

Human Rights Law Centre

Human Rights Law Centre – Victorian state election platform

In the lead up to the 2022 Victorian state election this November, the Human Rights Law Centre calls on all parties to commit to addressing the state’s imprisonment crisis and creating a fairer legal system for everyone by:

1. Raising the age of criminal responsibility from 10 to at least 14 years old

The current extremely low age of criminal responsibility at just 10 years old is harming Victorian children, contributing to the over-representation of Aboriginal and Torres Strait Islander people in prisons, and is not the answer to keeping communities safe. Victoria must follow the lead of the ACT by committing to raise the age to at least 14 years old and implement a similar scoping process that maps out the services that will support children under 14 in an evidence-based, therapeutic way rather than by criminalising them. This approach is consistent with the recommendation made in the bipartisan report from the recent Inquiry into Victoria’s criminal legal system: “That the Victorian Government raise the minimum age of criminal responsibility” alongside an expansion of the many community-based support services already successfully operating to support children in Victoria.

There is overwhelming evidence, from medical and legal experts and frontline workers, that raising the age to at least 14 years old is a necessary reform to stop harming Victorian children who are not yet at the stage of brain development where they can be held criminally responsible. At Australia’s Universal Periodic Review, Australia was condemned by over 30 UN nations for its low age of criminal responsibility, and it is indisputable that Australia is out of step with the rest of the world.

Polling shows that raising the age has broad public support, and it would have an immediate impact on Victoria’s ability to meet its Closing the Gap, Victorian Aboriginal Justice Agreement and *Wirikara Kulpa* Aboriginal Youth Justice Strategy targets. It is a straightforward reform to implement with the backing of the service provision and legal sector. Data from 2021 shows that 29 primary-school aged children were locked up in Victorian prisons the year prior. This small number means the transition to a new system can be relatively easy.

It is time for the Andrews government to listen to the calls of Aboriginal and Torres Strait Islander organisations, human rights, medical and legal bodies and UN experts, and immediately raise the age of criminal responsibility to at least 14 years old.

2. Ending mass imprisonment and fixing the bail laws

Ending deaths in custody starts with ending mass imprisonment, and fixing laws that needlessly drive people into prisons like the bail laws. As highlighted by the recent Inquiry into Victoria’s criminal legal system: “women, particularly Aboriginal women and women experiencing poverty, are disproportionately remanded under current bail legislation.” This is because – as also found by the

Inquiry – the criminal legal system does not appropriately or fairly balance the maintenance of community safety with the presumption of innocence. This is particularly because of:

1. The reverse onus provisions, which require a person to show that ‘compelling reasons’ or ‘exceptional circumstances’ exist for them to be released on bail. If a person is unable to meet the applicable legal test, then bail must be refused.
2. The broad range of offending captured by these reverse onus provisions. Previously, the ‘exceptional circumstances’ test applied only to the most serious offences. Now, if people engage in repeat, low-level wrongdoing – like shoplifting or possess drugs – they can be held to the same standard as people accused of the most violent and dangerous crimes.

Many women are unfairly denied bail, needlessly locked up and placed at risk of dying in custody. This includes Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Marie Nelson who died in custody after being arrested for shoplifting-related offences and refused bail.

Data consistently shows that over half the women in Victorian prisons are unsentenced. Women are denied bail not because they pose a risk to the community, but because they are at risk – of homelessness, poverty, family violence and addiction. Intersecting forms of disadvantage make it hard for women to put forward a case in favour of bail, which makes time in prison the default.

The Andrews government must end this injustice by repealing the reverse-onus provisions in the bail laws and creating a presumption in favour of bail for all offences. The onus should be on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk. This reform is urgent, and should not be delayed by any further review of the bail laws.

3. Implementing the United Nations anti-torture treaty – OPCAT

The Australian government ratified the UN’s anti-torture treaty – the Optional Protocol to the Convention against Torture (**OPCAT**) – in 2017, and the Andrews government was due to implement its obligations pursuant to the protocol in January 2022. While the deadline for OPCAT implementation has now been extended by a year to January 2023, this does not change the fact that the Andrews government have made alarmingly little progress to date establishing independent oversight of prisons, police cells and all other places of detention.

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

The use of cruel and degrading practices – including solitary confinement and routine strip searching – are in direct violation of people’s human rights, and their use should be expressly banned in law. They are also examples of systemic human rights abuses that OPCAT-compliant oversight mechanisms are designed to prevent.

As a matter of priority, the Andrews government must establish an OPCAT-compliant National Preventive Mechanism to monitor and oversee places of detention in full and transparent consultation with civil society and Aboriginal and Torres Strait Islander people, communities and organisations.

4. Ending the practice of police investigating police

For too long in Victoria, police have been able to act with impunity. While the Independent Broad-based Anti-Corruption Commission (**IBAC**) has the power to investigate complaints of police

misconduct, in practice, the overwhelming majority of complaints by the public are sent back to the police for investigation. For as long as police have the powers to investigate the actions of other police officers, members of Victoria Police will keep escaping accountability for their actions.

