Submission to Victorian Law Reform Commission

Review of Recklessness

Victoria Legal Aid

Acknowledgement of country

This submission was written on the land of the Wurundjeri people of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present. We also acknowledge the strength and resilience of all First Nations people who today are still arrested and imprisoned at rates far higher than other Australians.

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Overview

Victoria Legal Aid (**VLA**) welcomes the opportunity to respond to the Victorian Law Reform Commission's (**VLRC**) Issues Paper on the definition of recklessness.

Our feedback is informed by our extensive practice experience in the Magistrates' Court and higher courts in Victoria, including in our 15 offices throughout the state.

Based on this practice experience, VLA is of the view that no change to the definition of recklessness is needed for offences against the person. In our experience, we have not been able to identify unfair or inappropriate outcomes arising from the current definition.

There are some differences in the language and words used to express the threshold of recklessness across the *Crimes Act 1958*. In our experience, these differences also do not cause difficulties for juries that are resulting in unfair or inappropriate outcomes. Rather, in our experience, the different mental and physical elements of each criminal offence are considered on their individual merits and evaluated against the evidence available.

More broadly, in considering whether to reform the criminal justice system, VLA considers it is vital that any potential changes are grounded in:

- a strong and identifiable evidence base that demonstrates the need for change
- careful consideration and identification of the potential consequences of any changes
- recognition of the need to avoid legislative change where possible to prevent unintended consequences or increasing complexity of laws.

Based on our experience, we consider there is insufficient evidence that warrants a change to the threshold of recklessness.

In addition, we are concerned that should a lower threshold of recklessness apply to offences against the person, there is a real risk that more people would be exposed receiving a mandatory minimum term of imprisonment. Such a change would risk further contributing to the disproportionate impacts and harms to First Nations people, young people and other marginalised communities caused by mandatory sentencing.

Should the VLRC ultimately form the view that a change to the threshold of recklessness is warranted, VLA would welcome further consultation on its form.

If you have any questions about this submission, please do not hesitate to contact Kirstie Twigg, Manager of Strategic Advocacy and Policy [redacted]

About Victoria Legal Aid

In 2020–21, VLA provided legal assistance to over 74,670 unique clients from our 15 offices across Victoria. This was a 16 per cent reduction in the number of people we usually help each year due to the COVID-19 restrictions and courts adjourning matters.

Legal assistance ensures fairness and helps ordinary people understand and participate in the legal system. It also helps to address the reasons people are in the justice system and works to address underlying causes to prevent recidivism.

As the image at the end of the submission shows, our clients are diverse and experience high levels of social and economic disadvantage. More than half of our clients are currently receiving social security and more than a third receive no income at all. More than a quarter of clients disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds. These circumstances increase the likelihood and severity of legal problems and make it more difficult for people to navigate the system without help.

As the largest criminal defence practice in Victoria, VLA's legal services are provided through specialised programs including Youth Crime, Summary Crime, Indictable Crime and Chambers.

VLA's Summary Crime Program is our largest service delivery program and is the first point of entry to the criminal justice system for most of our clients. We provide duty lawyer assistance at all Magistrates' Courts throughout Victoria and assist people in a range of proceedings, including where offences against the person are charged.

Through our Indictable Crime Program, we assist and represent legally aided clients in indictable proceedings and provides duty lawyer services to clients appearing at filing and committal mention hearings at Melbourne Magistrates' Court.

The extent and breadth of our work gives VLA significant practice experience in the application of recklessness to summary and indictable offences throughout Victoria.

1. Are there problems with the current common law definition of recklessness as it applies to offences against the person in Victoria? If so, please explain what these problems are and provide case studies or examples.

In VLA's practice experience, we do not see examples that indicate the recklessness standard is set unreasonably high. Rather, the current approach is appropriate, particularly in light of the criminal penalties that apply to these offences.

The definition of recklessness in Victoria has been settled for some time. It can be understood and applied by juries clearly. Our lawyers report that we are unaware of appeals arising from difficulties in the application of the recklessness standard, for example, where a jury may be required to apply the recklessness standard (including where phrased differently) to a range of offences. We are also not anecdotally aware of any recent appeals arising from difficulties in appropriately directing juries in how to apply the recklessness threshold.

We have also not been able to identify examples of recurring unfair or inappropriate outcomes arising from the existing definitions of recklessness that suggest a change in the threshold is needed.

The issues paper outlines several scenarios which seek to outline how the existing threshold may not be capable of application in the hypothetical case studies. In our view, it is difficult to draw a concluded view that they result in an unfair or inappropriate outcome.

