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# **Submission to the Commission for Children and Young People's Inquiry into the overrepresentation of Aboriginal children and young people in youth justice: *Our Youth, Our Way***

15 November 2019

## **Victoria Legal Aid**

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## Summary of recommendations

### ***Recommendation 1. Support Aboriginal young people to stay out of the youth justice system***

- Strengthen Aboriginal families through Aboriginal-led preventative and community initiatives.
- Improve compliance with child protection obligations that support connection to culture.
- Reduce the contact that Aboriginal youth in residential care have with police.
- Extend the age that a young person must leave out-of-home care from 18 to 21.

### ***Recommendation 2. Prevent the entry of Aboriginal children into the Court system***

- Raise the minimum age of criminal responsibility to 14 years.
- There should be a legislative presumption in favour of pre-plea cautions and expand the Koori Youth Cautioning Pilot Program.
- There should be a legislative presumption in favour of post charge diversion, with no requirement for consent from Victoria Police, supported by Aboriginal-led, culturally appropriate, diversion programs.

### ***Recommendation 3. Prevent the entry of Aboriginal children into custody***

- There should be strict adherence to the presumption in favour of summons contained in s345 of the Children Youth and Families Act and a requirement for the police officer to provide reasons for proceeding by way of bail.
- Facilitate bail for Aboriginal children and young people by improving and expanding bail support services, enabling management of bail risk in the community, and extending the Central After Hours Assessment and Bail Placement Service (CAHABPS) to cover full non-business hours period from 5pm to 9am.
- Pre-interview advice should be mandatory for children and for Aboriginal young people.
- Increase the use of restorative conferencing, led by Aboriginal communities, and expand its availability to the pre-plea stage.

### ***Recommendation 4. Facilitate the rehabilitation of Aboriginal young people who have entered the youth justice system***

- Expand the Children's Koori Court geographically and increasing eligibility.
- Amend the CYFA and the Sentencing Act to ensure that the sentencing court can give weight to factors such as disadvantage, trauma, abuse and neglect and the importance of culture to rehabilitation.
- Ensure staff in the child protection, youth justice, law enforcement and court workforce can demonstrate cultural competency, awareness of child and adolescent development and the impact of trauma.

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# Acknowledgement

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. We acknowledge and pay respect to their Elders, past, present and emerging.

## 1. Introduction

### 1.1. Overview of the submission

Victoria Legal Aid (VLA) welcomes the opportunity to contribute to the Commission for Children and Young People's (Commission) Inquiry into the overrepresentation of Aboriginal children and young people in the criminal justice system.<sup>1</sup>

VLA appreciates the work of the Commission in engaging in significant consultation and data collection, including travelling across regional Victoria to interview Aboriginal young people and their families and gather their experiences of being involved in youth justice. Our submission presents our key recommendations for addressing the system inequalities which we see perpetuating the cycle of overrepresentation.

Our submission focuses on children. However, most of the principles and suggestions we make could and should equally apply to young adults, and we refer in parts to the adult jurisdiction.

Our submission focuses on four main areas:

- supporting Aboriginal children and young people to stay out of the youth justice system
- preventing entry into the court system
- preventing young people from entering custody
- facilitating the rehabilitation of Aboriginal young people who have entered the youth justice system.

We would be happy to elaborate on any of the issues raised in this submission or provide further information and case studies if that would assist the Commission in its work.

### 1.2. About Victoria legal Aid

VLA is an independent statutory authority established under the *Legal Aid Act 1978 (Vic)*. We receive funding from the Commonwealth and Victorian governments and through the Victorian Public Purpose Fund but are independent of government. The Legal Aid Act sets out our responsibilities to provide legal representation, advice and assistance, and to administer the Legal Aid Fund to Community Legal Centres and private practitioners who provide eligible services in the most effective, economic and efficient manner.

VLA helps people with legal problems involving criminal matters, family separation, child protection, family violence, social security, mental health, discrimination, guardianship and administration, fines, immigration, tenancy and debt.

By providing a range of services – from information and early intervention services to intensive assistance under a grant of legal assistance – VLA aims to provide improved access to justice and legal remedies for people when they need it most.

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<sup>1</sup> The Inquiry terms refers to 'Aboriginal children and young peoples' and VLA has adopted this phrase throughout this submission.

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In addition to helping people resolve their legal problems, we work to address the barriers that prevent people from accessing the justice system. We contribute to law reform, influence the efficient running of the justice system, and ensure the actions of government agencies are held to account. We take on important cases and systemic issues that aim to improve the law and make it fairer for all Victorians. This is one way we extend the reach of our services and improve outcomes for the community more broadly.

### 1.3. Our crime and family services

During 2018–19 we helped 100,061 unique clients. We have seen steady increases in the level of disadvantage experienced by our clients. Many experience language, literacy or cultural barriers, disability or other health issues, or social and geographic isolation.<sup>2</sup>

VLA is the only legal practice in Victoria with specialised child protection and youth crime services that operate across the state, including:

- our Family, Youth and Children's Law Program provides duty lawyer, legal advice, representation and information services to children and parents in the Children's and Magistrates' Courts across Victoria, in child protection, family violence, parenting disputes and child support;
- our specialist Youth Crime service provides duty lawyer services, legal representation and weekly youth justice centre outreach visits for children up to 18 years of age;
- our Summary Crime and Indictable Crime programs provide duty lawyer services and legal representation for young people in the adult jurisdiction (18-25 years);
- our Legal Help service responds to telephone inquiries from young people;
- our Community Legal Education team provide outreach services to schools and education material for young people in efforts to avert contact with the justice system.

Our submission draws on this significant experience.

### 1.4. Our clients

Most of our clients are people who are socially and economically disadvantaged: people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander people, and/or people who live in remote areas.

Aboriginal Australians are over-represented in both the child protection area, youth justice and adult criminal justice areas. An analysis of VLA client data over a ten-year period, from 2006 to 2016, found that Aboriginal clients make up 2 percent of our total client population, but received 3 percent of total services.<sup>3</sup> Approximately three out of ten young people with Aboriginal background will go on to be 'high cost' clients of legal aid, using multiple legal aid services for each year they are in contact with us, compared with one out of ten overall clients.

