



## **Inquiry into Victoria's Criminal Justice System by the Legislative Council's Legal and Social Issues Committee (the Inquiry)**

### **SJ4YP Response to the Inquiry**

#### **1. About Smart Justice for Young People**

Set up in 2011 by Youthlaw, Smart Justice for Young People (SJ4YP) is a coalition of leading social services, health, legal and youth advocacy organisations, calling for evidenced-based and effective responses to justice involved children and young people. The coalition provides a coordinated and expert voice on youth justice initiatives and reforms so that children and young people will have the best chance to succeed in life, supported by their families and in their communities.

#### **2. SJ4YP priorities**

- A.** A commitment to community-led, place-based initiatives to tackle disadvantage and address other drivers of child and adolescent offending and to strengthen children and families;
- B.** Reducing the disproportionate representation of some groups of young people – including those of culturally and linguistically diverse, Aboriginal and Torres Strait Islander, or out-of-home-care backgrounds – in the criminal justice system, and
- C.** Raise the age of criminal responsibility to at least 14,
- D.** Treatment in youth detention, including:
  - Improving the health outcomes for children in detention and released from detention
  - Eliminating the use of solitary confinement and minimising group isolation in youth detention
  - Support of full OPCAT implementation for oversight of youth detention and treatment of children detained.

#### **3. SJ4YP Response to the Inquiry**

Below we respond to the four terms of reference (TOR) of the Inquiry from the perspective of both child and youth offending (under 25 year olds).

While many members will be submitting their own submission to the Inquiry the following members support this collective response:

Anglicare Victoria  
Dr Diana Johns, Senior Lecturer in Criminology, Melbourne University  
CatholicCare Victoria  
CMY Centre for Multicultural Youth  
Federation of Community Legal Centres Vic  
Flemington Kensington Community Legal Centre Inc along with the Police Accountability Project  
Inner Melbourne Community Legal  
Jesuit Social Services  
Melbourne City Mission (MCM)  
Oz Child  
The Kimberley Foundation  
Victorian Aboriginal Legal Service  
VCOSS  
WEstjustice  
Youth Affairs Council Victoria (YACVic)  
Youthlaw  
YSAS Youth Support - Advocacy Service

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#### 4. Summary of recommendations

In relation to TOR 2 we ask the Committee to consider and recommend:

- a) A joined up cross government approach to crime prevention that supports young Victorians to lead safe and fulfilling lives
- b) A “justice reinvestment” strategy to reduce the number of children at risk of offending
- c) Build on what we know works to reduce offending and divert children away from the legal system, including cautions, diversion and restorative justice
- d) End criminalisation and overrepresentation in the justice system of Aboriginal children and young people, culturally & linguistically diverse children & young people and young people with experiences of family violence and the out-of-home-care system
- e) Prioritise early support, intervention and prevention, as the most effective ways to promote health and wellbeing and reduce child and youth offending
- f) A commitment to ensure that all children and young people are supported to access a quality education
- g) Strengthen opportunities for job readiness and connection to employment
- h) Ensure Victoria’s response to the pandemic does not criminalise young people via COVID fines
- i) Minimise Victoria Police members’ interactions with children and young people and ensure members are accountable for fair, professional conduct within the scope of their roles and appropriately resource independent oversight of complaints of police misconduct
- j) Victoria raise the age of criminal responsibility from 10 to at least 14
- k) Victoria legislate to ensure no child under 16 years can be imprisoned in youth justice detention.
- l) Detention must be a measure of absolute last resort and for the shortest amount of time possible
- m) Urgent reform to bail laws so that young people are only exposed to remand in rare and exceptional circumstances, and only young people over the age of 16 years
- n) Children and young people in youth justice detention facilities must be treated respectfully, humanely and with a focus on rehabilitation, including prohibiting solitary confinement, implementing Government’s obligations pursuant to OPCAT and the provision of an equivalent standard of healthcare to what is available in the community,
- o) A differentiated response to young people under 25 years in the adult prison system, including by expanding the dual track system to include young adults aged 21 to 25.

#### TOR 1: Analysis of factors influencing Victoria’s growing remand and prison populations

##### High numbers of children in detention and on remand

The number of children in detention in youth justice in Victoria is increasing. In 2019/2020, there were 623 children in prison during the year, compared to 560 in the previous year; this increase is despite the impacts of the COVID-19 pandemic and a decrease nationally in the number of children in prison over the same period.<sup>1</sup>

As you are aware, Victoria’s youth detention facilities have a high number of children and young people on remand, averaging at almost 60% of the population in youth detention.

According to the Sentencing Advisory Council (SAC) *Children Held in Remand in Victoria* Report (2020) the number of un-sentenced children held in custody (on remand) on an average day in Victoria more than doubled between 2010 and 2019, from 48 to 99.

In 2019-20 some 602 children aged 10-17 years in detention were un-sentenced, of these children, 29 were aged 10-13 years.<sup>2</sup>

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<sup>1</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2019-2020*, Australian Government, data table s80b; see also Australian Institute of Health and Welfare, *Youth justice in Australia 2018-2019*, Australian Government, data table s80B.

<sup>2</sup> *Youth justice in Australia 2019-20* Australian Institute of Health and Welfare: 2019-20 <https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/overview>

Many children on remand are of Aboriginal and/or Torres Strait Islander descent.

Most of these children are on remand in relation to charges for non-violent offences and do not present a risk to public safety.

Two-thirds of children held on remand did not ultimately receive a custodial sentence.<sup>3</sup>

Placing a young or vulnerable person in custody unnecessarily interrupts their work, housing arrangements, education or other supports that can help to prevent them offending. It can have a criminogenic effect. The SAC report provides further evidence that each contact a child has with the justice system exacerbates the risk of further contact, trapping children in the revolving door of youth justice. Even a short spell in prison on remand can increase the likelihood of future offending.

Young people on remand are not eligible for the support services and rehabilitation programs available to those sentenced.

Changes to the bail laws in 2017 and 2018 flowing from the Coughlan Bail System Review have triggered an increase in the number of children and young people detained on remand.<sup>4</sup>

We acknowledge that bail reform is a politically sensitive issue in Victoria and that the reforms made occurred in the context of heightened public concern following the Bourke Street tragedy on 20 January 2017. However, far too often, vulnerable children and young people have borne unintended consequences of these legislative changes.

These changes included a presumption against bail for many offences, the 'reverse onus test'. Instead of police having to show cause why bail should be denied, a suspected offender now has to demonstrate a 'compelling reason' why it should be granted.

Children and young people have difficulty getting bail because they have to show 'compelling reasons' or 'exceptional circumstances', even though they are not facing a term of imprisonment and don't pose any significant risk to the community.

While the breach of bail offence has been withdrawn for under 18 year olds, the treatment of breaches of bail conditions for older young people means their matters quickly escalate to far harder bail tests even though breaches are minor or technical in nature and result from young people's disadvantage.

