



Developing a youth strategy for all young Victorians

A Victoria Legal Aid submission

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Victoria Legal Aid operates on Aboriginal country throughout Victoria; we acknowledge the traditional custodians of the land and respect their continuing connections to land, sea and community.

Executive Summary

Victoria Legal Aid (VLA) welcomes the Victorian government consultation on the development of a youth strategy and the bold vision set out in the current discussion papers for Victoria to be the best place for young people to live.

Through the provision of legal services to children, youth and families in the child protection system and youth crime jurisdiction, we see the way in which some young Victorians can be disadvantaged by circumstances outside of their control, but that with adequate, tailored and sufficient supports in place, they have the same potential to participate fully in social, economic and civic life as any other young person.

A youth strategy that takes a whole-of-government approach, building on existing strategies and initiatives for young people such as the Roadmap to Reform, Victoria's Vulnerable Children Strategy, the Framework to reduce the criminalisation of young people in residential care and the Youth Justice Strategic Plan 2020-2030, will reflect the many cross-cutting issues facing young people and be a point of coordination for many of the existing policies and initiatives that target young people in Victoria. We point the government to the New Zealand Child and Youth Wellbeing Strategy¹ as an example of a youth strategy that puts initiatives for young people who are living in poverty front and centre.

We acknowledge the current discussion paper defines youth as aged 12-25, however a Victorian youth strategy must recognise that the initiatives, supports and services that a young person needs from age 12 are frequently informed by what has occurred earlier in their life. Given this, and our own practice experience, we refer to children and young people throughout this submission at times interchangeably and at times reflecting the link between childhood experience and responding to the needs of a young person beyond the age of 12.

Further, to achieve good outcomes in the best interests of the child, including for children and young people in the child protection system, any youth strategy must also recognise the importance of supports and initiatives for their parents and aim to keep the family unit together where safe to do so.

We note the range of external factors, including COVID-19, the 2019-20 bushfires and more precarious work that are having a significant impact on young people's mental health. Children and young people require specialist support and mental health services that are appropriate for their age and cognitive development but, for children and young people in the child protection system, who are already vulnerable, often they are unable to access these services when they need them. A youth strategy should commit to all children in out-of-home care having access to tailored mental health supports.

In our experience, young people who are in care and Aboriginal, Torres Strait Islander or culturally and linguistically diverse young people are at greater risk of contact with the criminal justice system. This is often perpetuated by systems and services that do not have the necessary policy and practices to prevent discrimination and provide supports and services for these young people in the

¹ New Zealand Government, Department of the Prime Minister and Cabinet, August 2019, *Child and Youth Wellbeing Strategy*, accessed 2 December 2020, <<https://childyouthwellbeing.govt.nz/resources/child-and-youth-wellbeing-strategy-html#section-3>>

community. We recommend a range of commitments be made to reduce the unnecessary enforcement of criminal law against young people.

Informed by our practice experience in the justice system we recommend four overarching, cross-government priorities for inclusion in a Victorian youth strategy to achieve improved outcomes for children and young people in the child protection system, more and specialist supports for children and young people experiencing a mental health issue and to reduce the disproportionate number of Aboriginal and Torres Strait Islander and culturally and linguistically diverse young people and young people in care in the youth justice system. The inclusion of these priorities will position Victoria well to be the best place to live for all young people – including those who are most disadvantaged.

Summary of recommendations

The Victorian youth strategy should take a whole-of-government approach including and building on existing strategies and initiatives for young people such as the Roadmap to Reform, Victoria's Vulnerable Children Strategy, the Framework to reduce the criminalisation of young people in care (the Framework) and the Youth Justice Strategic Plan 2020-2030, to best coordinate and prioritise the policies and initiatives that reflect the broad and diverse needs of young people and put the most disadvantaged young people at its centre.

To achieve the outcomes set out in the discussion paper, VLA recommends the following commitments, initiatives, and actions² be included in Victoria's youth strategy:

1. Make the necessary legislative, policy, and practice change to ensure the Child Protection system is acting in the best interests of the child by:

- amending the *Children, Youth and Families Act 2005* (Vic) reunification timeframes to allow the Children's Court to make any protection order that it deems to be in the best interests of a child, including making or extending a family reunification order, even if that child has been in court-ordered out-of-home care for a cumulative period of over 24 months.
- improving court oversight and discretion through legislative reform to enable better outcomes for children by allowing the Children's Court to, in the best interests of the child:
 - make conditions on any protection orders; and
 - name a placement on an order.
- reducing the high rates of removal of Aboriginal and Torres Strait Islander and culturally and linguistically diverse young people from their families. Initiatives to achieve this include:
 - continuing to build upon the success of Marram Ngala Ganbu that provides a culturally safe and appropriate response specifically tailored to Aboriginal and Torres Strait Islander families involved in the child protection system; and
 - introducing oversight mechanisms to ensure that there is compliance with the requirement for cultural support planning and adherence to the Aboriginal Child Placement Principle.