Finally, our report showed that our Aboriginal clients are also more likely to have signs of disadvantage. Our Aboriginal clients have a younger median age of first contact, a higher percentage identified with a disability, more likely to be on benefits (such as Newstart and the

<sup>2</sup> Victoria Legal Aid, *Annual Report 2018–19*.

<sup>3</sup> Victoria Legal Aid and Analytics for Change, *VLA Client and Service Data Analysis*, 2017, <https://www.legalaid.vic.gov.au/about-us/research-and-analysis/client-profiles/client-profiles-analysis-of-2006-16-data>.

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disability support pension), considerably more likely to be unemployed than overall client group (84.42 percent compared with 52.53 percent) and were more likely to be receive criminal law rather than civil law services.<sup>4</sup>

For the 2018-2019 financial year:

- 5,192 unique clients, 5.3 percent of all VLA clients, identified as Aboriginal or Torres Strait Islander, an increase of 10 percent from the previous year;
- 2,316 unique clients assisted by our Family, Youth and Children’s Law Program identified as Aboriginal or Torres Strait Islander, an increase of 14 percent from the previous year;
- 3,348 unique clients assisted by one of our Criminal Law programs (Youth Crime, Summary Crime or Indictable Crime) identified as Aboriginal or Torres Strait Islander, an increase of 9 percent from the previous year.<sup>5</sup>

## 2. Supporting Aboriginal young people to stay out of the youth justice system

**Recommendation 1. Support Aboriginal children and young people to stay out of the youth justice system:**

- a. Strengthening Aboriginal families through Aboriginal-led preventative and community initiatives**
- b. Improving compliance with child protection obligations that support connection to culture**
- c. Reducing the contact that Aboriginal youth in residential care have with police**
- d. Extending the age that a young person must leave out-of-home care from 18 to 21**

### 2.1. Strengthening Aboriginal families through Aboriginal-led preventative and community initiatives

Early support is essential to keep Aboriginal families together and strong. VLA recognises that in order to reduce the number of Aboriginal young people involved in the youth justice system we must focus our efforts on preventing families from having unnecessary contact with the acute end of the child protection system.

#### Addressing family violence in culturally safe ways

Responding effectively to family violence remains a key priority, both as a stand-alone concern and to reduce subsequent contact with the child protection system. A recent review of Aboriginal children in out of home care showed that 88 per cent of children had experienced family violence as a protective concern.<sup>6</sup>

<sup>4</sup> Ibid.

<sup>5</sup> Victoria Legal Aid, *Annual Report 2018–19*.

<sup>6</sup> See Commission for Young People and Children, *Always was, always will be koori children: Systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria*, 2016 <https://ccyp.vic.gov.au/assets/Publications-inquiries/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf>

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This demonstrates the importance of providing coordinated, specialised and culturally appropriate supports to Aboriginal family violence victim survivors, who are predominantly female, to enable them to stay safe, address any protective concerns and keep children safe. VLA also recognises the importance Aboriginal Community Controlled Organisations providing culturally safe services and the need for this support to have a strong focus on enabling victim survivors to maintain safe care of their children, within family, connected to culture and identity.<sup>7</sup>

VLA welcomes the introduction of the Orange Door, however notes that the model – which involves co-location of community based child protection and perpetrator services, creates an unintended, adverse impact for Aboriginal people, families and communities. We welcome the Victorian government’s incorporation of Aboriginal positions and organisations within the Orange Door and continue to note the importance of the Orange Door being grounded in self-determination principles.<sup>8</sup>

VLA also recognises that Aboriginal young people living in regional areas are further disadvantaged by the lack of access to essential support services. The Gippsland legal assistance sector’s recent investigation into access to justice in the Latrobe Valley identified this as an issue which can result in Aboriginal young people not receiving the supports that they need in order to reduce the likelihood of criminal engagement.<sup>9</sup>

### **Adolescents who use family violence in the home**

Family violence is not only a driver of child protection involvement, it is also an issue that can result in the unnecessary criminalisation of Aboriginal children and young people in its own right.

VLA’s practice experience confirms that children and young people who use violence usually present with a range of complex behavioural, mental, physical, and emotional issues including neurological or emotional harm caused by recent or long-term exposure to family violence, neglect or abuse, substance abuse, family breakdown, unresolved grief and loss.

These experiences may manifest themselves in challenging adolescent behaviours. Children and young people are still developing and can be experiencing undiagnosed mental health issues. The young person’s use of violence may then result in one or multiple legal issues such as criminal charges, child protection intervention, or personal safety or family violence intervention orders (FVIOs).

Currently the family violence system struggles with how best to juggle the competing needs of protecting the best interests of young people and the safety of their family when an adolescent is using violence in the home. Adolescent violence has some similarities with adult family violence, but adolescent violence in the home also has unique characteristics and requires different responses.<sup>10</sup>

Despite this, we are seeing FVIOs sometimes being used as a form of first response for adolescents who use family violence. The Gippsland Legal Assistance Forum’s report earlier this year on justice issues in the Latrobe Valley, for example, showed that the number of family

<sup>7</sup> See Gippsland Legal Assistance Forum, *Equal Justice for a strong, healthy, resilient Latrobe Valley*, February 2019, p 24 <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-equal-justice-for-a-strong-equal-and-resilient-latrobe-valley.pdf>

<sup>8</sup> See above p 29.

<sup>9</sup> See above p 20.

<sup>10</sup> Victorian Government, ‘Chapter 23’, *Royal Commission into Family Violence, Volume 4, Report and Recommendations*. 2016, p 165.

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violence intervention orders being taken out against children in that region is the highest in the state (4.27 per 1000 young people aged 10-17 years), with Aboriginal young people likely to be over-represented in this number.<sup>11</sup>

The use of an FVIO does not in itself provide the range of supports a young person may need, and can lead to the removal of the respondent child to protect other children in the family or the risk of involving child protection to assess whether parents are deemed able to care safely for a child with complex mental health needs. The presence of a FVIO also creates the risk of a respondent child then breaching the order, leading to criminal charges.