There is "no evidence that harsher bail laws reduce youth crime, but there is an abundance of evidence that creating a presumption against bail means more children behind bars for behaviour that a court has not even found them guilty of."<sup>5</sup>

Children who are refused bail are exposed to a custodial environment, which places them at further risk of stigmatisation and increased likelihood of experiencing physical and psychological harm.<sup>6</sup> They experience disruptions to their family life, social and emotional development, education and employment. Custodial settings expose children to restrictive practices, such as strip searching, use of force and solitary confinement, and to an environment where spread of COVID-19 is a high risk. These factors are exacerbated for Aboriginal and Torres Strait Islander children.<sup>7</sup>

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<sup>3</sup> Sentencing Advisory Council Children Held in Remand in Victoria (2020) is dedicated to this topic:

[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-09/Children\\_Held\\_on\\_Remand\\_in\\_Victoria.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-09/Children_Held_on_Remand_in_Victoria.pdf)

<sup>4</sup> McMahon, No bail, more jail? 1; K Derkley, Lawyers warn of bail crisis, Law Institute Journal website, 2018, accessed 17 February 2021.

<sup>5</sup> Change The Record, *Queensland youth justice 'reform' a dangerous step backwards for children and the community*, (10 February 2021), accessible: [changetherecord.org.au/change-the-record/posts/queensland-youth-justice-reform-a-dangerous-step-backwards-forchildren-and-the-community](https://changetherecord.org.au/change-the-record/posts/queensland-youth-justice-reform-a-dangerous-step-backwards-forchildren-and-the-community).

<sup>6</sup> M Ericson and T Vinson, Young people on remand in Victoria: balancing individual and community interests, Jesuit Social Services, Richmond, 2010, 18–20.

<sup>7</sup> Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (June 2021), 455.

## **Systemic overrepresentation of cohorts of young people in criminal justice system**

In Victoria, children who live in residential care, Aboriginal children, children from culturally and linguistically diverse (CALD) sub-communities particularly affected by structural inequities and social exclusion e.g. African Australian and Maori and Pasifika children, and girls with complex needs, are disproportionately represented in the youth justice system, and in custody in particular.

### ***Policing***

#### *Concerns about profiling*

Aboriginal and CALD children are also predominately living in over-policed communities, contributing to their disproportionate criminalisation and imprisonment. A myriad of service data provides evidence that Aboriginal and culturally diverse young people, especially from African and Pasifika backgrounds, are significantly over-represented in police contacts in Victoria. Furthermore, discrimination in the use of discretionary powers draws them disproportionately into the courts and criminal justice systems.

Children in residential care are still having unnecessary contact with police, which too often escalates to arrests and charges, and triggers a cycle of criminalisation.

We know young people are often stopped and charged by police because of their perceived age, colour, race or because they are from a family who are known to police, rather than because of their behaviour or a reasonable suspicion held by the police officer. Of particular concern has been the apparent differential treatment of Aboriginal and Torres Strait Islander young people, who have been found to be less likely than non-Indigenous young people to be cautioned or referred to diversionary processes<sup>8</sup>.

#### *Predictive and pre-emptive policing*

Predictive policing technologies that rely on technology-based data collection and analysis have the propensity to produce biased, discriminatory and racialised effects. Effective crime prevention aims to disrupt motivations of offending. However, in allocating police resources into interventions with non-offending youth and a prioritisation of intelligence-gathering and data-mining, police interactions with young people perpetuates further contact with police and entrenchment into the CJS.<sup>9</sup>

#### *Proactive Policing*

Offender management and other proactive policing strategies including Youth Specialist Officers (YSO's) designed to prevent crime also having an adverse criminogenic effect on young people already at risk of systemic overrepresentation. These circumstances include (but are not limited to) obtaining personal information about young people, from them and their support workers:

- without providing adequate (or any) disclosure about the purposes of collection, use and storage of this information;
- without informing young people or their support workers about their rights in relation to whether or not they are required/compelled to provide the information, the basis for that and the consequences of not providing the information (if any);
- by attending Department of Health and Human Services (DHHS) Care Team meetings without the consent of the young person who is the subject of the care team meeting;

YSOs were established quite specifically to focus on repeat, high-impact offending young people, with a view to engaging with them and preventing further offending. It is our observation and that of community service providers we work with that some YSOs are targeting low offending cohorts of vulnerable young people including children in out of home care. We are concerned about this latter practice as it is well established that over-policing of vulnerable young people presents a high risk of engagement with the criminal justice

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<sup>8</sup> Productivity Commission, *Report on Government Services 2021*, Part C, S.6. <https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/archive/police-services>

<sup>9</sup> Jefferson, BJ 2017, 'Predictable policing: Predictive crime mapping and geographies of policing and race', *Annals of the American Association of Geographers*,

system. The latter practice in our opinion also directly undermines the implementation of the recently released *Framework to reduce criminalisation of young people in residential care* to which Victoria Police is signatory.

Similar concerns have been raised in NSW in relation to the STMP including a misunderstanding of the scope of power, for example home visits and searches without reasonable suspicion; lack of transparency and accountability, blurring of the role and relationship of the police as law enforcers vis a vis the policed cohort and biased risk assessments,<sup>10</sup>

#### *COVID fines for breaches of CHO directions*

We have seen young people from communities that were already being over-policed, being more likely to be fined with breach of CHO direction: including homeless people, those people already in contact with the justice system and children living in residential care facilities, people living in public housing, migrant communities, LGBTQIA+ persons, people with disabilities, and people experiencing poor mental health.

Of the 40,000 or so COVID fines issued, we know;

- Aboriginal and Torres Strait Islander people, people of Sudanese and South Sudanese background , and young people have all been disproportionately fined.
- Aboriginal and Torres Strait Islander people were five times more likely than non-Indigenous people to be fined under the directions.
- More than 1,500 fines - of the same amounts as adult fines – have been issued to children.
- People living in lower socio-economic areas were twice as likely to be fined.

#### *Criminalising children and victims of family violence*

Current responses to family violence used by young people are often propelling young people into contact with the law who are may be victims of family violence themselves, or who may be living with significant disability but received inadequate community support.<sup>11</sup>

The initial decision by police about the nature of a legal response, as well as whether to proceed with one at all, has major consequences for a child's life. Police have a role to play in ensuring that affected families get the intervention that they need.

However, legal responses generally 'individualise' the problem to the child/ accused/respondent, when it is the whole family that needs help. In many cases the legal process puts the label of "perpetrator" on a child alone, where multiple members of a family were using violence, a label which can then propel adolescents down the path of criminalisation and involvement with youth justice systems, which can continue to compound and entrench harm.