2. Involve young people in child protection in decision-making that affects them by:

- Enabling young people to have:
 - meaningful participation and input in case planning and all placement decisions affecting them; and

² A note on recommendations in this report: This summary page provides VLA's overarching recommendations for initiatives to be included in a Victorian youth strategy. Throughout the document we have included more detailed recommendations, including some possible measures and indicators, to provide detail or context to the issues we are seeking to address, and the summary recommendations listed here.

- access to an advocate/support separate from DHHS.

3. Implement and resource specialist support and mental health services for young people experiencing a mental health issue to:

- ensure all young people can access tailored youth services, including inpatient care.
- ensure children in out-of-home care can access the mental health supports they need.
- provide clear guidance and greater support to improve the child protection system's response to families experiencing mental health issues.
- expand and extend youth forensic mental health facilities.

4. Reduce the enforcement of criminal law against young people by:

- finalising the implementation plan for the Framework to reduce the criminalisation of young people in care.
- raising the minimum age of criminal responsibility to 14.
- implementing and resourcing a specialised response for adolescent family violence including the key recommendations of the *PIPA project: Positive Interventions for Perpetrators of Adolescent violence in the home* report (2020).
- improving discretionary decision-making and providing increased access to caution and diversion.
- changing the law to deliver more proportionate responses to young people engaged in low-level examples of criminal offending.

About Victoria Legal Aid

VLA is a Victorian statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

In 2019-20, VLA provided assistance to over 88,000 unique clients from our 14 offices across Victoria. Our clients from the 2019-20 financial year are diverse and experience high levels of social and economic disadvantage. Almost half of our clients are currently receiving social security and one in three of our clients receive no income at all, a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds and increasing number of our clients are at risk of homelessness.

VLA provides:

- free legal information through our website, our Legal Help line, community legal education, publications and other resources.
- legal advice through our Legal Help telephone line and free clinics on specific legal issues.
- grants of legal aid to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer.
- support to people in the mental health system through non-legal advocates in the Independent Mental Health Advocacy service.
- support to people in the early stages of child protection involvement through non-legal advocates in our pilot Independent Family Advocacy and Support service.
- family dispute resolution services to help families make decisions about family law disputes away from court.
- funding to 43 community legal centres, Djirra, the Victorian Aboriginal Legal Service and the Federation of Community Legal Centres, and support for the operation of the community legal sector.

VLA also works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account.

Our child protection and youth crime practice

VLA has a significant presence in both the Family and Criminal Divisions of the Children's Court, providing legal advice and representation services to Victorians who are involved in matters before the court. Through our practice, VLA continues to see an increase in demand for child protection legal assistance across Victoria:

- Grants of assistance to child protection clients totalled 9,961 in 2019-20, an increase of 3.5 percent on the previous year.

Our presence in the Criminal Division saw an increase in demand for youth crime services in 2019-20 prior to the impact of COVID-19 associated public health measures including delays in matters proceeding:

- Grants of assistance to youth crime clients totalled 4,129 in 2019-20, tracking at an 8.8% increase prior to the pandemic.

Our submission

1. Improving the child protection system to ensure the best interests of the child

For many young people their involvement in the child protection system starts well before the age of 12 yet the experience of having child protection involvement in their lives, potentially being removed from their parents and, living in out-of-home care can be a defining feature in their young lives. This can also determine many of the supports they may need beyond childhood. For this reason, irrespective of the defined age range of youth, a Victorian youth strategy should include initiatives and outcomes that ensure the best interests of the child or young person involved in the child protection system.

Supporting the best interests of the child through timely supports for parents

A necessary part of making decisions in the best interests of the child, amongst other things is to consider Section 10(3) (a) of the *Children, Youth and Families Act 2005* which recognises the importance of maintaining and preserving the parent-child relationship, and requires that:

3) [when] determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—

(a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child.

In our recent report,³ which analysed data of all legally-aided child protection grant files from 2014-15 to 2019-20, including where we represented children and where we represented parents, we made five key findings showing that the intention of the permanency amendments⁴ from 2014 – timely, safe, permanent homes for children who need state intervention and prompt support for families at risk – are not being achieved and thus not ensuring the best interests of each child and young person in the child protection system. It also finds that necessary public health measures responding to the COVID-19 pandemic have exacerbated existing challenges for parents seeking reunification with their children.