The Royal Commission into Family Violence made six recommendations for establishing a specialised response for adolescents (recommendations 123–128). While implementation of the recommendations is in progress, it is crucial that family violence responses for young people are resourced to identify and respond to the complexity of behavioural, development, and mental health needs of young people.<sup>12</sup> This should include specialised culturally safe services for Aboriginal young people.

### **Early intervention family and child protection services**

Arising from a comprehensive review of child protection legal aid services in Victoria, VLA has invested in funding the Independent Family Advocacy and Support service (IFAS). IFAS is a three-year pilot service to provide non-legal advocacy and support to families engaged with the child protection system, focusing on matters before they go to court. This small pilot project commenced in October 2018, delivering services to people who live or work in the pilot sites of Darebin, Moreland and Bendigo. It focuses particularly on Aboriginal and Torres Strait Islander families and parents, and parents with an intellectual disability.<sup>13</sup>

IFAS advocates work with clients to provide information about the child protection system, identify their own goals and needs and develop their skills and confidence to speak up for themselves, and can also advocate for clients directly in some circumstances and arrange referrals to other support services like drug and alcohol counselling or parenting programs. The service can also arrange referrals for legal advice if this is required. The IFAS team includes a lived experience consultant who supports a reference group of people with lived experience of the child protection system to provide strong input into IFAS' services.

The pilot will be evaluated to determine if a pre-court, non-legal advocacy service helps more families to engage with child protection and other services, provides a better experience for clients and leads to a reduction in child protection court proceedings.

While the IFAS pilot is only in its early stages, it has already shown promising outcomes. We would encourage consideration of how earlier intervention family services, and processes such as Aboriginal Family-Led Decision Making, could be further supported and recognised as an essential

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<sup>11</sup> See Gippsland Legal Assistance Forum, *Equal Justice for a strong, healthy, resilient Latrobe Valley*, February 2019, p 27 <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-equal-justice-for-a-strong-equal-and-resilient-latrobe-valley.pdf>

<sup>12</sup> See Victoria Legal Aid, *Roads to Recovery: Building a better system for people experiencing mental health issues in Victoria*, Submission to the Royal Commission into Victoria's Mental Health System, 2019, p 57 <https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-for-people-with-mental-illness-and-disability/roads-to-recovery-building-better-system-for-people-experiencing-mental-health-issues-in-victoria>

<sup>13</sup> See Victoria Legal Aid website, 'Independent Family and Advocacy Support', 2019, <https://www.legalaid.vic.gov.au/about-us/what-we-do/independent-family-advocacy-and-support>



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pillar in keeping Aboriginal families together and Aboriginal youth outside of the youth justice system.

## **2.2. Compliance with child protection system obligations that support maintenance of connection with Aboriginal culture**

Aboriginal children in the child protection system have a fundamental right to preserve and enjoy their Aboriginal culture in connection to family and community. This connection is often disrupted when an Aboriginal child enters the child protection system. The *Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter) recognises that Aboriginal persons hold distinct cultural rights, and must not be denied the right to exercise this with other members of their community:

- to enjoy their identity and culture
- to maintain and use their language
- to maintain their kinship ties
- to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

VLA notes the findings of the Commission for Children and Young People 2015 inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria.<sup>14</sup> The Commission identified practice deficits in respecting and establishing children's Aboriginal identity (with early identification an issue) and a lack of compliance with legislative and policy obligations. This included child protection practitioners failing to observe the Aboriginal Child Placement Principle, with failure to properly explore whether there are suitable carers in the family / community (and where supports may be needed to facilitate a kinship placement) and magistrates failing to apply the principle, but also failing to convene timely Aboriginal Family-Led Decision-Making meetings and poor cultural support planning.

While the Commission made 54 recommendations, VLA lawyers continue to see a lack of compliance and we are concerned that the Commission's recommendations have not been implemented. We highlight the need for a strong implementation plan, a communications plan that is visible across the state, concrete agreements from Government and other agencies who are responsible for implementing recommendations, and independent monitoring and evaluation of the plan.

## **2.3. Criminalisation of children in residential care placements**

Children placed in out-of-home care are some of the most vulnerable and disadvantaged in the community. Many have been exposed to multiple traumas from a young age due to family violence, substance abuse, neglect or abandonment and/or sexual or physical abuse. Aboriginal children are significantly overrepresented in the residential care placement cohort. While Aboriginal children made up 1.6 percent of the Victorian population on 30 June 2016<sup>15</sup> they are 16.4 times more likely

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<sup>14</sup> See The Commission for Children and Young People report 'In the child's best interests', 2015, <https://Commission.vic.gov.au/assets/Publications-inquiries/In-the-childs-best-interests-inquiry-report.pdf>

<sup>15</sup> See Sentencing Advisory Council, '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*, 2019.

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to be to be placed in out of home care than non-indigenous young people – a rate second only to Western Australia.<sup>16</sup>

The over-representation of children and young people from out-of-home care in our criminal justice system is a matter of long-standing concern for VLA. A recent review of our child protection client data found that of the children we assist with a child protection matter who are placed in residential care, **57 percent** require legal help for criminal charges within 12 months of placement. **10 percent** of these clients identified as Aboriginal or Torres Strait Islander.<sup>17</sup>

Numerous studies have shown that despite being removed from environments deemed unsafe, once placed in out-of-home care, too many of these children become unnecessarily involved in our criminal justice system.<sup>18</sup> There is significant evidence of a link between children and young people experiencing child abuse and neglect and later offending. The Sentencing Advisory Council's analysis of 2016-2017 data on sentenced or diverted youth found that almost 40% of children sentenced or diverted by the Children's Court had been the subject of at least one child protection report. It also found that children who are in residential care are the most over-represented group amongst sentenced or diverted children.<sup>19</sup>

This is due at least in part to the continued practice in many residential care facilities of relying on police to manage incidents of challenging behaviour by young people. The following client story demonstrates the long-term impact criminal charges have on a young person.