Where police refer a matter to court, and it's processed through the family violence court system with an interim Family Violence Intervention Order imposed, the adolescent has been subjected to a legal response to their behaviour within a family violence framework.<sup>12</sup>

#### **Youth justice**

On an average day in Youth Justice, 18 per cent of young people identify as Aboriginal, 39 per cent identify as culturally and linguistically diverse Australians and 44 per cent identify as non-Aboriginal Australian.<sup>13</sup>

From an overall perspective, sixty-seven per cent of children in custody had history of trauma, abuse or neglect in 2019/20 and 68 percent were suspended or expelled from school. 54 percent had a history of drug or alcohol abuse, 48 percent present with mental health issues and 27 percent had history of self-harm or

<sup>10</sup> The NSW Police's Suspect Targeting Management Plan (STMP) to Effectively Reduce Crime, Oct 31 2020, lexology.com

<sup>11</sup> See: Positive Interventions for Perpetrator of Adolescent violence in the home (2020) (PIPA Report) Centre for Innovative Justice RMIT

<sup>12</sup> Ibid PIPA Report p67

<sup>13</sup> Youth Justice Strategic Plan 2020-30 (p9) [https://files.justice.vic.gov.au/2021-06/Youth%20Justice%20Strategic%20Plan\\_o.pdf?\\_w94l\\_m\\_xFOW1JgmS9ZGDbUAq8MozRXJ=](https://files.justice.vic.gov.au/2021-06/Youth%20Justice%20Strategic%20Plan_o.pdf?_w94l_m_xFOW1JgmS9ZGDbUAq8MozRXJ=)

suicidal ideation and 38 percent had cognitive difficulties which affect their daily functioning and 4 percent are NDIS participants.<sup>14</sup>

The statistics indicate that there are cultural, socioeconomic and health factors which cut across these children and there are those that are unique. The COVID-19 pandemic also highlighted that many children and young people who contracted the disease live in disadvantaged postcodes, public housing, rural areas and areas with well-known, persistent and embedded intergenerational disadvantage.<sup>15</sup>

From the perspective of Aboriginal children and young people, they endure the unique and tragic results of dispossession from their ancestral land, colonisation, intergenerational trauma as a result of the successive removal of children from kin and sustained post-colonisation policies of assimilation.

The recently released *Our Youth Our Way* Report<sup>16</sup> by the Commission for Children and Young People delves into painstaking detail regarding the circumstances of Aboriginal children in the youth justice system and their systemic overrepresentation.

*In 2019/2020, 15 per cent of children under youth justice supervision in Victoria (community and detention) were Aboriginal and Torres Strait Islander children, yet they comprised only 1.5 per cent of the Victorian population aged 10 to 23 years.*<sup>17</sup>

From the perspective of Aboriginal and CALD children, some are more likely than their peers to be exposed to risks of justice engagement, including structural disadvantage, poverty, social and economic exclusion, racism, educational and health disadvantage, and insecure housing, contributing to their overrepresentation in the youth justice system.<sup>18</sup>

In terms of children in out of home care, a 2019 *Crossover kids* report by the Sentencing Advisory Council<sup>19</sup> confirmed that Aboriginal children are significantly overrepresented among children known to both the child protection and youth justice systems and that children who experience residential care and similarly overrepresented in the youth justice system. The report found that 10% of the 4,230 Victorian children aged 10-17 in out-of-home care on 30 June 2017 were in residential care and that 58% of the 213 sentenced or diverted children in out-of-home care on 30 June 2017 were in residential care (2019 SAC factsheet- 'Crossover Kids': Vulnerable Children in the Youth Justice System Report 1). The Youth Parole Board 2019/20 report also noted an increase in the number of children in custody from the previous year who were subject to a child protection order (see page 33).

Finally, girls and young women make up a small percentage of young people who offend. However, they often present with complex needs and significant trauma histories, including abuse, family violence, self-harm and higher rates of mental illness. This is especially the case with Aboriginal girls and young women, who have higher levels of complexity and vulnerability through socioeconomic disadvantage and exposure to the effects of intergenerational trauma.<sup>20</sup>

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<sup>14</sup> Youth Parole Board Annual Report 2019-20 [https://files.justice.vic.gov.au/2021-06/YPB\\_Annual\\_Report\\_2020\\_0.pdf?SHqqjA7ryiQQ2Wf6PFxLC05\\_cOvFXsh](https://files.justice.vic.gov.au/2021-06/YPB_Annual_Report_2020_0.pdf?SHqqjA7ryiQQ2Wf6PFxLC05_cOvFXsh), and Youth Justice Strategic Plan 2020-30, p 9 (op cit)

<sup>15</sup> Interim Report PEAC Inquiry into the Victorian Government's response to the COVID-19 pandemic [https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19\\_Inquiry/Report/PAEC\\_59-07\\_Vic\\_Gov\\_response\\_COVID-19\\_Interim\\_report.pdf](https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Report/PAEC_59-07_Vic_Gov_response_COVID-19_Interim_report.pdf)

<sup>16</sup> Commission for Children and Young People, *Our Youth, Our Way* (9 June 2021) <https://ccyp.vic.gov.au/upholding-childrens-rights/systemic-inquiries/our-youth-our-way/>

<sup>17</sup> Commission for Children and Young People, *Our Youth, Our Way* (9 June 2021) [ccyp.vic.gov.au/news/our-youth-our-way-report-released/](https://ccyp.vic.gov.au/news/our-youth-our-way-report-released/).

<sup>18</sup> Armytage & Ogloff, 2017; McAtamney & Morgan, 2009; CMY, 2014; Youth Parole Board, 2019) [https://www.sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-](https://www.sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-children-youth-justice-system-report-3)

<sup>19</sup> *Crossover kids* report by the Sentencing Advisory Council [children-youth-justice-system-report-3](https://www.sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-children-youth-justice-system-report-3)

<sup>20</sup> Youth Strategic Plan 2020-30, p32 and Sentencing Advisory Council *Children Held in Remand in Victoria* (2020) is dedicated to this topic: [https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-09/Children\\_Held\\_on\\_Remand\\_in\\_Victoria.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-09/Children_Held_on_Remand_in_Victoria.pdf)

## **Systems and social problems**

Despite considerable investment and effort over many years, we have been unable to adequately respond to known drivers of youth crime and overrepresentation - while the faces and names of over-represented children and young people have changed over time, their negative and racialised experiences and outcomes in our justice system have persisted.

We have been focused on trying to 'fix' individual young people or groups of young people or their families or their communities through disconnected and fragmented services (or short-term partnerships) and responses that have been unable to sustain their successes or to address the complex systems and structural conditions that hold these problems in place (Armytage & Ogloff, 2017). We have persisted with these approaches despite the evidence, which shows that problems not only involve individuals or their communities but that the "problems are also a function of how institutions behave, of policy decisions, of the way markets operate, and even of public attitudes and cultural norms".

## **TOR 2. Strategies to reduce rates of criminal recidivism**

### **a) A joined up cross-government approach supporting young Victorians to lead safe & fulfilling lives**

We welcome recent steps taken by the Victorian Government towards overcoming policy responses that are fragmented and siloed and lack coordination across government and community

We are looking to both the Victorian Youth Strategy (being drafted) and the Crime Prevention Strategy to provide coordination and a unified approach. The Crime Prevention Strategy promotes a shared responsibility across government, councils, community, business and other key sectors to address risk factors for offending, build on successful initiatives that are already underway and support Victoria's recovery from the pandemic. In doing so, the Strategy builds on existing investment in a number of key reforms across government in family violence, mental health support, housing, education, employment and community policing, that support Victorians to lead safe, secure and fulfilling lives.<sup>21</sup>

### **b) A justice reinvestment approach that promotes community led, place-based projects to tackle disadvantage and address other drivers of offending**

SJ4YP calls for a "*justice reinvestment*" strategy to reduce the number of children at risk of offending.<sup>22</sup> The approach involves supporting and investing in communities to identify, develop and implement their own local, place-based solutions tackling localised economic and social risk factors underlying the root causes of crime, preventing young people entering the criminal justice system in the first place (and reducing reoffending).