This is because, like many factual circumstances, there may be a range of different offences that could be considered, charged, and ultimately proceeded with as the most appropriate charge for finalisation.[1] The case studies do not highlight what charges would be open to be proceeded with, nor what may be the most appropriate charge for the factual circumstances. Given this, we do not consider the case studies are demonstrative of unfair outcomes.

In our experience, it is relatively common for multiple offences to apply to an alleged factual circumstance, and these issues are worked through as the matter progresses so that the most appropriate offence (taking into account all of the relevant elements) is identified.

[1] The *Policy of the Director of Public Prosecutions for Victoria* (*Director's Policy*) requires that for a prosecution to proceed, there must be a reasonable prospect of conviction and it must be in the public interest. Office of Public Prosecutions Victoria, Policy of the Director of Public Prosecutions for Victoria (10 March 2023) 2 <http://www.opp.vic.gov.au/Resources/Policies>

2. **Should the Crimes Act be amended to include a definition of recklessness applicable to offences against the person in Part I, Division 1(4)? If so, what definition should be adopted? For example, foresight of**
    - **probable harm (with or without an objective element)**
    - **possible harm (with or without an objective element)**
    - **a substantial risk that the accused is not justified in taking**
    - **some other definition.**

3. **What are the strongest arguments for or against adopting:**
    - **a legislative definition of recklessness for offences against the person in Part I, Division 1(4) of the Crimes Act?**
    - **the particular definition you support?**

On the basis we do not see significant issues in the practical operation of the existing definition, we do not see a need for a legislative definition of recklessness to be adopted.

However, should the VLRC consider that there is sufficient evidence to warrant a change, we consider that codifying the existing threshold would be most appropriate. However, we note there are risks in translating common law to a legislative threshold that there may be unintended consequences, or that the test may not be applied in the same way. Given these potential risks, we recommend that no changes are made.

In undertaking its inquiry and considering what, if any, change to the definition of recklessness should be made, we would encourage the VLRC to consider and be guided by underpinning principles of law reform to ensure our criminal justice system is fair and operates effectively.

While there is not a set of commonly agreed frameworks or tools that clearly distinguish whether a law reform or change should be made, we note some broad principles have been identified that provide helpful guidance. This includes that law reform should only occur where:

- there is a sufficiently serious and identifiable harm that should be addressed
- less punitive, or regulatory approaches or other public policy tools cannot address that harm.[2]

We note it has also been highlighted that approaches to law reform should also avoid legislative change when it is not necessary, including by:

- considering all available implementation options and avoiding legislation unless it is necessary
- laws should not be unnecessarily complex in achieving the overall aim.[3]

Should the VLRC consider that a change in the definition is warranted, VLA would appreciate the opportunity to further discuss the form of the threshold. For instance, we consider the inclusion of an objective element would have particular importance should the VLRC consider the definition of 'possible harm' should be adopted.

[2] Luke McNamara, 'In Search of Principles and Processes for Sound Criminal Law-Making' *Criminal Law Journal* (2017) 41(3), 5.
[3] Commonwealth Government, *Causes of Complex Legislation and Strategies to Address These* (Factsheet) <https://www.ag.gov.au/sites/default/files/2020-03/causes-of-complex-legislation-and-strategies-to-address-these.pdf>

4. For the purposes of charging offences that have recklessness as an element, are you aware of any problems with obtaining relevant evidence about the alleged offender's state of mind?

The issues paper outlines that the VLRC are exploring whether there are any difficulties in proving the mental element of offences involving the recklessness threshold. It is highlighted that the prosecution will usually rely on statements provided by an accused in a police interview, and skilled interviewing is required to elicit relevant information about an accused's state of mind.

In our practice experience, all criminal offences that include a mental element will necessarily require either admissions, or inferences to be drawn about an accused person's state of mind from available evidence. This can include relying on inferences from evidence including conduct or behaviours, words spoken, the surrounding circumstances or conduct that occurs after the alleged offence.

This process of drawing inferences is inherent to the investigation and proof of criminal offences across the criminal justice system – it is not limited to offences involving a recklessness threshold. Only offences involving the application of strict liability or where the mental element involves a purely objective standard of behaviour do not require such inferences to be made.

As a result, we consider there is nothing specific to the threshold of recklessness that is different from the evidence necessary to provide mental element for all offences in the criminal justice system. On this basis, we consider this would not form a sufficient basis to justify a change to the recklessness threshold.

5. What are your views on the approach and reasons for using 'probably' to express the fault element for recklessness in Part I, Division 1(8A)-(8F) of the Crimes Act?

The VLRC's issues paper highlights that various offences within the *Crimes Act 1958* take different approaches to the articulating the test of recklessness.