*Anna\** is an Aboriginal woman from regional Victoria. Anna went into kinship care at 11 weeks old and just after her 11th birthday she was taken away from her family and placed in residential care. Within the first four days Anna was moved three times.

'I have no idea why they moved me so much. In the next four years, I was moved over 35 times from one town to another and all over the place. I never unpacked my bags in the end because I didn't know when I would move again', she said.

Anna got into trouble a few times when she got frustrated or upset. On one occasion police were called because she walked into an office without permission and she was charged with burglary.

'Once the police arrived, they'd charge you for every little thing, not just one charge, and it was for stupid stuff. The staff would push for the police to take us (to the station) or charge us and they didn't care about the repercussions this has afterwards'.

Despite moving so many times and dealing with court processes that the criminal charges brought on, Anna was determined to stay in school. She now has one year before she completes her studies in early childhood education. Working a part-time job waitressing and playing for her local netball team, Anna should have a world of opportunity ahead of her, but she faces barriers others don't.

'When I was at school having a criminal record meant that I always had to go and talk to principal about what was happening in the unit or my behaviour. But now that I am an adult it's way worse. I

<sup>16</sup> See *Family Matters Report 2019* [https://www.familymatters.org.au/wp-content/uploads/2019/10/cropped\\_1099FM-Snapshot-2019HRprint.pdf](https://www.familymatters.org.au/wp-content/uploads/2019/10/cropped_1099FM-Snapshot-2019HRprint.pdf)

<sup>17</sup> Victoria Legal Aid, *Care not custody: A new approach to keep kids in residential care out of the criminal justice system*, 2016.

<sup>18</sup> *Ibid.*

<sup>19</sup> See Sentencing Advisory Council, *'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*, 2019.

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can't pass a police check. It's delayed my career because I need to do placements for my studies and need to pass those checks to get a job in childcare'.

*\* Client of the Victorian Aboriginal Legal Service (VALS), not her real name.*

VLA has welcomed the commitment made by the Victorian Government, Victoria Police and residential care providers to commit to an Agreed Plan to reduce the criminalisation of young people in residential care. We urge the Government to finalise and publicly launch the Agreed Plan. An implementation plan must be developed which clearly identifies the actions, measures and timeframes that each signatory will take to reduce the contact of young people in residential care with police, consistently across the state. We strongly encourage a commitment for the plan be independently monitored and evaluated within 18 months of it being launched.

## 2.4. Young people leaving residential care placements

Extending out-of-home-care to 21 would ensure more support for young people who need it most.

VLA analysis shows that children with child protection contact go on to become some of the most frequent users of legal aid services.<sup>20</sup>

The following client stories from Youth Law, demonstrate how quickly young people find themselves involved in the criminal justice system when they lose access to stable placements once they turn 18. Both proudly identify with their Aboriginal heritage.

*Kenny\** is now 22 years old, he has always wanted to be a professional wrestler. Kenny was in care since he was 2 years old, where he experienced physical, sexual and emotional abuse. Kenny has cerebral palsy. He has complex mental health and substance abuse issues.

However, at the age of 18 he lost his access to stable housing and as a result experienced homelessness for long bouts - at times living in refuges and transitional housing. Though he is a recipient of the Disability Support Pension, he experienced financial hardship.

As a result of his financial hardship and homelessness, Kenny found himself in the criminal justice system with fines incurred for public drunkenness, road traffic and property damage offences.

*Abby\** had been in out of home care from aged 3 to 18, she had mental health concerns. From the age of 18 she was released from out of home care, but without transition to stable housing. She experienced firsthand the pains of homelessness and financial hardship. She quickly accrued unpaid fines (\$12,000), as well as debts in the thousands to various creditors, including Centrelink, Vodafone, CBA, Nimble, Cash Converters, Latitude, Credit Corp and Origin.

Abby was extremely distressed about her legal problems and felt unsupported to deal with legal challenges she faced.

*\* Not their real names.*

<sup>20</sup> Australian Bureau of Statistics data shows that in 2011, 88% of 15-19 years olds and 51% of 20-24 year olds lived with at least one parent, and predicted that trend would continue: Australian Bureau of Statistics, [Household and Family Projections, Australia, 2011 to 2036 \(cat. no. 3236.0\)](#).

VLA welcomes the Victorian Government's 2019 funding announcement to pilot extended care for 250 young people over the next five years. While this is a significant milestone, we would encourage the Victorian Government to work towards extending this support to all young people in out of home care.

As a signatory of the Homestretch campaign, we support the campaign's evidenced-based<sup>21</sup> case for extending young people's access to government-funded out-of-home care from 18 to 21 years because:

- housing, social and financial support for young people prevents entry to the justice system;
- Home Stretch promotes targeted support for the cohort of children and young people who are at greatest risk of entering the justice system;
- it is cost effective to spend money on prevention: analysis by Deloitte Access Economics has determined that each \$1 invested in increasing the out-of-home-care leaving age would see a \$1.84 return.<sup>22</sup>

### 3. Preventing entry into the court system

#### ***Recommendation 2. Prevent the entry of Aboriginal children into the court system***

- a. Raise the minimum age of criminal responsibility to 14 years***
- b. There should be a legislated presumption in favour of pre-plea cautions and the Koori Youth Cautioning Pilot Program should be expanded***
- c. There should be a legislated presumption in favour of post-charge diversion, supported with Aboriginal community-led culturally appropriate diversion programs, and there should be no requirement for consent from Victoria Police***

#### 3.1. Minimum age of criminal responsibility

VLA recommends the minimum age of criminal responsibility be increased. This would ensure that children are kept out of the youth justice system and supported with health and other service responses. The current minimum age of criminal responsibility in Victoria is 10. This is inconsistent with international standards and research around brain development. Research in recent years has demonstrated that the parts of children's brains that affect decision-making and impulse control are poorly developed before the age of 14.<sup>23</sup> This affects the extent to which they should be held criminally responsible for their actions.