Over time, these approaches will help reduce the number of children at risk of offending and becoming adults who offend, save public funds spent on the criminal justice system, policing and prisons. These savings can be redirected to disadvantaged communities.

In essence the Crime Prevention Strategy adopts a *justice reinvestment* like approach. It has developed a framework for government to partner with communities and key organisations to deliver local solutions that address the underlying causes of crime and improve safety for all Victorians. It will support and invest in

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<sup>21</sup> Crime Prevention Strategy p5 Figure 1 [https://files.crimeprevention.vic.gov.au/2021-06/DJCS\\_Crime-Prevention-Strategy\\_A4\\_2021\\_V8.pdf?VersionId=dgzH9O4\\_KVwaoop4DPoMUFwfulm79G5m](https://files.crimeprevention.vic.gov.au/2021-06/DJCS_Crime-Prevention-Strategy_A4_2021_V8.pdf?VersionId=dgzH9O4_KVwaoop4DPoMUFwfulm79G5m)

<sup>22</sup> A report by SJ4YP *Investing in Communities not prisons*, (2018) called on the Victorian Government to develop a 10 year crime prevention plan that adopts a justice reinvestment approach., including setting up a justice reinvestment fund, investing in Victorian place-based justice reinvestment pilots and providing communities with the resources and authority they need to ready themselves for a justice reinvestment approach

Victorian communities to innovate and address issues at a local level to prevent crime before it occurs. It recognises that communities hold the expertise, knowledge and ideas to design the solutions that are right for them.

### **c) Build on what we know works to reduce offending and divert children away from the legal system**

All reforms moving forwards should be focused on diverting children away from the legal system at every opportunity and reducing young people's further progression into the youth and adult justice systems.

When young people do have contact with police and the criminal justice system, we must ensure there are effective cautioning and diversion processes are in place to reduce further offending, including through the Children's Court Youth Diversion Service.

Victoria Police members make daily decisions to divert children and young people away from the criminal justice system wherever possible using cautions, referrals, diversion and summons, rather than charging, arresting or bailing young people. There are members of Victoria Police who do a good job diverting young people via warnings, cautions and referrals, however a significant number are reluctant to caution or refer some children to diversion, and this can be the most determinative factor in whether a child or young person who comes into contact with the youth justice system.

The system should prioritise alternatives to formal proceedings, including cautions and diversion and make it more onerous to proceed by way of charge (at the moment it is the other way around), and ensure young people have equitable access to caution and diversion.

#### ***Cautions***

Welcome recent policy changes by Victoria Police to the Victoria Police Manual including to:

- a) provide clarification that young person can be cautioned on more than one occasion
- b) instruct that prior criminal history does not exclude a young person being eligible for a caution
- c) removal of the requirement for a young person to admit an offence to be eligible for a caution

We also support:

- the introduction of a legislative presumption in the new Youth Justice Act in favour of cautions ((pre-charge) with no offences excluded and no limits on the number of cautions.
- If a caution is not administered, the officer should compile a 'notice of failure to caution' demonstrating in writing the reasons for why it is 'inappropriate to caution' and seek authorisation from a Senior Sergeant or higher rank to charge.
- the provision of a caution does not lead to increased surveillance or a process for information gathering by police and should not lead to onerous conditions/expectations being placed on the young person.

#### ***Diversion***

Effective diversion practices encourage young people to take responsibility for their behaviour and understand the harm they have caused, while supporting them to address the underlying causes of their offending.

There is much to gain from improving and strengthening then many diversion initiatives delivered by community agencies across Victoria, designed to keep local young people out of the criminal justice system.

The Children's Court Youth Diversion Service (CCYDS) introduced in January 2017, aims to ensure consistent access to diversion for young Victorians in contact with the Children's Court.

- All young people should be provided consistent and equitable access to diversion
- The Government must substantially invest in and promote culturally appropriate and specific diversion programs for all Victorian young people of different cultural groups delivered by community agencies.

- Diversionary programs should be available at all stages of the youth legal system, from apprehension to final disposition, and opportunities for children to access diversion should be as broad as possible.
- Access to diversion should not be restricted by prior offending or by categories of offending, be dependent on an admission of guilt, or be conditional on the prosecutor's consent.
- The requirement for Victoria Police to consent to a diversion should be removed. A Magistrate should be able to make orders decide based on arguments from prosecution and defence as to why diversion is appropriate /inappropriate. This should include removing the requirement for prosecutorial consent to diversion in section 356D(3)(a) of the *Children, Youth and Families Act 2005*.

***Make restorative justice processes available as an option earlier in the youth justice system***

Victims of offences committed by children and young people must be supported and assisted to participate in the criminal justice process, and have meaningful involvement of victims early (so they get the necessary throughcare and after care), and not feel locked out and unsupported in the criminal justice system

Restorative practices bring together those involved or affected by an offence to discuss how the young person can find fair and safe ways to repair and heal social harm done. The process allows for reflection, learning and opportunity of understanding to take place, to repair harm and restore relationships where possible. Restorative justice approaches – including culturally appropriate practices – should be available earlier in the justice system, and also in out of home care and education settings. These processes should run in compliment with therapeutic interventions aimed at rehabilitating these children and young people. Restorative practices must always and only be used in a way that is trauma responsive, culturally responsive, and responsive to children and young people's cognitive and speech and language needs.

**d) End criminalisation and overrepresentation in the justice system of Aboriginal children and young people, culturally & linguistically diverse children & young people and young people with experiences of family violence and the out-of-home-care system**

The ideal strategy involves an analysis of the system itself and how it contributes to recidivism.

We need to hold systems accountable for preventing further harm rather than focusing solely on making individuals responsible for their actions

We must acknowledge that systemic racism is a key driver of over-representation of Aboriginal children and young people, and young people from culturally and linguistically diverse backgrounds. By acknowledging it, we must commit to ending systemic racism and eliminating its underlying causes and conditions.

We need to address the systemic inequalities within the Victorian criminal justice and youth justice systems by:

- Implementing the recommendations in the *Our Youth Our Way* Report (CCYP 2021)
- Dismantling and prohibiting pre-emptive and predictive policing strategies to avoid racialised outcomes that particularly impact young people.
- Mandating the collection and regular publication of data on police stops and searches without charge.
- Directly involving community groups with disproportionately high rates of contact with the youth justice system in leading the design and delivery of appropriate initiatives that address that community's particular drivers of increased risk of contact with the youth justice system.
- Facilitating the right of Aboriginal peoples to self-determined solutions in the youth justice system and the right of children to grow up safe and strong in their culture, families and communities, as outlined in the Koorie Youth Council's (2018)<sup>23</sup> *Ngaga-Dji* Report.
- Implementing the changes suggested in the Sentencing Advisory Council's (2019)<sup>24</sup> *Crossover Kids Report*, to enable the youth justice system to more holistically and effectively address the causes of offending of children who have had contact with the child protection system.