For example, some sexual offences (but not all) use the expression 'probably' rather than 'reckless'. For other offences, such as culpable driving causing death, the expression recklessness is supported by additional statements that guide the interpretation such as 'that is to say, consciously and unjustifiably disregarding a substantial risk'.

In our experience, we do not see examples of the current expression of recklessness causing unfair or inappropriate outcomes in our practice. We also note sexual offences in particular have been the subject of significant consideration, recommendations and reforms in recent years.[4]

The differences in the approach to recklessness reflect the broader diversity and tailored approach to the construction of:

- offences of a similar nature (e.g. sexual offences, driving offences, injury offences)
- the particular elements that should be applied to different type of conduct.

In our view, the different expressions of recklessness across offences represents that each offence across the Crimes Act also contains various different elements depending on the conduct that is criminalised, as well as reflecting how various elements intersect together.

[4] See, eg, Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, October 2021).

Each offence must also respond to the unique factors of its context. While VLA cannot comment on the exact reason for the legislature's choice of language, as the VLRC highlights in its issues paper, a reason could include a desire for juries to be able to easily understand the term. This may be a particularly important factor in the creation of sexual offences, because issues of complexity are more likely to be important in these trials.[5]

In our experience, the different definitions of recklessness do not cause difficulties for juries to apply. Each offence requires juries to apply the elements of each offence to factual circumstances. This will differ for each offence – including across all offences that may be on an indictment. In our experience, there are not difficulties or specific concerns arising either about the ability to clearly instruct juries on the relevant elements to be applied or how they are interpreted.

6. What are the advantages/disadvantages of ensuring that recklessness is consistently defined:
- **in the Crimes Act?**
- **in other Victorian statutes?**

As noted in our response to question 5.

7. If you support legislating a definition of recklessness for offences against the person, should the common law continue to apply in relation to that definition or should its operation be excluded?

As noted earlier, VLA does not support legislating a definition of recklessness.

We note that should the VLRC consider that a new definition is appropriate, if it is not consistent with the existing common law, then the common law should be excluded for clarity.

8. If a new statutory definition of recklessness for offences against the person is adopted that incorporates a lower threshold, will the associated penalties and minimum terms of imprisonment need to change, and if so, how?

Yes. Should a lower threshold of recklessness apply to offences against the person, associated penalties and minimum terms of imprisonment should be lowered.

While there are a range of factors that are relevant to setting the maximum penalty for an offence, importantly, a maximum penalty should:

- be proportionate to the gravity of the offending
- reflect the degree of fault, or moral culpability required for the offence to be established.[6]

If the recklessness threshold were lowered, to for example, foresight of 'possible harm', we consider the moral culpability required for the offence to be established has also been lowered – warranting a reduction in the maximum penalty.

While these are not the only factors that are determinative of the maximum penalty for an offence, in our view, they do suggest that if the requisite culpability for recklessness were lowered, this should be reflected in the maximum penalty.

[5] Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, October 2021) [20.5].
[6] Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes* (Issues Paper, October 2010) 11 citing Sentencing Task Force, Victoria, Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General (written for the Sentencing Task Force by Richard G Fox and Arie Freiberg) (1989) [46], [55].

Offences involving a mandatory term of imprisonment

The issues paper highlights that some offences against the person can involve requirements to impose custodial sentences, standard sentences and minimum terms of imprisonment.[7]

Should a lower threshold of recklessness apply to offences against the person, we consider there is a real risk that more people would be exposed the risks of receiving a minimum term of imprisonment. This includes, for example, the offence of recklessly causing injury to an emergency, custodial or youth justice worker on duty, which has particularly narrow exceptions to imposing the minimum sentence of six months imprisonment.[8]

VLA does not support mandatory sentencing and is particularly concerned that lowering the threshold of recklessness would risk continuing to contribute to the disproportionate impacts and harm to First Nations people, young people and other marginalised communities.

The Australian Law Reform Commission, and others, have documented the 'serious miscarriages of justice' that can arise from mandatory sentencing, including:

> *"disrupt employment and family connections … and diminish the prospects of people re-establishing social and employment links post release. Significantly, mandatory sentencing prevents the court from taking into account the individual circumstance of the person, leading to unjust outcomes."*[9]

Victorian Courts have also highlighted the unjust outcomes that arise from the requirements to impose sentences of imprisonment, and the resulting impacts on young people:

> *Mandatory minimum sentences are wrong in principle. They require judges to be instruments of injustice: to inflict more severe punishment than a proper application of sentencing principle could justify, to imprison when imprisonment is not warranted and may well be harmful, and to treat as identical offenders whose circumstances and culpability may be very different. Mandating imprisonment in this way must be seen to reflect the ascendancy of a punitive sentiment and a disregard of the demonstrated benefits of non-custodial orders and — in cases like the present — the vital importance of rehabilitating young offenders.*
>
> *In our view, mandatory sentencing reveals a profound misunderstanding of where the community's best interests lie, especially in the sentencing of young offenders. As has been pointed out repeatedly, sending young people to adult gaol is almost inevitably counterproductive.*[10]

These comments are consistent with our own practice experience.