Where parents are provided with early and ongoing support from DHHS child protection, we see consistently better outcomes for children and young people. However, in our experience, long wait times, costs, limited services near to a parent's home or lack of other services such as public housing are causing significant barriers to parents addressing protective concerns within the timeframe. Early supports for parents give children and their families the best opportunity of remaining together as a family unit where it is safe to do so, and, as recognised in the Roadmap to Reform guiding

³ Victoria Legal Aid, 2020, *Achieving safe and certain homes for children*, accessed 12 November 2020
<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla_report_child_protection_permanency_report_pdf.pdf>

⁴ In August 2014, the Victorian Government passed the *Children, Youth and Families (Permanent Care and Other Matters) Act 2014* (the permanency amendments) in an effort to ensure that decisions about the care of children are made in a timely way, and that decisions promote permanency of care. The permanency amendments made a significant change to the functioning of the child protection system.

principles,⁵ is deeply interconnected to long term strategies for improved outcomes for children and young people.

For parents who may need additional or more intensive supports – such as those with a disability, experiencing a mental health issue or family violence – a lack of availability, delay or challenge in accessing services can be more acute and our data⁶ shows an increased risk of having children being removed from their parents' care.

In our practice experience we also see assumptions being made about people's capacity to parent due to current or former experiences of mental health issues. These assumptions can result not only in children being removed from the care of their parents but also inadequate supports to facilitate contact between children and their parents or, the involvement of parents in decisions regarding their children's care during the parents' inpatient admissions. Similarly, parents often do not receive adequate support to be reunified with their children when discharged.⁷

Considering both a child's best interests and the often-episodic nature of mental health issues families should be supported, wherever appropriate, to remain together as a family unit in accordance with the Charter and the objectives of Victoria's child protection legislation. Child protection and mental health services should work together to understand on what basis, if any, a mental health issue may present a current or future risk of abuse or neglect to the child, and then determine what services could be put in place to support the family including the parent and, where relevant, children to give the best opportunity for family preservation rather than child removal.

More and better resourcing for vital services

While the permanency amendments and legislative architecture are integral to establishing a framework for the child protection system, they alone cannot guarantee a child a permanent home. We expressed concerns in 2016⁸ that the implementation of the amendments has not been supported by the resourcing required to give effect to the amendments' goals including resourcing of DHHS workers, Aboriginal cultural support planning and reunification planning support, public housing, drug and alcohol rehabilitation services, parenting support services, family violence survivor programs, men's behaviour change services, counselling, mental health services, disability assessment and support services, and support for kinship carers and foster carers as well as long court wait times.

We acknowledge that the Victorian government has made a substantial investment in DHHS child protection in the 2020/21 budget but note that more is needed to improve the availability and timeliness of services that will support children to return to the care of their parents safely and quickly.

⁵ Victorian Government, Department of Health and Human Services (2016) *Roadmap to Reform*, accessed 16 December 2020, <https://www.dhhs.vic.gov.au/publications/roadmap-reform-strong-families-safe-children> (p - 15)

⁶ Victoria Legal Aid, 2020, *Achieving safe and certain homes for children*, accessed 12 November 2020 <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla_report_child_protection_permanency_report_pdf> (p 16-19)

⁷ Victoria Legal Aid, 2019, *Submission to the Royal Commission Victoria's Mental Health System: Roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-roads-to-recovery-july-2019.docx>> (p 49 – 50)

⁸ Victoria Legal Aid, 2016, *Submission to the CCYP Child Protection Permanency Amendments Inquiry* (p 8).

In working towards achieving Outcome 30 – Victorian young people are safe, experience equality of opportunity and are treated fairly - we recommend the following action and initiatives:

Recommendation: Provide more and better resourcing to support children to reunify with their parents safely and quickly by:

- (a) expanding availability and timely access to vital services such as family violence services, public housing, drug and alcohol services, children’s services, parenting support, mental health services;
- (b) expanding access to culturally safe initiatives and services for Aboriginal and Torres Strait Islander families; and
- (c) increasing the capacity for specialist Children’s Court Magistrates to hear matters, especially in regional areas, to mitigate the impacts of COVID-19 adjournments.

Reduce the high rates of Aboriginal and Torres Strait Islander young people removed from their families

Where used and complied with, new initiatives and legislative amendments including the requirement to adhere to existing initiatives aimed at improving connection to community and culture, provide culturally appropriate court processes that facilitate greater family participation and support the right to self-determination are contributing to improved outcomes for Aboriginal and Torres Strait Islander children and young people. Since 2016, our data shows that the proportion of Aboriginal and Torres Strait Islander children in out-of-home care has reduced by approximately 14 percent.⁹ However, Aboriginal and Torres Strait Islander children remain overrepresented in the child protection system and including on care by Secretary orders. Our data also showed that for the period 2016-2020, of all final orders made, the proportion of Aboriginal and Torres Strait Islander children on care by Secretary orders was an average of 22 percent compared to an average of 17 percent of non-Indigenous children on the same order.¹⁰

At the same time, we found significant delays in the planning and finalisation of cultural support plans is contributing to connection to culture and community for Aboriginal and Torres Strait Islander children being impeded.