<sup>23</sup> <https://www.ngaga-djiproject.org.au/>

<sup>24</sup> <https://www.sentencingcouncil.vic.gov.au/publications/crossover-kids-vulnerable-children-youth-justice-system-report-3>

- Implementing and monitoring the *Framework to reduce criminalisation of young people in residential care*<sup>25</sup> (the framework), to promote trauma informed responses to challenging behaviours of young people in care. The framework aims to reduce the unnecessary and inappropriate contact of young people in residential care with the criminal justice system. The framework establishes a commitment across government departments, Victoria Police and residential care service providers.
- Decision making principles should be introduced in the CYFA that introduce presumptions in favour of bail, diversionary and community-based sentencing outcomes to explicitly acknowledge and actively address, the chronic overrepresentation of specific groups of children, including Aboriginal children, in youth detention wherever safe and practicable.
- Improving police response to family violence by adolescents and prevent their criminalisation by directing police practice to address vulnerabilities of adolescents using violence, with flexible and tailored responses that are supported by expert service referrals and support, and specialist risk assessment. For example, when Victoria Police are called in relation to a potential (adolescent violence in the home incident, the Victoria Police Code of Conduct should clearly provide the option of referring the matter to Orange Door or another form of Support and Safety Hub for risk assessment and triage as an alternative to applying for an FVIO.<sup>26</sup>

#### **e) Prioritise early support, intervention and prevention, as the most effective ways to promote health and wellbeing and reduce child and youth offending**

An increased focus on investment in early intervention and prevention programs is required to reduce the level of risk factors and enhance protective factors, thereby preventing criminal behaviour, avoiding contact with the criminal justice system altogether, and/or addressing the contributing causes underlying the child's offending.

The most effective way to promote health and wellbeing is to provide support as early as possible in a child's life, as well as at critical points of their life. A critical focus is maintaining a young person's connection to family, community and education. In order to thrive, children and young people require a supportive, loving and safe home environment, equitable access to meaningful education and learning opportunities, employment and training, and income security. Working with families and supporting them to address the risk factors that can lead a child to contact with the youth justice system including health, disability and social determinants is equally imperative.

Effective measures to prevent crime therefore require a specific focus on the underlying drivers of crime. For children and young people, the reasons for contact with the criminal justice system are often multiple and complex. Focus on helping a child to emotionally and socially develop in positive ways, to avoid further criminalisation, and continue and embed trauma-informed approaches.

We need to assume shared accountability and responsibility for offending: Government (as State parents), education, health, social services and communities all have a role to play in supporting families and children. There must be collective responsibility for offending. A child should not be held solely accountable for their behaviour as their behaviour is often a symptom of the failings of these institutions and they are reliant on adult caregivers.

Holistic and integrated systems are required to address the various social, health, wellbeing and personal issues that contribute to the risk of a young person engaging in criminal behaviour.

<sup>25</sup> <https://providers.dfh.vic.gov.au/framework-reduce-criminalisation-young-people-residential-care>

<sup>26</sup> Positive Interventions for Perpetrator of Adolescent violence in the home (2020) (PIPA Report) Centre for Innovative Justice RMIT

## **f) A commitment to ensure that all children and young people are supported to access a quality education**

There is a clear link between disengagement (or detachment) from school and/or poor school attendance and a child's entry into the youth justice system. Nearly 70 percent of young people in custody were suspended or expelled from school. (Youth Parole Board Annual report 2019-20)

Victoria needs a commitment to ensure that all children and young people are supported to access a quality education, especially those who are at risk of disengaging and detaching<sup>27</sup> and in doing so close off the school to prison pipeline.

A multitude of individual and systemic factors can lead to disengagement and detachment, including identity issues, learning difficulties, lack of financial resources, family dysfunction, mental illness, relationships with teachers and peers, bullying and discrimination. These students either disengage, disappear or, worse still, are silently ushered out of the 'back door' by school leaders concerned about the reputational impact.

It is time to take serious coordinated action to prevent our most vulnerable young people from falling through the cracks. We must incentivise mainstream schools in today's narrow and competitive educational environment to take early intervention to prevent disengagement and detachment, support for teachers and schools to identify and intervene for those students at risk, rehabilitate detached and disengaged young people and increased investment in psychology, mental health and allied support services.

We must also lower the age of Navigator, a program supporting disengaged young people to return to education and learning, from twelve to ten years to support vulnerable children to re-engage with education at the critical transition period from primary to secondary schooling.

## **g) Strengthen opportunities for job readiness and connection to employment**

Communities that are disproportionately represented in the criminal justice system, particularly Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities, face compounding discriminatory barriers in terms of access to employment.

SJ4YP welcomes the introduction of a spent conviction scheme as it will promote rehabilitation and restorative responses and the removal of discriminatory barriers impacting the most vulnerable in our community. Critically this scheme may reduce the damaging impact and barriers to education, employment and housing faced by some of the most vulnerable members of our community based on their historical criminal records. The scheme will give young people the opportunity to rehabilitate and offers a vital second chance to adults who have previously committed an offence and provide an opportunity to set their lives on a better path.

However, members still hold some concerns regarding waiting periods, offences excluded and access to legal support to make applications to have convictions spent.

It is vital that those who experience disadvantage and exclusion in the job market are specifically targeted and supported to strengthen their connection to employment both now, and beyond.

Young people are being hardest hit by job loss as a result of COVID-19 and will suffer the long-term labour market consequences of economic downturn. It is also anticipated that refugees and migrants will experience these effects disproportionately. The intersection of being both young, and from a migrant or refugee background, creates a double disadvantage in this labour market crisis. However long before this crisis hit, young people from refugee and migrant backgrounds faced persistent barriers, including racism and

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<sup>27</sup> Dr Jim Watterston, Dean of the University's Melbourne Graduate School of Education, *Those Who Disappear: The Australian education problem nobody wants to talk about* and YACVic report: *Suspensions and Expulsions in Victorian Schools* (2016) <https://www.yacvic.org.au/assets/Documents/SUB-School-exclusions-in-Victoria-2016.pdf>

discrimination, when looking for work; barriers that contribute to long-term unemployment, underemployment or insecure employment.

The increased barriers to employment that many young people, especially from refugee and migrant backgrounds will face as a result of COVID-19 requires a tailored response in order to level the playing field, support them to reach their full potential and enable them to make meaningful contributions to the community. Without intervention, many young people from refugee and migrant backgrounds are at serious risk of being crowded out of the labour market.<sup>28</sup>

#### **h) Ensure Victoria's response to the pandemic does not criminalise young people via COVID fines**

We know across our agencies that young people with excessive and unpayable COVID-19 fines are experiencing heightened stress and anxiety during arguably the most difficult period of their lives. Many of these crippling fines of \$1652 are for minor, often inadvertent breaches of health directions. These fines come on top of all the challenges COVID-19 has presented including job loss, disrupted education and social isolation. If unpaid, there is a grave risk that these young people will be pulled into the criminal justice system.

As of 10 May 2021, 30,473 COVID-19 fines remained unpaid, of which:

- 1,575 fines issued related to children under 18 years of age
- 10,394 fines issued related to young people aged 18-25 years

Victoria needs an alternative solution to deal with these fines that have been issued or else we will see the dire impact on the communities' mental health for years to come.

- Adopt a public health response to compliance with COVID-19 CHO directions including warnings education, and providing support for compliance, instead of fines.
- Any fines issued to reflect a young person's capacity to pay
- Any fines issued be waived if there are ground of financial hardship
- Any COVID fines already issued to be reviewed to facilitate the early exit of young people with special circumstances or vulnerabilities and without capacity to pay from the infringements system.