Consistent with the views expressed by the Court of Appeal, a statutory review undertaken of emergency worker harm offences in 2022 has found that the minimum periods of imprisonment are applied in most cases.

The review found that 79% of cases in which emergency worker harm laws applied resulted in the application of the statutory minimum (29%) or longer than the statutory minimum (50%). In twenty-

[7] *Crimes Act 1958* (Vic) s 15B; *Sentencing Act 1991* (Vic) s 10.
[8] Sentencing Act 1991 (Vic), ss 5(2GA), 44A.
[9] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report, 2017) citing a submission from the National Aboriginal and Torres Strait Islander Legal Service, 276.
[10] *R v Buckley* [2022] VSCA 138.

one percent of cases, special reasons were found to impose a sentence below the statutory minimum.[11]

9. If a new statutory definition of recklessness for offences against the person is adopted, what will be the consequences for the justice system (for example, impacts on prosecution, conviction or incarceration rates)?

The extent of impact on the justice system will depend on the legislative threshold chosen, and whether it is lower than the existing standard.

Factors that may affect consequences for the justice system would also be affected by whether there is a reduction in the maximum penalties and/or changes to sentencing schemes.

Accordingly, it is difficult to say what impacts will arise and their extent. We consider these matters would require careful consideration should the definition of recklessness be changed.

10. What guiding principles could be used to review the use or proposed use of recklessness as a fault element in Crimes Act offences other than offences against the person?

In general, the guiding principles identified by the Victorian Law Reform Commissions provide a useful frame to support consideration of how the definition of recklessness should be applied.

However, we consider that some guiding principle should be reframed or removed.

The guiding principle relating to reducing inconsistency in the Crimes Act and across Victorian legislation does not provide useful guidance. We consider that consistency should not be the only or primary consideration given to the creation of fault elements, as offences should be appropriately tailored to the conduct that is being criminalised and reflect the interactions between elements of offences (as explored above).

Further, the guiding principles that how recklessness is used should be consistent with everyday usage should be removed. We consider the term 'recklessness' is unlikely to have a consistent or broadly accepted similar meaning. The intent of this principle is that the definition should be capable of being applied clearly and easily, which is already addressed in other guiding principles.

[11] Victorian Government, *Sentencing of Emergency Worker Harm Offences – Review into the operation and effectiveness of the Sentencing Amendment (Emergency Worker Harm) Act 2020* (Report, 2022) 5.

Our clients

Service snapshot

The number of clients we worked with and services we delivered reduced overall in 2020–21 due to COVID-19 restrictions, courts adjourning matters and the challenges of providing services remotely.

74,670
total number of unique clients
16% down on 2019–20

40,486
number of grants of legal assistance
11% down on 2019–20

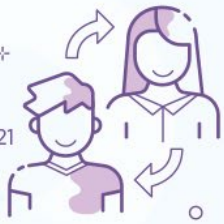
In-house
5,787 – 14% of total services delivered
Private Practitioners
34,086 – 84% of total services delivered
Community Legal Centres
643 – 2% of total services delivered

57,049
number duty lawyer services
45% down on 2019–20

Inhouse
36,499 – 64% of total services delivered
Private Practitioners
8,697 – 15% of total services delivered
Community Legal Centres
11,853 – 21% of total services delivered

Family Dispute Resolution Service

1,245 conferences in 2020–21
26% increase on 2019–20



Supporting remote service delivery

To provide continuity of services while working remotely and reduce the need for staff and clients to attend the office, we continued our transition to digital file management and digital service records.

