



VALS Submission to the Senate Legal and Constitutional Affairs
Committee concerning the *Crimes Amendment (Remissions of
Sentences) Bill 2021 (Cth)*

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This submission has been endorsed by Liberty Victoria and Fitzroy Legal Service



**Community
driven justice.**

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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal Community Controlled Organisation (ACCO). VALS was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victoria.¹ VALS' vision is to ensure that Aboriginal people in Victoria are treated equally before the law; our human rights are respected; and we have the choice to live a life of the quality we wish.

Legal Services

Our legal practice serves Aboriginal people of all ages and genders in the areas of criminal, family and civil law. We are also in the process of relaunching a dedicated youth justice service, Balit Ngulu. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers (CSOs). CSOs are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

Our Criminal Law Practice provides legal assistance and representation for Aboriginal people involved in court proceedings. This includes bail applications; representation for legal defence; and assisting clients with pleading to charges and sentencing. This includes matters in the generalist and Koori courts.² Most clients have been exposed to family violence, poor mental health, homelessness and poverty. We aim to understand the underlying reasons that have led to the offending behaviour and equip prosecutors, magistrates and legal officers with knowledge of this.. We support our clients to access support that can help to address the underlying reasons for offending and so reduce recidivism.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in areas, including infringements; tenancy; victims of crime; discrimination and human rights; Personal Safety Intervention Orders (PSIVO) matters; coronial inquests; consumer law issues; and Working With Children Check suspension or cancellation.³

Our Aboriginal Families Practice provides legal advice and representation to clients in family law and child protection matters.⁴ We aim to ensure that families can remain together and children are kept safe. We are consistent advocates for compliance with the Aboriginal Child Placement Principle in situations where children are removed from their parents' care.

¹ The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.

² In 2019-2020, VALS provided legal services in relation to 1,873 criminal law matters. In 2020-2021, VALS has provided legal services in relation to 805 criminal law matters (as of 19 March 2021).

³ In 2019-2020, VALS provided legal services in relation to 827 civil law matters. In 2020-2021, VVALS has provided legal services in relation to 450 civil law matters (as of 19 March 2021).

⁴ In 2019-2020, VALS provided legal services in relation to 835 family law and/or child protection matters. In 2020-2021, VALS has provided legal services in relation to 788 family law and/or child protection matters (as of 19 March 2021).

Our Specialist Legal and Litigation Practice (Wirraway) legal advice and representation in civil litigation matters against government authorities. This includes for claims involving excessive force or unlawful detention; police complaints; prisoners' rights issues; and coronial inquests (including deaths in custody).⁵

Community Justice Programs

VALS operates a Custody Notification System (CNS). The Crimes Act 1958⁶ requires that Victoria Police notify VALS within 1 hour of an Aboriginal person being taken into police custody in Victoria.⁷ Once a notification is received, VALS contacts the relevant police station to conduct a welfare check and facilitate access to legal advice if required.

The Community Justice Programs Team also operates the following programs:

- Family Violence Client Support Program⁸
- Community Legal Education
- Victoria Police Electronic Referral System (V-Per)⁹
- Regional Client Service Officers
- Baggarook Women's Transitional Housing program¹⁰

Policy, Research and Advocacy

VALS informs and drives system change initiatives to improve justice outcomes for Aboriginal people in Victoria. VALS works closely with fellow members of the Aboriginal Justice Caucus and ACCOs in Victoria, as well as other key stakeholders within the justice and human rights sectors.

⁵ In 2019-2020, VALS Wirraway provided legal services in relation to 2 legal matters. In 2020-2021, VALS Wirraway has provided legal services in relation to 53 legal matters (as of 19 March 2021).

⁶ Ss. 464AAB and 464FA, Crimes Act 1958 (Vic).

⁷ In 2019-2020, VALS CNS handled 13,426 custodial notifications. In 2020-2021, VALS CNS has handled 8,366 custodial notifications (as of 19 March 2021).

⁸ VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

⁹ The Victoria Police Electronic Referral (V-Per) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.

¹⁰ The Baggarook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.