The status quo of police investigating the actions of other police in relation to deaths in custody must end and, consistent with the calls of the Victorian Aboriginal Legal Service, the Victorian government must consult with the families of Aboriginal and Torres Strait Islander people who have died in custody regarding the appropriate mechanism for independent investigation of police-contact deaths.

The current Systemic Review of Police Oversight (**Review**) presents an opportunity for the Andrews government to create a best practice Police Ombudsman. While the Review was prompted by one of the most extreme cases of police misconduct in recent history and the subsequent recommendations made by the Royal Commission into the Management of Police Informants, abuse of police power is most often meted out on the most marginalised members of the community.

Consistent with the recommendation made by the Inquiry into Victoria's criminal legal system, the Review should establish a new independent body to investigate allegations of police misconduct. That body should be an independent Police Ombudsman that is responsible for investigating all complaints of police misconduct (other than customer service matters) and systemic failings. It must be:

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

The new police complaints system must also provide for independent monitoring and auditing of the exercise of police powers, supported by transparent record-keeping and reporting by Victoria Police.

This approach is consistent with the position of the Victims of Crime Commissioner, who recently said that: "To ensure a robust oversight system, all complaints involving misconduct and serious misconduct must be investigated by the independent oversight body, not by Victoria Police."

5. Getting public intoxication reform right

It is deeply disappointing that the Andrews government have delayed the implementation of these long overdue reforms. There can be no further delays - the decriminalisation of public drunkenness was a recommendation made by the Royal Commission into Aboriginal Deaths in Custody over 30 years ago that has been repeated on numerous occasions over the years in multiple reports.

The Coroner who presided over the inquest into the death of Yorta Yorta woman Aunty Tanya Day – who died after being arrested for being drunk in a public place after she fell asleep on a train – first foreshadowed that she would recommend that the Andrews government decriminalise public intoxication in December 2018, and the government committed to do this in August 2019.

Consistent with the staunch and ongoing advocacy of the Day family, members of Victoria Police should not be involved in the public health response and responding to incidents of people being drunk in public places. Members of Victoria Police must not – in any circumstances – have legislative powers to detain people, transport people to and/or lock people up in police cells for being drunk in a

public place. This is of paramount importance because, in jurisdictions that have decriminalised public drunkenness, police cells continue to be used and Aboriginal and Torres Strait Islander people remain significantly over-represented in police cells and at risk of dying in custody.

6. Closing prisons - instead of opening new and expanding existing ones

The Victorian government continues to spend billions of dollars on prisons, with a current \$2.1 billion commitment to prison construction and expansion. This spending is often justified on the basis that prisons support ‘community safety’, but the Inquiry into Victoria’s criminal legal system recently recommended an overhaul of the state’s criminal legal system in recognition of the fact that the current, punitive approach is “not reducing crime or improving community safety”.

This is consistent with an increasing body of evidence from around the world, which demonstrates that prisons actually undermine community safety. A landmark study from America recently found that: “incarceration cannot be justified on the grounds it affords public safety by decreasing recidivism”. Yet unfair laws – like the bail laws – continue to funnel people into prisons, while new or expanded prisons just enable this to happen at even higher rates.

The Human Rights Law Centre supports the *Homes Not Prisons* campaign in its calls to stop the expansion of the Dame Phyllis Frost women’s prison. The campaign recently received communications from Corrections Victoria that the women’s prison will no longer be expanded, and we support their ongoing calls for the Victorian government to stay true to this commitment.

The Victorian government must commit to closing prisons, rather than opening new and expanding existing ones. Instead, this money should be allocated to building social housing and support services that divert people away from the criminal legal system in the first place.

7. Strengthening the Charter of Human Rights

The Andrews government also needs to strengthen Victoria’s Charter of Human Rights (**the Charter**). The Covid-19 pandemic has highlighted the important work that the Charter does, by providing a compass to help governments make the right, human rights-informed decisions.

While the Charter has been important, its effectiveness must be further enhanced. Michael Brett Young’s 2015 review recommended making the Charter easier to use, including by giving people the power to take action in the low cost, accessible Victorian Civil and Administrative Tribunal. The Andrews government has not acted on this, despite previously accepting, in full or in principle, 45 of the 52 recommendations made by the review.

The Charter should be further strengthened to enable standalone action, rather than such actions only being available in circumstances where people can ‘piggyback’ them onto other legal causes of action. The Adult Parole Board and Youth Parole Board should also no longer be exempt from the application of the Charter, given that they make decisions that engage with human rights on a regular basis.

Greater recognition of social and economic rights is also needed, and in March 2021, the Victorian Parliament’s cross party Legal and Social Issues Committee Inquiry on Homelessness in Victoria made three recommendations to strengthen the Charter on the right to housing, and how people in social housing can take action if evictions are contrary to the Charter.

Acting to address the abovementioned recommendations in Victoria would significantly strengthen the Charter and see the re-elected Andrews government truly live up to its reputation as Australia’s most progressive government.