for several reasons, including that it is a business unit of the Department of Justice and Community Safety so therefore not independent of government or the prisons it oversees in any sense.

It is concerning that little progress has been made to date in establishing and resourcing independent monitoring and oversight of prisons in Victoria, and this raises serious concerns about whether the January 2022 deadline for implementation of OPCAT will be met.

To date, we are unaware of any civil society consultations convened in Victoria for the purposes of discussing designation of a National Preventive Mechanism with oversight of prisons. The Victorian Government must take urgent steps to implement OPCAT and this starts with consulting civil society - including Aboriginal and Torres Strait Islander organisations - as a matter of priority.

10. Resourcing legal services for people in prison

There is limited access to legal advice and representation for people in prison who want to shed light on, and demand accountability for, human rights abuses that they have been subjected to in Victorian prisons.

There is clear demand for legal services in prison and, in one year of operation, the Victoria Legal Aid Prisoner Legal Help telephone service received 4,157 calls from the 5 prisons it serviced at that time, with 8 per cent of callers identifying as Aboriginal or Torres Strait Islander people.[92]

Yet very few legal services are dedicated to responding to the needs of people in prison in Victoria after they have been sentenced, including conditions in prison (and being subjected to solitary confinement and routine strip searching), parole, disciplinary hearings and placement/transfers. Those limited services which do assist people in prison are under-resourced and unable to meet current demand.

While handful of existing legal services offer invaluable support to people in prison, they provide a patchwork of coverage that largely involve the provision of legal advice over the phone.

Dedicated legal services for people in prison exist in New South Wales and Queensland, and the Review provides a unique opportunity for the Victorian Government to resource a legal service dedicated to providing legal advice and representation for people to prison, and properly resource Aboriginal Legal Services to provide such services to Aboriginal and Torres Strait Islander people in prison.

[91] Department of Justice and Community Safety, Justice Assurance and Review Office (JARO) website, accessible online here: https://www.justice.vic.gov.au/contact-us/justice-assurance-and-review-office-jaro.
[92] Victoria Legal Aid, Prisoner Legal Help evaluation report (June 2018).