The Sentencing Advisory Council's (SAC) 2016 report, *Reoffending by Children and Young People in Victoria*, tells us that the likelihood of a child or young person progressing from the Children's Court to the adult criminal jurisdiction was found to be associated with age at 'entry' into the criminal courts. The younger the children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, continue offending into the adult criminal jurisdiction and be

<sup>21</sup> See SJ4YP's factsheet "More prisons are not the answer to reducing crime", available from [http://www.smartjustice.org.au/cb\\_pages/more\\_prisons\\_are\\_not\\_the\\_answer\\_to\\_reducing\\_crime.php](http://www.smartjustice.org.au/cb_pages/more_prisons_are_not_the_answer_to_reducing_crime.php), particularly the section 'Reducing disadvantage reduces crime'.

<sup>22</sup> See Victoria Legal Aid client profiles – high-contact users of legal aid services, June 2014, <https://www.legalaid.vic.gov.au/about-us/what-we-do/research-and-analysis/client-profiles>

<sup>23</sup> SB Johnson, RW Blum and JN Giedd, 'Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy' (September 2009) Vol 45 Issue 3 *Journal of Adolescent Health*, pp 216-221.

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sentenced to an adult sentence of imprisonment before their twenty-second birthday. 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 per cent decline in the likelihood of reoffending.

### 3.2. Pre-plea caution

There must be legislative presumptions in favour of diversion from key entry points into the system – pre-plea cautions and post-charge diversion in the CYFA – to ensure young people are diverted away from the criminal justice system. The focus then shifts to responding to offending in a manner that acknowledges the young person’s needs, assists with rehabilitation, and connects the young person with ongoing support services which will provide pathways to education, training and employment.

The Crime Statistics Agency (CSA) has demonstrated that young people who were cautioned were less likely to re-offend than those charged (26.8 percent compared to 57.6 percent) and, for those who did reoffend, there was a longer duration between the police contact and the first reoffending incident compared with those charged. Furthermore, the CSA data demonstrates that Aboriginal young people and those who lived in more socio-economically disadvantaged postcodes were more likely to be charged than cautioned.<sup>24</sup>

Our practice experience is that young people are cautioned inconsistently across the State; there are differing interpretations regarding when a young person should be cautioned and how often; misconceptions that once a young person has been charged and brief prepared that it is too late to caution them.

### 3.3. Post-charge diversion

Findings from several 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 who is subsequently incarcerated, even where the seriousness of the offending is taken into account.<sup>25</sup>

Diversion can assist in an offender’s rehabilitation, ensure that appropriate reparation is made to the victim, and reduce re-offending through ordering the offender to apologise to the victim, attend counselling or attend courses such as anger management.<sup>26</sup> A person who successfully completes the conditions and does not commit further offences during the diversion period, will not have the matter recorded as part of their criminal history.

VLA’s practice experience, similar to that of cautions, is that diversion is applied unevenly and inconsistently across the state.<sup>27</sup> For instance, there is a separate Children’s Court matrix that is used to assist police decision making and no offence is excluded. However, in our experience

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<sup>24</sup> Crime Statistics Agency, *The Cautious Approach: Police cautions and the impact on youth reoffending*, p13; at [https://www.crimestatistics.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2017/09/7f/e1e924c80/20170925\\_in%20brief9%20FINAL.pdf](https://www.crimestatistics.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2017/09/7f/e1e924c80/20170925_in%20brief9%20FINAL.pdf).

<sup>25</sup> Caitlin Grover, Victorian Parliamentary Library & Information Service, *Youth Justice in Victoria*, April 2017.

<sup>26</sup> Diversion began as an adult pilot program at the Broadmeadows Magistrates’ Court in January 1997, and was reviewed and revised in late 2000. Diversion is now available in all Magistrates’ Courts in Victoria. Youth diversion began as a pilot in the Children’s Court in January 2017. In 2017 a legislated diversion option was inserted into the *Children, Youth and Families Act 2005*.

<sup>27</sup> Research has found young Aboriginal people are less likely to receive police referrals to diversionary processes see K Richards, ‘Police-referred restorative justice for juveniles in Australia’, *Trends and Issues in Criminal Justice no 398*, Australian Institute of Criminology, 2010.

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there is still confusion with the adult matrix for example lawyers are told that offences, such family violence related matters, cannot receive diversion.

Lawyers are often required to provide a significant amount of material which may need to be gathered over a number of court dates to convince the police to agree to diversion (supplanting the role of the diversion coordinator). In our experience, consistency is difficult to achieve if access to diversion depends on the discretion of the prosecution. Jane's story highlights the difficulties in obtaining a diversionary outcome.

*Jane*\* is 16 years old. She is Aboriginal and an aspiring football player. She was charged with theft of motor vehicle. She had never been in trouble with the court before (not even a caution), and was able to demonstrate a number of compelling circumstances outlined in support letters. All of her co-accused were approved for ROPES, which is a diversion program in which the accused completes a program with police informants at a rope climbing facility.

Jane's lawyer adjourned the matter to seek a caution, however the informant refused. The prosecution then agreed to ROPES, however the Children's Court Magistrate refused the ROPES application. Jane's lawyer proceeded with a diversion application. The Magistrate refused Diversion and placed Jane on an adjourned undertaking.

Jane appealed this decision. At appeal the Office of Public Prosecutions relayed that the informant does not support Diversion, however the OPP agreed to Diversion without informant consent. Diversion was approved by the County Court judge.

This matter concluded in September 2019, almost six months after its first listing. This is a significant delay for a child, in the context that she is young, has no prior history, could demonstrate compelling circumstances which mitigated the offending, and all of the co-accused had already been approved for ROPES at the first instance.