Reflecting young people’s concerns, expressed in the discussion paper, for the need to address structural and systemic barriers for Aboriginal young people, we recommend the following:

Recommendation: The Youth Strategy include actions and initiatives under Outcome 38 that will continue to reduce Aboriginal and Torres Strait Islander children presence in child protection:

- (a) continue to build upon the success of initiatives such a Marram Ngala Ganbu that provide a culturally safe and appropriate response specifically tailored to Aboriginal and Torres Strait Islander families involved in the child protection system; and
- (b) introduce oversight mechanisms to ensure that there is compliance with the requirement for cultural support planning and adherence to the Aboriginal Child Placement Principle.

⁹ Victoria Legal Aid, 2020, *Achieving safe and certain homes for children*, accessed 12 November 2020 <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla_report_child_protection_permanency_report_pdf.pdf> (p 3)

¹⁰ Ibid (p 22)

Court's reduced level of decision-making oversight and discretion

As we also said in our recent report¹¹ the court's reduced level of decision-making oversight and discretion as a result of the permanency amendments may be leading to outcomes that are not always in the best interests of the child and inadvertently prolonging court proceedings.

We see examples where children would benefit from maintaining an ongoing relationship with their parents when living in out-of-home care but the court is unable to make conditions on protection orders to support this if the child is unlikely to be reunified with their parents.

A child can also be moved between different placements on several order types without any independent court oversight of the frequency or reason that a child is being moved. Recent reports¹² have shown that some children are at more risk than others of experiencing placement changes, causing significant and potentially ongoing instability and uncertainty in their lives.

Recommendation: Include a commitment under Outcome 38 of the Youth Strategy to make legislative reform to the *Children, Youth and Families Act 2005*:

(a) amend reunification timeframes to allow the court to make decisions in the best interest of the child by allowing the Children's Court to make any protection order that it deems to be in the best interests of a child, including making or extending a family reunification order, even if that child has been in court-ordered out-of-home care for a cumulative period of over 24 months.

(b) improve court oversight and discretion to enable better outcomes for children by allowing the Children's Court to, in the best interests of the child:

- make conditions on any protection orders; and
- name a placement on an order.

2. Involving young people in the child protection system in decision-making that affects them

We acknowledge the extensive work undertaken to reach a broad range of young people in consulting on the Victorian youth strategy, which is a demonstration of the government's commitment to engaging young people in discussion about issues that concern them. For children and young people in the child protection system, more meaningful participation is needed to empower them to feel they have some control and input in decisions that affect them and may affect the course of their life. This is especially true when being removed from their parents' care and being placed on a care by Secretary order. Reflecting young people's desire to be heard, understood, and meaningfully engaged¹³ we recommend involving them in decision-making that affects them.

Recommendation: Involve young people in child protection in decision making that affects them by including commitments under Outcome 38 of the Youth Strategy that allow them:

(a) to have meaningful participation and input in case planning and all placement decisions affecting them; and

¹¹ Ibid.

¹² Sentencing Advisory Council 2019, 'Crossover Kids': Vulnerable Children in the Youth Justice System, Report 1: Children who are known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court, accessed 13 September 2020 < https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf> (p 69-72)

¹³ Victorian Government, Department of premier and cabinet (2020) *Victorian Youth Strategy discussion Paper* (p 38)

(b) access to an advocate/support separate from DHHS.

3. Implementing and resourcing specialist support and mental health services for children and young people experiencing a mental health issue

Supports and services for young people and families involved in the child protection system¹⁴

As the youth strategy discussion paper outlines, there are a range of external factors, including COVID-19, the 2019-20 bushfires and more precarious work, that are having a significant impact on young people's mental health.

Children and young people require specialist support and mental health services that are appropriate for their age and cognitive development but, for children and young people in the child protection system, who are already vulnerable, often they are unable to access these services when they need them. Links with existing supports can be interrupted by moving between out-of-home care placements and for some this is exacerbated by placement in Secure Welfare. More generally, there are often only limited mental health supports provided for Victoria's most vulnerable children in state care, including in Secure Welfare, despite children being placed in Secure Welfare often having increased need for mental health support.¹⁵

Recent research¹⁶ finds that almost half of young people leaving out-of-home care (at age 18) require acute mental health services within three years of leaving care, highlighting the need for earlier, specialist supports to avoid ongoing challenges for young people.

In our practice experience we have seen cases in which young people already had a treating psychologist who they had an established relationship with, but DHHS sought new psychiatrist/psychologist assessments once the young person was in Secure Welfare. On other occasions a mental health assessment is not arranged at all, even when a young person's mental health was one of the issues that placed them in immediate and substantial risk causing their placement in Secure Welfare.