#### **i) Minimise Victoria Police members interactions with children and young people and ensure members are accountable for fair, professional conduct within the scope of their roles**

As mentioned earlier we need to be wary of predictive policing technologies that rely on technology-based data collection and analysis have the propensity to produce biased, discriminatory and racialised effects. In allocating police resources into interventions with non-offending youth and a prioritisation of intelligence-gathering, police interactions with young people perpetuates further contact with police and entrenchment into the criminal justice system.<sup>29</sup>

Time and time again we have seen young people stopped on the street and asking for their names, addresses and where they are going, targeted on the basis of their race, age and association.

It can be confusing for young people. Police may be friendly, but obviously they won't be your friend if you commit a crime, they will charge you. We need to acknowledge that at the end of the day police members are law enforcement agents. Police are not social workers or counsellors and cannot be relied on by young people in the same way.

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<sup>28</sup> CMY Locked Down and Locked Out report (2020) <https://www.cmy.net.au/wp-content/uploads/2020/06/Locked-Down-and-Locked-Out-Report-June-2020-final.pdf> (p5)

<sup>29</sup> Jefferson, BJ 2017, 'Predictable policing: Predictive crime mapping and geographies of policing and race', Annals of the American Association of Geographers,

This is why SJ4YP does not support the reintroduction of the police in schools program. If the aim of such engagement is to develop trust between police and young people, this would be better achieved through police being better trained to interact with young people like de-escalating conflict, unconscious bias and understanding the ages and stages and impact of trauma.<sup>30</sup>

There is also confusion of about different roles of police members as they relate to young people. For example, Youth Specialist Officers are not necessarily focusing their efforts on repeat, high impact offending young people, as is set in their role descriptions. Rather we have observed some YSOs targeting low offending cohorts of vulnerable young people including children in out of home care who, already over-policed and at high risk of engagement with the criminal justice system.

We call on YSOs roles and practices to be reviewed in light of the *Framework to reduce criminalisation of young people in residential care*, to which Victoria Police is signatory.

As you know some young people are mistreated by police. Yet Victoria lacks an adequate accountability for police or PSO misconduct and as yet has not implemented the recommendations in the Independent Broad-Based Anti-Corruption Commission Parliamentary Committee (the 'IBAC Committee') *Inquiry into the external oversight of police corruption and misconduct in Victoria* (2018)<sup>31</sup>

Many young people are reluctant – or don't realise they have a right – to complain about treatment by police officers. They also regularly say they don't want to make a complaint because they did not think it will do anything, and/or they are fearful of might happen to them if they do.

- Investigations of allegations of police misconduct, criminality and human rights abuses must be conducted by an agency that is not only institutionally independent of police but also practically, culturally and politically independent
- Provide proper resourcing for the independent oversight of complaints of police misconduct and deaths in police custody.

#### **j) Victoria must raise the age of criminal responsibility from 10 to at least 14**

In Victoria children as young as 10 years old are arrested, prosecuted and detained in youth jails. Criminalising behaviour of young and vulnerable children with emotional, mental and intellectual immaturity creates a cycle of disadvantage that can entrench children in the criminal justice system. Engagement with the youth legal system compounds disadvantage, trauma and increases the potential for further offending by children.

We are not talking about a large number of children in the Victorian system: 29 children aged 10-13 years were in Victorian detention during the year 2019-20.

Evidence shows the younger a child is when they have their first contact with the criminal justice system, the higher the chance of future offending and the more likely they are to have long term involvement in crime.<sup>32</sup>

The Victorian Sentencing Advisory Council (2016) report, *Reoffending by Children and Young People in Victoria*, found that with each one year increase in a child's age at first sentence, there is an 18 per cent reduction in the likelihood of reoffending. Children who are forced into contact with the criminal justice system at a young age are less likely to complete their education and find employment and are more likely to die an early death. Our current system traps children who would otherwise grow out of the behaviours and benefit from social interventions and support.

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<sup>30</sup> <https://www.abc.net.au/news/2021-05-05/victoria-police-bringing-police-officers-back-into-schools/100097956>

<sup>31</sup> [https://www.parliament.vic.gov.au/images/stories/committees/IBACC/report/IBACC\\_58-06\\_Text\\_WEB.pdf](https://www.parliament.vic.gov.au/images/stories/committees/IBACC/report/IBACC_58-06_Text_WEB.pdf)

<sup>32</sup> Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria*, (2016) State Government of Victoria, 31.

To break this cycle, the Victorian Parliament must legislate to raise the age of criminal responsibility from 10 to at least 14 years old and prevent unnecessary harm to young and vulnerable children through early exposure to criminogenic aspects of the formal legal system.

The current age of criminal responsibility in Victoria is just 10 years old. This very low age of criminal responsibility is out of step with medical science on child development and criminological evidence. Research shows that children’s brains are still developing throughout these formative years where they have limited capacity for reflection before action.<sup>33</sup> The current minimum age is also out of step with international human rights standards. The United Nations Committee on the Rights of the Child has confirmed that the minimum age should be set no lower than 14 years old, and the median age of legal responsibility worldwide is 14 years old.<sup>34</sup> The United Nations Committee has also recommended that laws be changed to ensure that children under the age of 16 years “may not legally be deprived of their liberty” and locked up in prison.

The Commissioner for Children and Young People (CCYP) recommended the age of criminal responsibility be raised to 14, and that children under 14 years be provided with therapeutic, culturally based, child-centred and coordinated responses to anti-social behaviour in Aboriginal children under 14 years.<sup>35</sup>

No child under 14 years should be exposed to the criminal legal system to deal with challenging behaviours. Governments can help children to remain in school and help families to provide the care and support children need. Victoria has the resources, the programs and the know how to provide intensive support, education and family and health assistance to help vulnerable children reach their potential and thrive. It is about building on the responses and support services we have. (see diagram below)