\* VLA client, not her real name

There is evidence that Aboriginal people have lower participation and completion rates of diversion programs, particularly those who access mainstream programs.<sup>28</sup> The Australian Institute of Health and Welfare (AIHW) found that "this gap is mainly due to a lack of cultural appropriateness of the programs and a greater impetus for Indigenous clients to attend residential rehabilitation programs" (which have more rigorous compliance requirements). The AIHW concluded that to be effective, diversionary initiatives need to be culturally appropriate and involve Aboriginal Elders or facilitators in delivery.<sup>29</sup>

## 4. Preventing children from entering custody

### **Recommendation 3. Prevent the entry of Aboriginal children into detention**

- a. There should be strict adherence to the presumption in favour of summons contained in s345 of the Children Youth and Families Act and a requirement for the police officer to provide reasons for not following the presumption**
- b. Facilitate bail for Aboriginal children and young people by improving and expanding bail support services, enabling management of bail risk in the community, and**

<sup>28</sup> Australian Institute of Health and Welfare, *Resource Sheet no.24, Diverting Indigenous offenders from the criminal justice system*, December 2013.

<sup>29</sup> Ibid.

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***extending the Central After Hours Assessment and Bail Placement Service (CAHABPS) to cover full non-business hours period from 5pm to 9am***

- c. Pre-interview advice should be mandatory for children and for Aboriginal young people***
- d. Increase the use of restorative conferencing, led by Aboriginal communities, and expand its availability to the pre-plea stage***

Children must be kept out of custody as much as possible. The 2017 Australian Law Reform Commission’s (ALRC) Inquiry into the incarceration of Aboriginal people stated that “juvenile detention can be seen as a key driver of adult incarceration”, referring to a 2005 study which “found that 90 percent of Aboriginal and Torres Strait Islander youths who appeared in a children’s court went on to appear in an adult court within eight years—with 36 percent of these people receiving a prison sentence later in life”.<sup>30</sup>

#### **4.1. Proceeding by summons rather than bail**

There is a presumption to proceed by summons in the CYFA,<sup>31</sup> yet our lawyers’ experience is that the majority of charges proceed by bail rather than summons. The presumption is not strongly worded, simply stating that “A police officer must have regard to this presumption in commencing a criminal proceeding against a child”.<sup>32</sup> There is no presumption in the *Criminal Procedure Act 2009* (CPA) applying to young adults and the summons and notice to appear provisions are highly underutilised.<sup>33</sup> In the *Bail Act Review 2017* (“the Coghlan review”), the Hon Paul Coghlan QC states:

Bail is rarely an appropriate process in cases involving minor, non-violent offending. People charged with such offences normally pose a negligible risk to the safety of the community, and the appropriate sentence for such offending is usually a fine or a lower sanction such as an adjourned undertaking. ...

The use of bail in cases of minor offending causes broader problems for the criminal justice system. It can lead to accused persons who pose a low risk to the community being remanded in custody for offences for which they would be unlikely to receive a sentence involving imprisonment.<sup>34</sup>

The review recommends that a new Notice of Charge process be created in the adult system, and that there be a presumption for police to proceed by way of a Notice of Charge, unless there are compelling reasons why an alternative method is preferred.<sup>35</sup> We support this recommendation, which would be beneficial for Aboriginal young adults.

In our submission, the CYFA presumption should be strengthened so that there should be compelling reasons why an alternative method is preferred, and police should state reasons for not following the presumption. Training should be provided with respect to proceeding by way of summons under both the CYFA and the CPA.

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<sup>30</sup> Chen, S, ‘The Transition from Juvenile to Adult Criminal Careers’, *Contemporary Issues in Crime and Justice No 86*, NSW Bureau of Crime Statistics and Research, 2005; cited in Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84, 19 July 2017, p486.

<sup>31</sup> *Children’s Youth and Families Act 2005*, section 345(1).

<sup>32</sup> *Children’s Youth and Families Act 2005*, section 345(2).

<sup>33</sup> The Hon Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government*, May 2017.

<sup>34</sup> The Hon Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government*, May 2017, pp 14-15.

<sup>35</sup> *Ibid*, Recommendation 26.

## 4.2. Facilitating access to bail for Aboriginal children and young people

Following the 2018 bail reforms, more children and vulnerable young adults are finding themselves in remand situations as a result of being propelled into the higher test categories for bail, in particular the exceptional circumstances category, more frequently.<sup>36</sup>

Our lawyers have observed other particular impacts of bail reforms on children:

- Our lawyers are finding that ss 3A and 3B of the Bail Act are adhered to enabling us to establish exceptional circumstances and compelling reasons in the case of Aboriginal children. However, the major impediment to being released on bail is the issue of unacceptable risk.
- Children who commit further offences whilst on bail are being remanded even though their capacity to be charged for the initial offending has not been assessed and determined.
- Because children are often on bail for longer (while they participate on supervised deferrals or diversion, or as matters are consolidated and as they start to engage with therapeutic services), there is a greater risk they may engage in behaviour that leads to further charges including against the Bail Act, resulting in more time in custody.
- The more frequent remands due to non-violent offending is disruptive to the young person's ability to continue with therapeutic interventions.
- The underutilisation of Intensive Monitoring and Control Bail Supervision Orders (IBOs).

*Tom\** is 16 years old, Aboriginal, lives in regional Victoria and is a talented football player. He is intellectually disabled. During the course of his young life he has had a history of transient accommodation. He and his siblings were removed from the care of his mother and placed with his maternal uncle. Between 2013 and 2017 he attended school every day, attended weekly sporting activities and his mother was able to have regular contact with her children. Sadly, in 2017 his uncle was unable to overcome his grief following the death of a loved one. This led to Tom and his siblings being placed with various family members and then into residential care and to this day he remains the subject of a Care by Secretary Order.

Tom does not remember when he started drinking alcohol but eventually it led him to being banned from playing with his local football club. He was charged with two counts of theft of a motor vehicle and correspondingly committing an indictable offence whilst on bail. He was refused bail and appealed the decision to the Supreme Court. Tom had no prior convictions at the time of his Supreme Court bail application.