ACKNOWLEDGEMENTS

VALS pays our deepest respect to traditional owners across Victoria, in particular, to all Elders past, present and emerging. We also acknowledge all Aboriginal and Torres Strait Islander people in Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

We also acknowledge the following staff members who collaborated to prepare this submission:

- Dr. Matthew Witbrodt, Policy Research and Advocacy Officer (VALS)
- Andreea Lachs, Head of Policy, Communications and Strategy (VALS)

EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the Senate Legal and Constitutional affairs Committee concerning the *Crimes Amendment (Remissions of Sentences) Bill 2021 (CAB)*. The present submission focuses upon the following key issues:

- The benefits of EMDs generally, as well as specifically during the COVID-19 pandemic;
- Human rights obligations.

SUMMARY OF RECOMMENDATIONS

Recommendation 1. The amendments to the *Crimes Act 1914 (Cth)* proposed in the *Crimes Amendment (Remissions of Sentences) Bill 2021 (Cth)* should not proceed further to a vote on the floor of Commonwealth Parliament.

The Commonwealth Government should recognise the importance of remissions, including Emergency Management Days (EMDs), noting particularly:

- they provide an incentive for incarcerated people to maintain good behaviour in situations and circumstances that result in further deprivation or disruption of their liberties and activities, which, in turn, helps to ensure security and good order within the custodial environment in such instances;
- they play a compensatory role for the physical and psychological impacts of increased deprivation and disruption of routine incarceration;
- they play an important role in reducing prison populations during the pandemic, with decarceration being an essential component of a comprehensive and responsible public health strategy.

Recommendation 2. In the event the *Crimes Amendment (Remissions of Sentences) Bill 2021 (Cth)* does proceed to vote on the floor of Commonwealth Parliament, the current amendments to s. 19AA of the *Crimes Act 1914 (Cth)* should be revised to ensure that people serving federal sentences prior to the commencement of the amendments continue to be eligible for remissions under the relevant state legislation.

DETAILED SUBMISSIONS

The Proposed Amendments

The proposed amendments to the CAB, specifically s.19AA, seek to eliminate the possibility of remission or reduction of sentences of imprisonment for those serving federal sentences. Victorian legislation allowing for the granting of Emergency Management Days (**EMDs**) is cited as a principal factor for the need to amend the existing *Crimes Act 1914 (Cth)*.

The Victorian Context

People Serving Federal Sentences in Victoria

As of June 2021, 1151 people were serving federal sentences in prisons across Australia, which was a significant increase from the 752 people serving federal sentences in June 2020.¹¹ Prisons located in Victoria accommodated 317 people serving federal sentences as of June 2021 (ie. 27.5% of all persons serving federal sentences).¹²

Emergency Management Days

In Victoria, EMDs are granted to reduce the sentences of people held in custody by Corrections Victoria. The reduction of sentences is the result of administrative measures undertaken in accordance with s.58E of the *Corrections Act 1986 (Vic)* and granted, in light of good behaviour, to persons who suffer disruption or deprivation during an industrial dispute or emergency where the custodial sentence is being served;¹³ or due to other circumstances of an unforeseen and special nature.¹⁴

EMDs generally provide two principal benefits.

- First, they provide an incentive for detained people to maintain good behaviour in situations and circumstances that result in further deprivation or disruption of their liberties and activities, which, in turn, helps to ensure security and good order within the custodial environment in such instances.
- Second, and most importantly, EMDs play a compensatory role for the physical and psychological impacts of increased deprivation and disruption of incarceration.

¹¹ Australian Bureau of Statistics (2021). 'Corrective Services, Australia: National and state information about adult prisoners and community based corrections, including legal status, custody type, Indigenous status, sex.' Available at <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release#federal-sentenced-prisoners>.

¹² Australian Bureau of Statistics. '45120DO001_202106 Corrective Services Australia, June Quarter 2021.' Available at <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release#federal-sentenced-prisoners>.

¹³ s.58E(1)(a) of the *Corrections Act 1986 (Vic)*.

¹⁴ s.58E(1)(b) of the *Corrections Act 1986 (Vic)*.

Risks to Safety and Good Order in Victorian Prisons

As noted above, EMDs provide an incentive for incarcerated people to maintain good behaviour in situations and circumstances that result in further deprivation or disruption of their liberties and activities, which, in turn, helps to ensure security and good order within the custodial environment in such instances.