Recommendation: Prioritise mental health supports for young people in out-of-home care

Under Outcome 17, the Youth Strategy commit the Victorian government to ensuring that all children in out-of-home care have access to the mental health supports they need, in recognition that children and young people in out-of-home care are some of Victoria's most vulnerable community members.

¹⁴ This section draws heavily on Victoria Legal Aid's submission to the Royal Commission into Victoria's Mental Health System: *Paving the roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-rcvmhs-paving-roads-to-recovery-june-2020.pdf>> (p 32-42)

¹⁵ Victoria Legal Aid, 2019, *Submission to the Royal Commission Victoria's Mental Health System: Roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-roads-to-recovery-july-2019.docx>> (p 66 – 67)

¹⁶ Commission for Children and Young People, Systemic Inquiry into services for young people transitioning out of care (December 2020) *Keep Caring*, <https://ccyp.vic.gov.au/assets/Uploads/CCYP-Keep-caring.pdf> accessed 16 December 2020 (p 13).

Recovery focused youth justice responses¹⁷

In *Roads to Recovery*¹⁸, we highlighted the paucity of mental health services within the youth justice system which manifests in delays in assessment and screening for mental health issues at entry into custody, and insufficient access to mental health care in custody. In our current system, children experiencing mental health issues are placed in more restrictive settings or subjected to highly restrictive management conditions.¹⁹

The recently released Youth Justice Strategic Plan 2020-2030 makes several commitments which, if implemented, would dramatically improve mental health services for children in the youth justice system.²⁰ It commits to:

- a Community Forensic Youth Mental Health Service to support early intervention services for at risk young people;
- a Mental Health Advice and Response Service in the Children's Court to inform bail, remand and sentencing decisions;
- expanded mental health services in custody;
- a dedicated health and mental health facility for voluntary mental health treatment and monitoring at the new Youth Justice facility at Cherry Creek; and
- three youth forensic beds at Footscray Hospital for compulsory treatment required by children in custody.²¹

We strongly support these commitments. To be effective, youth forensic mental health facilities should be staffed by dual specialists in forensic mental health and disability to effectively address the complex needs of children experiencing mental health issues. Youth forensic mental health facilities should be available for young people on remand. We also encourage the Mental Health Advice and Response Service rollout to the Children's Court being expanded to all Children's Court locations.

While the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) has been extended to the Children's Court, it is not widely used. Our lawyers report that they have seen children experiencing mental health issues and/or disability detained for long periods while awaiting fitness determinations or a trial at which the defence of mental impairment will be raised, during which time they may not be receiving appropriate mental health support. This is particularly marked in regional areas. This highlights the need to resource court-based youth mental health services to provide assessments and reports, to avoid vulnerable children spending extended periods on remand simply due to lack of services.

¹⁷ This section draws heavily on Victoria Legal Aid's submission to the Royal Commission into Victoria's Mental Health System: *Paving the roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-rcvmhs-paving-roads-to-recovery-june-2020.pdf>> (p 35-37)

¹⁸ Victoria Legal Aid, 2019, *Submission to the Royal Commission Victoria's Mental Health System: Roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-roads-to-recovery-july-2019.docx>>

¹⁹ Victoria Legal Aid, 2019, *Submission to the Royal Commission Victoria's Mental Health System: Roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-roads-to-recovery-july-2019.docx>> (p 39 – 42)

²⁰ Youth Justice Strategic Plan 2020-2030 (May 2020), (p 38 – 39)

²¹ Department of Justice and Community Safety, (May 2020), *Youth Justice Strategic Plan 2020–2030* (p 29 and 38)

We further suggest that these services should be available to young people where appropriate, in accordance with the mainstream dual-track system and research which highlights the benefits of age appropriate facilities and services for young offenders under 25 years of age.²² We also suggest that dual-track sentencing approach available in the mainstream system be applied to the CMIA, so that the shorter nominal terms applicable to children subject to a CMIA Supervision Order would also apply to young people up to 25 years old.

Recommendation: Youth forensic mental health response

The Youth Strategy's commitments to improve the mental health of young people recognise the contribution of:

- (a) expanded availability of the Children's Court Mental Health Advice and Response Service to all locations where the Children's Court sits;
- (b) ensuring new youth forensic mental health facilities are available on remand as well as post-sentence for young people up to 25 years of age; and
- (c) extended nominal term limits for children under the CMIA to apply to young people up to 25 years old, mirroring the mainstream dual track system.