His Honour Justice Lasry noted "this applicant represents the consequences of the failings of our society". His Honour found that the "answers to many of (Tom's) difficulties may well lie in his Indigenous background and the willingness of his community to support him". His Honour continued "it is time society paid more attention to the ability, insight and influence of the Indigenous community".<sup>37</sup> To this end Tom's bail conditions were tailored to focus on his reintegration into culture.

When Tom was connected to his biological family and culture he thrived. His reintegration into the community, via his bail conditions, has the potential to provide Tom that opportunity again.

\* VLA client, not his real name

<sup>36</sup> *Brock Hall v Constable Nico Pangemanan* [2018] VSC 533.

<sup>37</sup> *Re LW* [2019] VSC 616.



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The Coghlan Review recommended that there be Aboriginal specific bail support services, and funding for increased numbers of Koori case managers to provide culturally specific support to Aboriginal people while on bail.<sup>38</sup> Similarly, the 2017 ALRC Report recommended that culturally appropriate bail support programs and diversion options should be developed and implemented by all jurisdictions.<sup>39</sup>

VLA supports these recommendations as critical to facilitating young people's engagement with therapeutic supports and success in participating in bail programs. Furthermore, the Bail Act should require the court to actively consider management of any bail risk in the community either through bail conditions to engage with culturally competent and safe community supports or Youth Justice, with the option of regular reviews to monitor progress and ensure supports being held to account.

The Coghlan Review also recommended that the Victorian Central After Hours Assessment and Bail Placement Service (CAHABPS) be a 24 hour service, and replace the existing bail supervision program "which is not meeting the needs of the highest risk young accused". CAHABPS provides a single point of contact when police are considering refusing bail to a young person; police must notify CAHABPS and allow the young person to be in contact with a CAHABPS worker. However, it currently finishes at 3am.

Consistent with the Coghlan Review recommendation, it should be extended so that it covers the full non-business hours period from 5pm to 9am, as "this should result in an improvement to the overuse of remand of young people, less than half of whom go on to receive a custodial sentence."<sup>40</sup> Our practice experience tells us that police, as decision makers, are reluctant to grant bail at the station and feel compelled, regardless of the offending, to bring the matter before court. Police also tell us that if they had more community support options available, they would be more likely to grant bail from the police station.

### 4.3. Pre-interview advice

VLA provides a telephone advice service to young people including pre-interview advice for young people who are suspected of having committed a criminal offence and are about to participate in a recorded police interview. We also provide volunteers for the after-hours Youth Referral and Independent Persons Program (YRIPP) pre interview advice service. The confidential advice is an opportunity for the lawyer to conduct a welfare check on the young person and thereafter empower them with their rights when engaging with police. The lawyer can brainstorm the possible options with a young person who often call in a distressed and anxious state.

Our practice experience is that children do not take up their right to speak with a lawyer pre-police interview. The reasons range from a limited understanding of how a lawyer can assist them, not understanding how the answers they give could be used against them in court, to simply wanting to have the interview 'over and done'. Mandatory obligations to arrange pre-interview advice for children including Aboriginal young people, would ensure that these vulnerable cohorts are supported and empowered with their rights before participating in a police interview.

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<sup>38</sup> The Hon Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government*, May 2017, Rec 27.

<sup>39</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Report, 19 July 2017, Recommendation 5–2.

<sup>40</sup> The Hon Paul Coghlan QC, *Bail Review: Second Advice to the Victorian Government*, May 2017, pp 35-36.

#### 4.4. Restorative justice conferencing

Youth Justice Group Conferencing is a state-wide, legislated program providing a community rehabilitation intervention in the Children's Court at the pre-sentence stage. It brings together those involved in an offence including the young person, their family and the victims of the crime. It encourages the offender to take responsibility for the harm done to the victim<sup>41</sup> and to make reparation to the victim and the community.<sup>42</sup> It is a key way of developing empathy in immature young offenders and encourages families to play an active role in the young person's rehabilitation.<sup>43</sup>

A 2010 evaluation by KPMG found that youth group conferencing was more successful in reducing reoffending than more formal sanctions. KPMG found that over 80 percent of young people involved had not reoffended two years later, compared to 57 percent of young people placed on Probation or a Youth Supervision Order.<sup>44</sup> Importantly, 95 percent of the victims and all of the accused participants surveyed agreed or strongly agreed that they were satisfied, overall, with the process and conduct of the group conference.

Despite its successes, the level of youth justice group conferencing in Victoria is particularly low compared with other Australian jurisdictions, and government expenditure on group conferencing is correspondingly low.<sup>45</sup> This may be in part because in Victoria, only the court can refer a young person to group conferencing, whereas in all other Australian jurisdictions referrals are made by police and courts. Conferencing is also not available at the pre-plea stage in Victoria. Expanding conferencing to the pre-plea stage could facilitate access to diversion or improved sentencing outcomes.

### 5. Facilitating the rehabilitation of Aboriginal young people who have entered the youth justice system

#### ***Recommendation 4. Facilitating the rehabilitation of young Aboriginal people who have entered the youth justice system***

- a. Expanding the Children's Koori Court geographically and increasing eligibility***
- b. Sentencing legislation should be amended to specifically ensure that the sentencing court can give weight to the young person's cultural context, and factors such as disadvantage, trauma, abuse and neglect, as well as the importance of culture to rehabilitation. This should enable admission of materials such as cultural context reports (Gladue Reports).***
- c. A culturally competent and trauma informed workforce***

#### 5.1. Koori Courts

A 2010 evaluation of the Children's Koori Court found:

- failure to appear and court order breaches were low

<sup>41</sup> Grant, P, 2008, 'Interventions that work: dealing with young people in conflict with the law', Conference Paper: *Young People, Crime and Community Safety: Engagement and Early Intervention*, Australian Institute of Criminology International Conference, Melbourne.

<sup>42</sup> Sentencing Advisory Council, *Sentencing Children and Young People in Victoria*, April 2012.

<sup>43</sup> KPMG 2010, *Review of the Youth Justice Group Conferencing Program Final Report*, DHS, p 64.

<sup>44</sup> Ibid.