There is a significant risk that passing this Bill will compromise the safety and good order of prisons in the following ways:

- The proposed amendments to the CAB would effectively create two classes of imprisoned people in Victorian prisons: those serving state sentences and eligible for EMDs; and those serving federal sentences and ineligible for EMDs as a result. The outcome of the proposed amendments would be legislated inequities with regard to the reduction/remission of sentences for deprivation and disruption. There will thus be reduced incentive for people serving federal sentences during the extreme disruptions and deprivations suffered and continuing to be suffered in Victoria to be of 'good behaviour'.
- The retrospective application of the legislation would result in people serving federal sentences losing EMDs they have already been notified will be granted. With people spending more time in custody than they had anticipated, it is quite possible that the high levels of distress caused will lead to disruption.

Increased Hardship in Victorian Prisons During the Pandemic

The protective measures instituted in Victorian prisons and remand centres during the current COVID-19 pandemic have resulted in significantly greater restrictions, including the deprivation of liberties and disruption of routine and activities in custodial environments. The implementation of preventative measures in Victorian prisons and remand centres since March 2020 have included:

- Reception and intake Protective Quarantine (amounting, at times, to solitary confinement) for periods of up to 14 days;
- The use of Transfer Quarantine;
- Prison lockdowns in response to suspected or actual cases, as well as when staff have attended exposure sites in the community;
- Clinical isolation of imprisoned people who have tested positive;
- Suspension of rehabilitative, counselling, educational and religious programs and services (with some service delivery moving to a remote model);
- Suspension of visits from family members, legal representatives and in-person service providers; and
- Significantly decreased out-of-cell time for access to exercise yards, outdoors areas, libraries and meal areas.

Of particular concern are the intermittent and protracted periods of solitary confinement to which thousands of incarcerated people have been subjected. The UN Mandela Rules define solitary confinement as the "confinement of prisoners for 22 hours or more a day without meaningful human contact," and define

prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days.¹⁵ They state that solitary confinement “shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorisation by a competent authority.”¹⁶ They prohibit the use of solitary confinement for people “with mental or physical disabilities when their conditions would be exacerbated by such measures.”¹⁷ Solitary confinement is a fundamentally harmful practice. As Lachs and Hurley have noted:

Solitary confinement is ‘strikingly toxic to mental functioning’ and can cause long-term, irreversible harm (Grassian, 2006, p. 354). As documented by Walsh et al. (2020), the cruel impact of the practice has been recognised in case law from Australia and across the world.

Solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody noting the ‘extreme anxiety suffered by Aboriginal prisoners committed to solitary confinement’ and that it is ‘undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention’.¹⁸

VALS has consistently encouraged Corrections Victoria to acknowledge that the pandemic has negatively impacted all people in detention, albeit to differing degrees. In addition to restrictive regimes of lockdowns, quarantine and isolation, discussed directly above, there has been suspension of therapeutic, educational and cultural programs, access to facilities, including libraries and exercise yards, and personal visits, the anxiety in relation to contracting COVID-19 in the high-risk environment of prison, and the distress of not being able to support and be with their families during this difficult time. VALS is of the view that EMDs should be available in relation to these additional hardships.

More information in relation to the restrictions in Victorian prisons can be found in VALS’ COVID-19 Recovery Plan, [Building Back Better](#), and our [submission to the Public Accounts and Estimates Committee COVID-19 Inquiry](#).

Critical Health and Safety Benefits of EMDs During the Pandemic – Reducing the Prison Population

While legislative measures providing for EMDs provide a means by which to mitigate the effects of the increased deprivation of liberty and disruption of routine, they have the further benefit of mitigating the potential spread of COVID-19 in prisons generally. People held in custody or prisons and remand centres are more vulnerable and at considerably greater risk of contracting COVID-19. EMDs provide an administrative and structured means by which to reduce the population of Victorian prisons and mitigate the risks of transmission if an outbreak should occur in prison. Such reduction has been recognised as a key public health measure¹⁹ which protects persons in custody as well as prison staff, and the broader community. EMDs granted during the COVID-19 pandemic are an important preventative measure.

¹⁵ Rule 44 of the Mandela Rules.

¹⁶ Rule 45(1), *ibid*.

¹⁷ Rule 45(2), *ibid*.