4. Reducing the enforcement of criminal law against young people – especially Aboriginal and Torres Strait Islander and culturally and linguistically diverse young people and young people in care

VLA is concerned about the continuing overrepresentation of children from marginalised and disadvantaged communities in the justice system. In VLA's experience, Aboriginal and Torres Strait Islander young people and young people from culturally and linguistically diverse communities and in care are at greater risk of contact with the criminal justice system. This is often perpetuated by systems and services that do not have the necessary policy and practices to prevent discrimination and provide supports and services for these young people in the community.

In the review of the youth justice system, Ogloff and Armytage found that overrepresentation of specific groups is not causally related to ethnicity, but rather to the range of sociodemographic factors and social disadvantage that can better explain criminality. These factors include economic and social exclusion, intergenerational trauma, a lack of pro-social supports for families establishing in Australia, and a feeling of exclusion from both family and mainstream communities.

For that reason, a Victorian Youth Strategy must include measures that seek to address these risk factors and support children to remain connected to supports in the community. While these measures have general application, it will assist to reduce overrepresentation by narrowing the entry points to the youth justice system.

Drawing on evidence and recommendations VLA has presented in several recent reports and submissions,²³ VLA recommends the Victorian youth strategy include the following commitments to:

²² Sentencing Advisory Council, (December 2019) *Rethinking Sentencing for Young Adult Offenders in Victoria*, Report, 3

²³ Victoria Legal Aid, 2020, *Achieving safe and certain homes for children*, accessed 12 November 2020
https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla_report_child_protection_permanency_report.pdf

- Finalise the implementation plan for the *Framework to reduce the criminalisation of young people in care*.
- Raise the minimum age of criminal responsibility to 14.
- Implement and resource a specialised response for adolescent family violence including the key recommendations of the *PIPA project: Positive Interventions for Perpetrators of Adolescent violence in the home* report (2020).
- Improve discretionary decision-making and provide increased access to caution and diversion.
- Change the law to deliver more proportionate responses to young people engaged in low-level examples of criminal offending.

Finalise the implementation plan for the *Framework to reduce the criminalisation of young people in care*

Since 2016 we have been advocating for a new approach to reduce the contact of young people in out-of-home care have with the criminal justice system. Our report: *Care Not Custody - A new approach to keep kids in residential care out of the criminal justice system* - found that more than one in three of our clients aged 11–17 who are placed in out-of-home care require help with a criminal matter.

In our view, preventing young people from entering the criminal justice system is the best way to limit ongoing and entrenched involvement in justice processes. To ensure that vulnerable children living in residential care units do not end up being charged with criminal offences for conduct that would not be criminalised in the family home, and that often has a grounding in previous experiences of trauma, abuse or neglect, we strongly support the Victorian Government announcement of a new plan to reduce young people's contact with police and their entry into the court system in early 2020. The plan acknowledges the need for therapeutic approaches when supporting young people in residential care. It also states that criminal charges should not be pursued if there are viable alternatives.

Recommendation: Implement the *Framework to reduce the criminalisation of young people in care*

The Victorian youth strategy should commit the Victorian Government to:

(a) finalising and implementing an implementation plan for the *Framework to reduce the criminalisation of young people in residential care* that:

(a) improves policies and practices of all signatories to this Framework that seek to reduce the unnecessary involvement of police in young people's lives.

Victoria Legal Aid, 2017, *Care Not Custody: A new approach to keep kids in residential care out of the criminal justice system*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-care-not-custody-report.pdf>>

Victoria Legal Aid, 2019, *Submission to the Royal Commission Victoria's Mental Health System: Roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-roads-to-recovery-july-2019.docx>>

Victoria Legal Aid, 2020, *Paving the roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-cvmhs-paving-roads-to-recovery-june-2020.pdf>>

(b) reduces in the number of charges experienced by young people in residential care, especially for minor matters that would not involve police if it occurred in the family home.

(c) evidences an increase in staff having been trained in therapeutic response strategies and greater use by residential care workers and police of alternative responses to challenging behaviour.

Raise the minimum age of criminal responsibility²⁴

We are pleased to see mention of Raise the Age in the youth strategy discussion paper. In Australia, the minimum age a child can be found guilty of committing a crime is ten years old. Most similar jurisdictions set a minimum age of at least 14 years, which is consistent with international human rights law. Peak bodies for doctors, psychologists and lawyers agree that children under 14 do not have the maturity to be held criminally responsible for their actions.²⁵

Most children in the youth justice system have experienced serious trauma and early life stresses such as abuse or neglect,²⁶ as well as mental health issues and cognitive impairment.²⁷ Children in the youth justice system have: 'significantly higher rates of mental health disorders and cognitive disabilities when compared with general youth populations'.²⁸ They are also more likely to have a range of other co-occurring issues, including attention deficit hyperactivity disorder, autism spectrum disorder, Foetal Alcohol Spectrum Disorder, ABI and problematic drug or alcohol use.²⁹