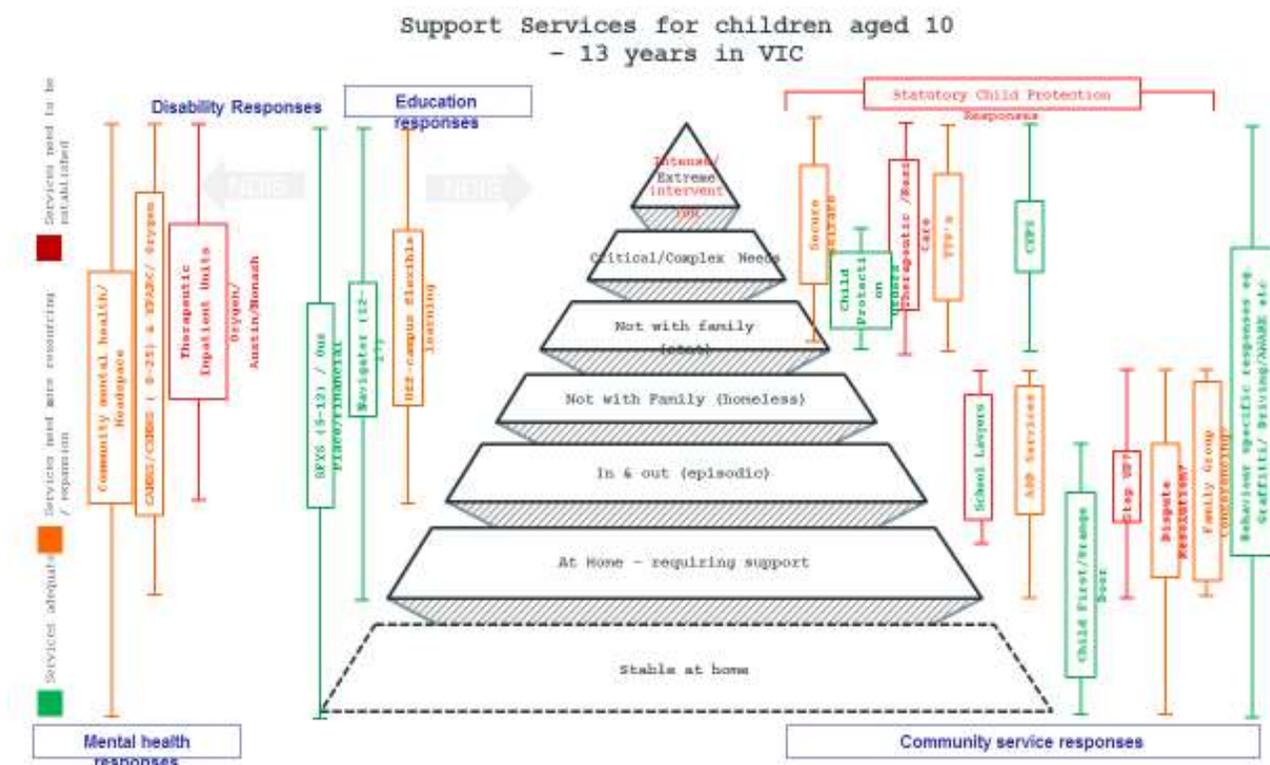


Diagram courtesy of WEstJustice

While proposed measures in the Victorian Youth Strategy provide steps to strengthen diversion and early intervention opportunities for young people under 14, and the Youth Justice Bill (currently being drafted)

<sup>33</sup> Judge Andrew Becroft, 'From Little Things, Big Things Grow' *Emerging Youth Justice Themes in the South Pacific*, 5 referring to Sir Peter Gluckman, *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence*, (2011) Wellington, Office of the Prime Minister's Science Advisory Committee, 24.

<sup>34</sup> Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).

<sup>35</sup> Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (June 2021), 24.

provides specific responses to support the diversion and rehabilitation of children aged 10-14 years, raising the age of criminal responsibility is the only way to ensure that children of this age stay out of the criminal legal system.

We understand the Youth Justice Bill, rather than legislate to raise the age of criminal responsibility, is likely to codify *doli incapax*. *Doli incapax* (incapable of crime) is an old, common law presumption that the child lacks the capacity to be criminally responsible for their actions. In order to rebut the presumption, the prosecution must prove that at the time of the offence, the child knew that their actions were seriously wrong in the moral sense. However, codification of *doli incapax* presumption **is not** a sufficient safeguard for children aged 10 to 13 years. In practice it is applied inconsistently and can be difficult for children to access or resource quality expert assessments/evidence, particularly children in regional and remote areas.

#### **k) Victoria legislate to ensure to no child under 16 years can be imprisoned in youth justice detention**

We support the United Nations Committee on the Rights of the Child's recommendation that laws be changed to ensure that children under the age of 16 years "may not legally be deprived of their liberty".<sup>36</sup>

We support the CCYP's call for the Victorian Parliament to enact amendments to the *Children, Youth and Families Act 2005* to prohibit the Children's Court from sentencing a child under the age of 16 to youth justice custody and amendment to the *Sentencing Act 1991* to prohibit an adult court from sentencing a child under the age of 16 to youth justice custody.<sup>37</sup>

#### **l) Detention must be a measure of absolute last resort and for the shortest amount of time possible**

Youth prisons are unsafe and harmful environments that often exacerbate and compound the disadvantage and trauma experienced by children and young people.

There is also no evidence that custodial orders reduce offending,<sup>38</sup> and, in fact, time in custody often results in a cycle of reoffending, remand and custodial sentences that is underpinned by the system's failure to meet children's underlying needs.<sup>39</sup>

Custody should only be a last resort for young people, whether at the time of arrest, when considering bail or at sentencing stage. It is critical that youth justice facilities are small, home-like centres, which are close to family and community and have an overarching emphasis on education and re-socialisation.

Therapeutic, rehabilitative, educational settings based in or close to children's communities, where they can be helped to establish or strengthen connections with family, community, education and other pro-social resources, can support children's growth and positive development.

#### **m) Urgent reform to bail laws so that young people are only exposed to remand in rare and exceptional circumstances**

We call for the Government to urgently reform bail for children to reduce numbers in detention un-sentenced. In 2019-20 some 602 children aged 10-17 years in detention were un-sentenced, of these children, 29 were aged 10-13 years (AIHW: 2019-20). This rate is unacceptably high.

The Youth Justice Strategic Plan 2020 -2030 commits to reducing remand numbers by analysing the factors contributing to current rates of remand. This remand-drivers project aims to prevent young people entering remand where it is appropriate and safe to do so.<sup>40</sup>

<sup>36</sup> Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).

<sup>37</sup> Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (June 2021), finding 4 and recommendations 8 - 10.

<sup>38</sup> Armytage and Ogloff, *Youth justice review and strategy*, Executive summary, 15.

<sup>39</sup> Sentencing Advisory Council, *Reoffending by children and young people in Victoria*.

<sup>40</sup> [https://files.justice.vic.gov.au/2021-06/Youth%20Justice%20Strategic%20Plan\\_o.pdf?\\_w94l\\_m\\_xFOW1JgmS9ZGDbUAq8MozRXJ=](https://files.justice.vic.gov.au/2021-06/Youth%20Justice%20Strategic%20Plan_o.pdf?_w94l_m_xFOW1JgmS9ZGDbUAq8MozRXJ=)

However more urgent action is required. In particular repealing the reverse onus provisions would create a fairer system for granting bail to children by allowing bail decision-makers to adopt a child centred approach and give due regard to principles such as using custody as a last resort and acting in the best interests of the child.<sup>41</sup>

The Inquiry should recommend that the Victorian Parliament reform bail laws by:

- Repealing the reverse-onus provisions in the *Bail Act 1977*, particularly the ‘show compelling reason’ and ‘exceptional circumstances’ provisions (sections 4AA, 4A, 4C, 4D and Schedules 1 and 2).
- Creating a presumption in favour of bail for all offences, with the onus 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 should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.
- Repealing the offences for over 18 year olds of committing an indictable offence while on bail (section 30B), breaching bail conditions (section 30A) and failure to answer bail (section 30).

#### **n) Children and young people in youth justice detention facilities must be treated respectfully, humanely and with a focus on rehabilitation**

International evidence tells us that an effective youth justice system is one that holds young people accountable for their actions while working to provide rehabilitation and better support to address the underlying issues that lead to offending. Punitive, deterrent and supervisory approaches have been shown to be ineffective at reducing the risk of reoffending and may even increase the rate of reoffending.