Digital mail room

15,785 documents digitised in 2020–21
157,906 pages digitised

Legal Help

112,939 total requests for help responded to

41,267 number of webchat services
54% increase on 2019–20

46,211 number of webchat requests answered, or
89% of incoming requests

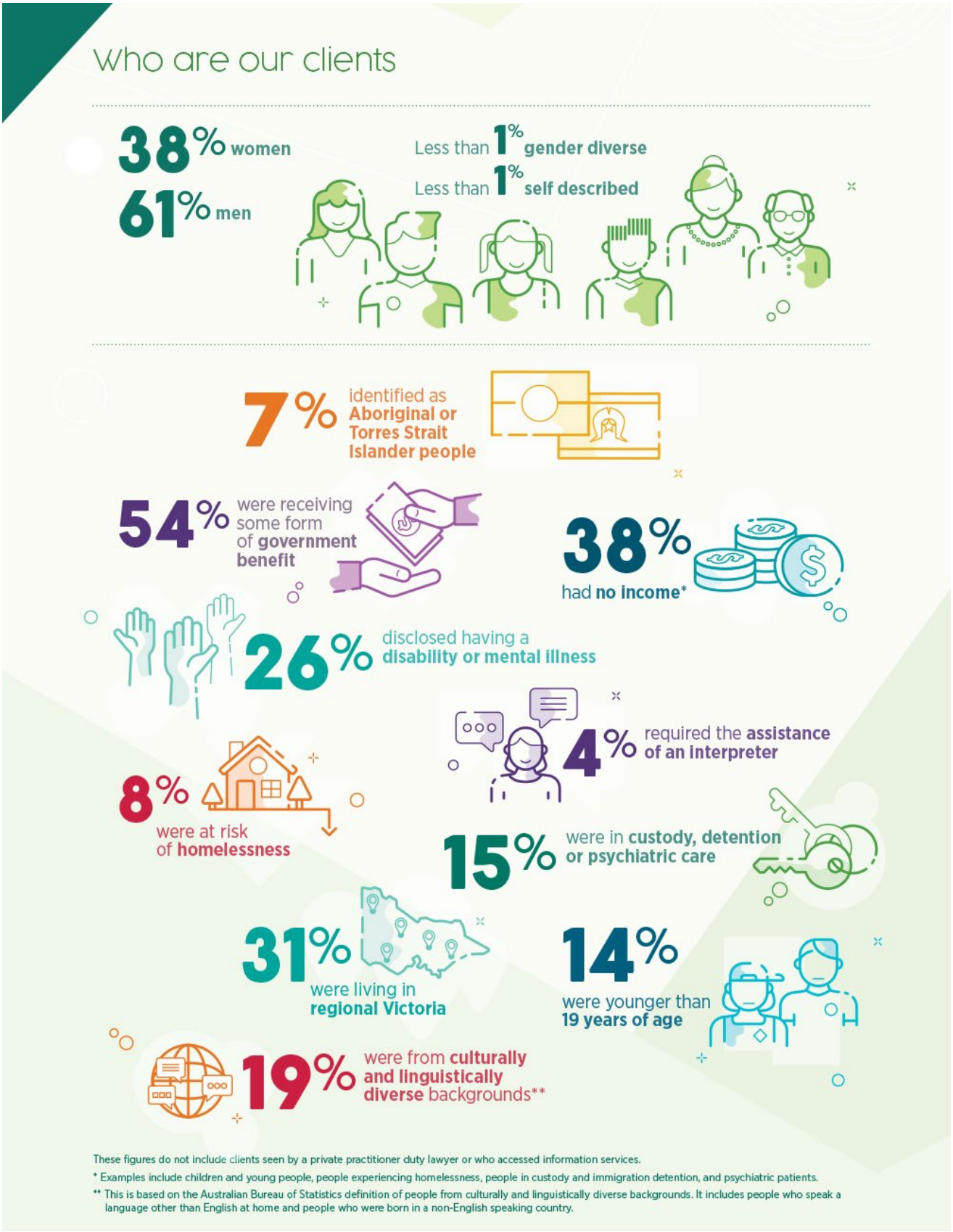
147,631 number of incoming calls
6% decrease on 2019–20

71,672 number of calls answered, or
49% of incoming calls

Family violence priority channels

3,395 number of webchats answered, or
90% of the **3,791** total incoming

6,804 number of calls answered, or
59% of the **11,470** total incoming


Who are our clients
38% women
61% men
Less than 1% gender diverse
Less than 1% self described
7% identified as Aboriginal or Torres Strait Islander people
54% were receiving some form of government benefit
38% had no income*
26% disclosed having a disability or mental illness
4% required the assistance of an interpreter
8% were at risk of homelessness
15% were in custody, detention or psychiatric care
31% were living in regional Victoria
14% were younger than 19 years of age
19% were from culturally and linguistically diverse backgrounds**
These figures do not include clients seen by a private practitioner duty lawyer or who accessed information services.
* Examples include children and young people, people experiencing homelessness, people in custody and immigration detention, and psychiatric patients.
** This is based on the Australian Bureau of Statistics definition of people from culturally and linguistically diverse backgrounds. It includes people who speak a language other than English at home and people who were born in a non-English speaking country.