The likelihood of a child progressing from the Children's Court to the adult criminal jurisdiction is associated with their age at 'entry' into the criminal courts. The younger a child is at their first sentence, the more likely they are to reoffend generally, reoffend more frequently, reoffend violently, continue offending and be sentenced to an adult sentence of imprisonment before their twenty-second birthday.³⁰

²⁴ This section draws heavily on Victoria Legal Aid's submission to the Royal Commission into Victoria's Mental Health System: *Paving the roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-rcvmhs-paving-roads-to-recovery-june-2020.pdf>> (p 34-35)

²⁵ Royal Australasian College of Physicians, *Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility* (Submission, July 2019); Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be raised to 14 years of age' (Media release, 25 March 2019) <<https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>>; Australian Indigenous Doctors' Association, 'Doctor Joint media release, Doctors, lawyers, experts unite in call to raise the age of criminal responsibility'. Available at: <https://www.aida.org.au/mediareleases/doctors-lawyers-experts-unite-in-call-to-raise-the-age-of-criminal-responsibility>.

²⁶ The Victorian Youth Parole Board's annual survey found that 67 per cent of young people in custody have been victims of trauma, abuse and neglect Youth Parole Board, *Annual Report 2018 – 2019*, (p 29)

²⁷ The Victorian Youth Parole Board's annual survey found that 48 per cent presented with mental health issues, 27 per cent had a history of self-harm or suicidal ideation, 38 per cent presented with cognitive difficulties that affect their daily functioning; *Ibid.*, (p 29)

²⁸ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report' (2017), *Comparative Youth Penalty Project UNSW*. Available at <http://cyp.unsw.edu.au/node/146>.

²⁹ *Ibid.*

³⁰ Victorian Sentencing Advisory Council, (December 2016) *Reoffending by Children and Young People in Victoria*. Available at: [https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Reoffending by Children and Young People in Victoria.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Reoffending%20by%20Children%20and%20Young%20People%20in%20Victoria.pdf). SAC found that, after accounting for the effect of other factors, each additional year in age at entry into the criminal courts was associated with an 18% decline in the likelihood of reoffending. See also: Victorian Sentencing Advisory Council, *Rethinking Sentencing for Young Adult Offenders* (Report, December 2019) (p 14 – 17)

Recommendation: Raise the minimum age of criminal responsibility to 14

The Youth Strategy should include a Victorian Government commitment to raise the minimum age of criminal responsibility to 14, to link young children into treatment and support in the community, rather than become exposed to the harmful impacts of the criminal justice system.

Responding appropriately to adolescent family violence in the home³¹

Adolescent family violence is a distinct phenomenon to adult-perpetrated intimate partner violence and requires a tailored response, including recognising that the adolescent may themselves also be a victim of family violence. Research has found that childhood trauma is a major contributor to an adolescent's use of violence in the home, yet our court system does not systematically record or respond to this.³²

Child respondents in family violence matters in the court system may have undiagnosed mental health issues driving their behaviour that have not been previously identified or addressed.³³ These young people will often be ordered to comply with a Family Violence Intervention Order (FVIO), which could exclude them from their home, putting them at risk of homelessness and/or becoming involved in the criminal justice system if they are later charged with breaching the FVIO.

Recommendation: Implement expert recommendations to respond appropriately to vulnerable young people's behaviours in the home

The Victorian Youth Strategy should include a commitment (Outcomes 30 and 38) to implement and adequately resource:

- (a) recommendations 123 to 128 from the Royal Commission into Family Violence for establishing a specialised response for adolescents; and
- (b) key recommendations of the *PIPA project: Positive Interventions for Perpetrators of Adolescent violence in the home* report (2020)³⁴

Improvements to discretionary decision-making by Victoria Police

Children and young people should be supported in the community where possible. Where a child is in conflict with the law, options that support children to remain in the community and connected with social, health, education and family supports can decrease the risk of ongoing contact with the criminal justice system. For this reason, VLA supports increased use of discretionary decision-making to support children to remain in the community and divert them away from criminal justice responses.

³¹ This section draws on Victoria Legal Aid's submission to the Royal Commission into Victoria's Mental Health System: *Paving the roads to recovery: Building a better system for people experiencing Mental Health Issues in Victoria*, accessed 2 December 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-rcvmhs-paving-roads-to-recovery-june-2020.pdf>> (p 34)

³² Elena Campbell et al, (March 2020), *The PIPA Project: Positive Interventions for Perpetrators of Adolescent violence in the home (AVITH)* (p 103)

³³ Victoria Legal Aid, *Submission to the Royal Commission into Family Violence* (Submission, June 2015) 40 <<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-family-violence/royal-commission-into-family-violence>>.