##### ***Staff training and minimum qualifications***

The emphasis of the youth justice operating model must be on therapeutic, age appropriate and rehabilitative programs, and investing in staff with the necessary qualifications, training and resources to be able to mentor and support young people with such complex needs, and to effectively de-escalate any situations in a trauma sensitive way.

It is critical to secure well-qualified, culturally responsive and trauma-informed staff. It is important to recognise that the needs of young people in detention vary greatly from adults. Therefore, staff in youth detention facilities must be trained in youth specific practice frameworks and frequently update their skills. Principles of a youth specific framework must include training around trauma-informed care, child brain development, impulsive adolescent behaviours, alcohol and other drug issues, and the impact of family violence on young people.

##### ***Solitary confinement and isolation***

Solitary confinement is a cruel practice that causes irreparable harm to the young people who are subjected to it. Solitary confinement is used in Victorian youth prisons under a number of different labels - isolation, separation, seclusion, segregation and lockdowns. While the words ‘solitary confinement’ are not used explicitly in Victorian legislation, the practice should be prohibited, regardless of how it is labelled.

*It is almost impossible to reconcile seclusion with the ‘best interests’ of the child as it serves no integrative or rehabilitative objective. Children in detention are particularly susceptible to medical, social and psychological problems which can be seriously exacerbated by the use of seclusion cells or being left alone in their own cells for extended periods of time.<sup>42</sup>*

Use of these harmful practices do nothing to address the underlying causes of ‘challenging’ behaviour and can even exacerbate those behaviours as a person’s mental and physical health deteriorate.

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<sup>41</sup> Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (June 2021), 462.

<sup>42</sup> Australian Commissioners and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices, Australian Commissioners and Guardians, 2016, 62.

Victorian Commission for Children & Young People *The Same Four Walls* Report found that children and young people were subject to an unacceptable level of isolation and were frequently locked down in units due to staffing issues.

In the context of COVID-19, the use of isolation and quarantine have become more widespread. This includes solitary isolation and also 'group isolation', usually justified by operational requirements, and implemented increasingly frequently because of staffing issues. This kind of isolation similarly limits social contacts and severely impacts the ability of children and young people to access education and other activities in detention.

- The Inquiry should recommend that the Victorian Parliament protect young people in prisons from being subjected to cruel and degrading treatment by legislating the prohibition of solitary confinement.

### ***Implementation of OPCAT, including cultural safety***

OPCAT is an international instrument which requires governments to establish 'preventive mechanisms' to inspect and monitor places of detention. It provides a major opportunity to improve conditions in prisons and other places of detention, and to prevent ill-treatment of children in detention, if properly implemented. The protocol was ratified by the Commonwealth Government, but implementation is a shared responsibility of state governments as well, which has led to some dispute about the correct model and source of funding. The Victorian Government is yet to give much dedicated attention to the issue. In the recently announced 2021-2022 Victorian Budget, only \$500K was allocated to OPCAT implementation (from 2021-2025).

- The Inquiry should recommend that the Victorian Parliament must urgently establish and adequately resource National Preventative Mechanism NPM or multiple NPMs to oversee conditions and the treatment of people in prisons as part of implementing their obligations pursuant to OPCAT.
- The NPM's mandate should extend to all places where children and young people may be deprived of their liberty including secure care and police cells. NPM staff should include people who have expertise to work with children and young people, have expertise in health issues, and in healthcare governance and delivery in places of detention.

### ***Equivalency of healthcare, including access to the NDIS***

Children and young people in youth detention should receive an equivalent standard of healthcare including mental health care, to what is available in the community, not a lower standard because of their engagement with the criminal legal system.

Yet children and young people held in detention are currently excluded from federal healthcare funding provided through the Medicare Benefits Schedule and Pharmaceutical Benefits Scheme (PBS), and from funding support for day-to-day disability care through the National Disability Insurance Scheme (NDIS). In youth prisons, there is a need for particular attention to the needs of 'crossover kids' (in contact with the child protection system as well as youth justice), the need for continuity of care between detention and the community, and the impact of time in custody on mental health.

Victoria is unusual among Australian states and territories in not providing healthcare in places of detention through its health department, but instead through a private provider sub-contracted by the Department of Justice and Community Safety.

## **o) A differentiated response to young people under 25 years in the adult prison system**

Recidivism rates for young are significantly higher than for other age groups. More than half [53 per cent] of young adults under 25 return to prison within two years, which is more than eight per cent higher than the general population.<sup>43</sup>

This suggests the criminal justice system is not adequately responding to the developmental needs of young adults, which are unique in comparison to older adults. It is well established that brain development continues until somebody is in their mid-20s, even up to 30. Young adults are greater risk

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<sup>43</sup> Sentencing Advisory Council *Rethinking Sentencing for Young Adult Offenders*,

takers, more likely to be influenced by peers and less future oriented than older groups and this has an impact on behaviours and attitudes.

Research shows that young adult offenders generally reduce their offending behaviour as they mature into adulthood, and most will eventually stop. This natural desistance, along with the fact that behaviour patterns are not as firmly entrenched in young adults as in older adults, means that young adult offenders can be more responsive to rehabilitative interventions than older adults. There is potential to improve outcomes for both society and young adults if they can be supported into this reduction in offending behaviour as early as possible. Criminogenic environments, including prison, can be counterproductive to this process, as they can entrench patterns of offending behaviour.<sup>44</sup>

A major reform would be the expansion of the dual track system to include young adults aged 21 to 25 (or even to 30). The dual-track sentencing system is unique to Youth Justice in Victoria. It allows adult courts to sentence young adults aged 18 to 20 years (currently) to serve a custodial sentence in a Youth Justice centre rather than an adult prison if the young person is particularly impressionable, immature or likely to be subject to undesirable influences in adult prison.<sup>45</sup>

### **TOR 3 & 4 Ensuring judges & magistrates have appropriate knowledge & expertise for sentencing & dealing with offenders, incl understanding of recidivism & causes of crime**

The question for the Committee is really how we assess and require **all** judges and magistrates (to be appointed or already appointed) to meet critical core competencies and skills to practice and make decisions (on a foundational as well as ongoing basis) that:

- are culturally and gender aware/safe
- are trauma informed
- understand child brain and young person development and neuro diversity
- understand best practice engagement with young people
- understand family violence
- understand recidivism
- problem solving

While appreciating the skills of members of specialist courts like the Children's Court, we see value in all judicial decision makers having these competencies and being equipped to problem solve intersecting problems underlying a young person's offending

It is important we promote diversity of judicial appointments, and that Victoria introduces a rigorous judicial complaints commission to introduce judicial accountability.

We do not support legislated directions about sentencing that do not allow judicial discretion taking into account an individual's actions and circumstances, and to appropriately sentence a young person consistent with the principles of rehabilitation.

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<sup>44</sup> Sentencing Advisory Council *Rethinking Sentencing for Young Adult Offenders*, pXiii  
[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-11/Rethinking\\_Sentencing\\_for\\_Young\\_Adult\\_Offenders.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-11/Rethinking_Sentencing_for_Young_Adult_Offenders.pdf)  
<sup>45</sup> <https://jss.org.au/new-approaches-needed-for-young-adults-in-the-criminal-justice-system/>