¹⁸ Lachs and Hurley, ‘Why practices that could be 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)

¹⁹ Reinhart and Chen, Association of Jail Decarceration and Anticontagion Policies with COVID-19 Case Growth Rates in US Counties, *Journal of the American Medical Association*, 2 September 2021, accessed 23 September 2021. <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783680>

Throughout the pandemic, VALS has been calling for a human rights compliant, health driven response. VALS has not been alone in encouraging the Victorian Government to take immediate steps to mitigate the risk of COVID-19 to people in detention, including by implementing effective decarceration strategies. Social distancing in prisons is impossible, and an outbreak of COVID-19 would impact not only those who are detained, but the broader community. In other jurisdictions prison outbreaks of COVID-19 have driven transmission in the broader community, as incarcerated people are released and prison workers return to their families and communities after their shifts. Decarceration is an essential component of a comprehensive and responsible public health response.

International experts have urged governments to take preventive measures and release people who are detained. We have heard a consistent message from them all; the World Health Organization, the UN, the UN High Commissioner for Human Rights, the UN Office on Drugs and Crime, the Joint UN Programme on HIV/AIDS, and the UN Committee on the Rights of Persons with Disabilities. Getting control of an outbreak of COVID-19 in detention will be much more difficult than preventing an outbreak in the first place, and the health of the people in custody is inextricably linked to the health of all Victorians during this pandemic. We have seen the devastation that comes with the spread of COVID-19 in detention in countries such as the USA.²⁰ VALS has emphasised that Aboriginal people in custody are particularly vulnerable to COVID-19, with many people having underlying medical conditions. One of the currently existing mechanisms in place, to which we have referred the Government, has included EMDs.

While Victorian legislation providing for EMDs was arguably envisaged as a measure to maintain security and good order in short-term situations or circumstances such as industrial disputes and fires, the beneficial impacts of the administrative measures during the current COVID-19 pandemic cannot be understated

Primary Reason Put Forward for the Proposed Amendments - Community Safety

Suspended and Reduced Programs and Personal Visits – Impact on Recidivism

The argument that early release of persons serving federal sentences in Victorian prisons would prevent them from undertaking and completing rehabilitation and reintegration programs²¹ fails to take into account the extensive impact of COVID-19 restrictive measures implemented by Corrections Victoria, discussed above.

VALS also draws the Committee's attention to the evidence that incarceration itself increases the risks of reoffending. This will only be compounded, given the suspension and reduction of rehabilitation and reintegration programs in Victorian prisons, as well as the suspension of family visits.

²⁰ Nerita Waight, Urgent action on prisons to avoid COVID-19 deaths (12 August 2020), available at <https://indigenoux.com.au/urgent-action-on-prisons-to-avoid-covid-19-deaths/>

²¹ Ibid., at 7.

Control Orders and Other Post-Sentencing Options

It has been argued that granting EMDs makes it more challenging to make applications for control orders and other post-sentencing options.²² These challenges are certainly not insurmountable. They can be managed with timely and accurate communications regarding the discretion to grant EMDs that rests with Corrections Victoria. This should already be the practice.

Federal Offences Considered by the Explanatory Memorandum

VALS notes that the *Explanatory Memorandum* focuses entirely on “terrorists, child sex offenders and drug traffickers” who have received sentence reductions due to being granted EMDs under s.58E of the *Corrections Act 1986*.²³ These examples are used to support the arguments that community safety will be jeopardised should people serving sentences for these offences be released from prison before the end of their original sentence. None of the examples relate to people who are serving sentences other types of federal offences that would, in fact, indicate a person’s early release would be a low risk to community safety. Example offences include:

- s. 135.2 of the *Criminal Code Act (CCA)*: Obtaining financial advantage (through dishonesty)(benefit fraud) - 12 months.
- s. 132.6 of CCA: Making off without payment (for goods and/or services provided by Commonwealth entity if the person knows immediate payment is due) - 2 years.
- s. 29(1) of CCA: Graffiti (destruction of or damage to Commonwealth real property) - up to 10 years.

It is critical to note that people who will be impacted by this legislation will include people who were welfare recipients and understated their income. Using the examples of terrorism, child sex offending and drug trafficking misrepresents the impact of the proposed amendments and does not accurately describe the group of people who are incarcerated for federal offences.

Recommendation 1. The amendments to the *Crimes Act 1914 (Cth)* proposed in the *Crimes Amendment (Remissions of Sentences) Bill 2021 (Cth)* should not proceed further to a vote on the floor of Commonwealth Parliament.

The Commonwealth Government should recognise the importance of remissions, including Emergency Management Days (EMDs), noting particularly:

- they provide an incentive for incarcerated people to maintain good behaviour in situations and circumstances that result in further deprivation or disruption of their liberties and activities, which, in turn, helps to ensure security and good order within the custodial environment in such instances;
- they play a compensatory role for the physical and psychological impacts of increased deprivation and disruption of routine incarceration;

²² Ibid., at 7.