³⁴ Elena Campbell et al, (March 2020) *The PIPA Project: Positive Interventions for Perpetrators of Adolescent violence in the home (AVITH)*, (p 16-17)

In our practice experience, children and young people are frequently charged for minor offending in circumstances where a caution or a referral to support services might be more appropriate. We also see clients who are charged and bailed in circumstances where it would be more appropriate to use one of the different enforcement options - such as issue a summons to appear in court at a later date. Too often we see young clients held in custody on remand when they should have been bailed to remain in the community and connected to their health, social, educational, and family supports.

Data shows that police are increasingly likely to commence court proceedings rather than utilise non-court action including referrals, diversions and cautions.³⁵ Recent data from the Sentencing Advisory Council also demonstrates that many young people are remanded for offending that would not receive a custodial sentence.³⁶

Focussed effort by police to find alternative pathways and divert children and young people away from the youth justice system will improve outcomes for these children and the community more broadly.

Cautions and diversions reduce future offending, engage young people with supports to address the underlying causes of the offending behaviour, and reduce the stigma and distress associated with criminal proceedings. Studies indicate that a young offender who participates in a diversion program is far less likely to reoffend than a young person whose case is determined in court and is subsequently incarcerated, even where the seriousness of the offending is taken into account.³⁷

Data highlights the inconsistent application of cautioning and consent for diversion across Victorian regions and police stations.³⁸

VLA supports access to diversion at the discretion of the court. The current requirement in the *Children Youth and Families Act 2005* that a prosecutor must consent to diversion should be removed to empower the Magistrates' and Children's Courts to order a court diversion where it is appropriate in the circumstances.

We also support access to diversion on more than one occasion to ensure that the justice response can continue to respond to the individual child or young person with the least restrictive response.

Recommendation: Improvements to discretionary decision-making by police

The Youth Strategy (Outcomes 30 and 38) recognise the opportunity to improve discretionary decision-making by police and commit the Victorian Government to:

³⁵ Australian Bureau of Statistics data shows that court actions as a proportion of police proceedings have increased from 52 per cent in 2012-13 to 71 per cent in 2018-19; conversely the proportion of non-court proceedings has decreased from a high of 65 per cent in 2012-13 to 32 per cent in 2018-19. Australian Bureau of Statistics, *4519.0 Recorded Crime – Offenders, 2018-19*, (Catalogue No 4519.0, 6 February 2020) Police proceedings, selected states and territories - Table 27 Victoria <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02018-19?OpenDocument>>.

³⁶ Sentencing Advisory Council, (2020), *Children Held on Remand in Victoria: A report on sentencing outcomes*

³⁷ Caitlin Grover, (April 2017), 'Youth Justice in Victoria' (Research Paper, Victorian Parliamentary Library & Information Service) (p 7)

³⁸ There is evidence that cautioning rates in rural and regional Victoria are below that of metropolitan Melbourne and the state average.; Kimberley Shirley, (2017) 'The cautious approach: Police cautions and the impact on youth reoffending,' *9 Crime Statistics Agency 3* <https://www.crimestatistics.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2017/09/7f/e1e924c80/20170925_in%20brief9%20FINAL.pdf>.

(a) introducing procedural and legislative changes to support increased cautioning of children and young people, including a legislated cautioning scheme to provide an enforcement response to children and young people that is proportionate to the offending and reduces the risk of continuing involvement in the criminal justice system.

(b) introducing legislative changes to enable children and young people to receive a caution or diversion from the Children's Court based on their individual circumstances, without first requiring the consent of a prosecutor.

More proportionate responses to low-level criminal offending

VLA supports bail and offences reform to deliver a more proportionate response to low-level offending. In our experience, children and young people may engage in a pattern of low-level offending and do not continue to offend as adults. Ensuring that the justice response is proportionate to the offending is essential to ensure that children are not over-criminalised and exposed to the harm of the justice system when this can be avoided.

Our practice experience is that the combination of low-level theft and property related offending and the reverse onus tests in the *Bail Act 1977* can result in children and young people being remanded for low-level examples of these offences in circumstances where they would not receive a custodial sentence.

We support changes to create summary offences for low-level examples of theft-related and drug offending as a priority. This will have the combined benefit of a more proportionate response to this offending and removing these matters from the harsh consequences of the *Bail Act 1977*. This will reduce the number of children and young people in custody for short periods of time and improve the outcomes for these children and young people.

Recommendation: Proportionate responses to low-level offending by children and young people

The Youth Strategy support reforms to low-level offending by children and young people and commit the Victorian Government to:

(a) introducing legislative changes to provide a more proportionate criminal justice response for children and young people engaged in low level offending, such as small value thefts and small quantity drug possession.

(b) introducing legislative changes to provide that a child or young person should not be remanded in custody for an offence which is not likely to result in a sentence of imprisonment.