²³ Explanatory Memorandum at 5-6.

- they play an important role in reducing prison populations during the pandemic, with decarceration being an essential component of a comprehensive and responsible public health strategy.

Retrospective Application – Human Rights Implications

VALS is particularly concerned by the Bill’s purported revocation of EMDs that have already been granted to persons who will still be serving federal sentences at the time of the commencement of the proposed amendments.

Arbitrary Detention

While the Explanatory Memorandum provides a more detailed position as to why “federal offenders... no longer hav[ing] the opportunity to receive remissions that may be available to prisoners in the state or territory in which they are incarcerated” does not amount to arbitrary detention,²⁴ the distinct circumstances of people who have already been granted EMDs under Victorian law are not properly considered.

In its Human Rights Scrutiny Report of the CAB, the Parliamentary Joint Committee on Human Rights noted that the retrospective application of the prohibition on remission and reductions to federal sentences among persons still serving federal sentences upon commencement of the proposed amendments to s.19AA of the *Crimes Act 1914* needed further consideration. The report stated:

questions remain as to whether the measure is arbitrary, noting that it does not only apply prospectively to ensure future grants of remissions will not apply to federal offenders, but also applies retrospectively so that those who have already had remissions applied will no longer receive them. The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill.²⁵

VALS agrees with the above position. Unless the below considerations, recognised in the *Memorandum* as arising from the *International Covenant on Civil and Political Rights (ICCPR)*, are properly addressed in relation to both future and retrospective implications, the Bill must not proceed. This is particularly the case for the proposed retrospective application.

Article 9 regulates, rather than prohibits, detention—it is only ‘arbitrary’ detention that is prohibited. Arbitrariness includes the elements of inappropriateness, injustice and lack of predictability. Detention is not arbitrary where, in all the circumstances, it is reasonable, necessary and proportionate to achieving a legitimate objective. Limitations on the right to liberty are permissible if in accordance with procedure established by law, and if the limitation is reasonable, necessary and proportionate.²⁶

²⁴ ‘federal offenders cannot assume or expect that they will be granted remissions under state or territory laws. For example, EMDs available under Victorian laws are not a right afforded to prisoners, and prisoners are not guaranteed to be granted EMDs for which they are eligible to be considered. Further, statutes providing for executive release of prisoners may validly change from time to time.’

²⁵ Parliamentary Joint Committee on Human Rights, *Crimes Amendment (Remissions of Sentences) Bill 2021, Report 11 of 21*, [2021] AUPJCHP 110, at 1.52-1.53.

²⁶ Explanatory Memorandum, para. 19.

Cruel and Inhuman Treatment

Article 16(1) of the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), ratified by Australia, places an obligation on State parties to ‘undertake to prevent in any territory under its jurisdiction... acts of cruel, inhuman or degrading treatment or punishment.’ The importance of preventing such treatment within detention facilities is emphasised in the preamble of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which was ratified by Australia on 21 December 2017.

The proposed Bill will require persons who have already been granted EMDs, and have been informed that their sentences will be reduced, to have their full sentences effectively reinstated, through no act or omission on their part. This will undoubtedly have a negative psychological impact on people serving federal sentences. It could certainly be argued that the retrospective revocation of EMDs granted to persons still serving federal sentences could constitute cruel or inhuman treatment, inflicting severe psychological suffering. This is likely to be exacerbated in the context of the extensive pandemic restrictions in place across prisons, and people’s fear of contracting COVID-19 in a high transmission risk environment.

Charter of Human Rights and Responsibilities Act 2006

VALS draws the Committee’s attention to the following, noting that the above obligations under international law are reflected in Victoria’s Charter:

- s21(2): “A person must not be subjected to arbitrary arrest or detention.”
- S10(b): “A person must not be treated or punished in a cruel, inhuman or degrading way.”

Recommendation 2. In the event the *Crimes Amendment (Remissions of Sentences) Bill 2021 (Cth)* does proceed to vote on the floor of Commonwealth Parliament, the current amendments to s. 19AA of the *Crimes Act 1914 (Cth)* should be revised to ensure that people serving federal sentences prior to the commencement of the amendments continue to be eligible for remissions under the relevant state legislation.