<sup>45</sup> Caitlin Grover, Victorian Parliamentary Library & Information Service, *Youth justice in Victoria*, April 2017, p 12.

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- it fostered positive participation by Koori youth, their families and their community
- it increased the accountability of the Koori community for Koori youth
- it fostered increased community awareness of Indigenous and community codes of conduct and standards of behaviour.<sup>46</sup>

The continued success of Koori Courts, in empowering its participants, is demonstrated in our client's story.

*Julia\** is a 17 year old Aboriginal young person. She has significant issues with methamphetamine dependence and has been involved in the criminal justice system since she was 14 years old. Unfortunately, due to new matters involving causing injury, diversion was no longer an option. Julia agreed to have her matters dealt with by Koori Court. Julia was very open with the Magistrate and the Elders in identifying what she needs help with. She made a list on the day- she needs help with her anger, frustrations, drug use. She said that she had felt "lost and floating about life". She had said she had lacked motivation in attending school and finds it hard to get up in the morning. Julia was placed on a deferral with youth justice to be able to assist her with her needs.

The Magistrate said they are going to take it step by step, slowly so as to not overwhelm Julia. Julia returned to court for two judicial monitoring appearances over the following two months. She had increased school attendance, largely due to youth justice providing transportation. She had attended all her appointments and accepted a referral to the Victoria Aboriginal Health Service as well as Bert Williams Aboriginal Youth Justice Support. Julia became pregnant and was continuing to do well, still attending her youth justice (YJ) appointments. After a third judicial monitoring appearance had attended all her YJ appointments and accepted all referrals on top of all her medical appointments. Julia was placed on a three month good behaviour bond. The Magistrate and elders were very impressed with her significant progress and acknowledged that she is now in a very important point in her life to focus on becoming a mother.

Julia's voice was heard and her needs were acknowledged. With the backing of her cultural Elders and the authority of the Magistrate, she was provided assistance in addressing those needs. She was held accountable for her actions however her sentence will empower, rather than diminish, her life prospects.

\* VLA client, not her real name.

In our experience, access to a Koori Court is particularly helpful for Aboriginal young people who feel disconnected from the rest of society and as a result may not engage positively with mainstream criminal justice agencies. By enabling Elders a seat at the table the decisions are more likely to be culturally appropriate, and may be perceived with greater respect and connection by the young person.

Despite the community and cultural benefits of the Koori Court, it is not available state-wide. The Koori Court is available in 12 Children's Court locations,<sup>47</sup> 11 Magistrates' Court locations,<sup>48</sup> and 4 County Court locations.<sup>49</sup> Furthermore, in some regional locations it sits as infrequently as every

<sup>46</sup> Borowski, A (2010) 'Evaluating the Children's Koori Court of Victoria: Some key findings', presentation to the Australian Institute of Criminology Occasional Seminar, 15 March 2010, cited in *ibid*, p 30.

<sup>47</sup> The Children's Koori Court is available at Melbourne, Mildura, Swan Hill, Warrnambool, Portland, Hamilton, Latrobe Valley (Morwell), Bairnsdale, Shepparton, Geelong, Heidelberg and Dandenong.

<sup>48</sup> The Magistrates' Koori Court sits at Bairnsdale, Broadmeadows, Geelong, Latrobe Valley, Melbourne, Mildura, Shepparton, Swan Hill, Warrnambool, Portland, Hamilton.

<sup>49</sup> The County Koori Court sits at La Trobe Valley, Melbourne, Mildura and Shepparton.

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six weeks, so in our experience a young person may go to the mainstream court instead of waiting for a Koori Court date.

The Koori Court is also limited to a plea and diversion court. Extending the Koori Courts to the pre-resolution stage would allow people to engage early in a culturally appropriate program that would address underlying criminogenic factors, which may then improve their sentence outcomes. In addition, it would preclude the possibility of people pleading guilty to charges which they may have otherwise contested. Harry Blagg and his colleagues found that:

The jurisdictional limitation was accepted as inevitable at the current time; but the necessity to plead guilty was a major source of dissatisfaction. Koori people, it was said, want to go to a Koori court because they want to be judged by their elders and to have access to culturally appropriate treatment options – there is a wide belief that the court is not a soft option but is willing to address the cultural, health and welfare needs of offenders. We were told on many occasions and by different sources, that this has led to some Koori offenders pleading guilty to charges they might otherwise have challenged (or which they said they had not committed), in order to gain access to the court. As one expressed it: “*I wanted to turn my life around, only my own people could help me do that*”.<sup>50</sup>

## 5.2. Sentencing options

The CYFA and the Sentencing Act should be amended to explicitly enable the court to take into account Aboriginal cultural background and context, regardless of whether it is directly relevant to the offending being sentenced. Bronitt and McSherry noted that “a review of the authorities reveals considerable judicial ambivalence about the extent to which the accused’s Aboriginal background may be taken into account, particularly in cases where the violence occurs within Indigenous communities.”<sup>51</sup>

The 2013 High Court in *Bugmy v R*<sup>52</sup> held that although an offender’s background of deprivation is a relevant factor when determining an appropriate sentence, the applicable sentencing legislation does not direct a sentencing judge to give attention to the circumstances of an Aboriginal offender in a way that is different from the attention they would give to the circumstances of an offender who is not Aboriginal. Though *Bugmy* is a NSW focused case, Victorian sentencing legislation suffers from the same deficiency - one’s Aboriginal background may be taken into account in some cases but this is not guaranteed.

VLA supports the introduction of cultural context reports, also known as Gladue reports, to sentencing processes.<sup>53</sup> Gladue reports are the means by which information is gathered about the individual defendant to assist the judge to better understand the impact of colonisation on contemporary cultural issues and socio-economic disadvantage, and how that context has affected that individual.

The following client story illustrates the significance of a culturally attuned sentencing response for a young person who has been removed from his heritage and institutionalised.

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<sup>50</sup> Harry Blagg, Neil Morgan, Chris Cunneen, Anna Ferrante, *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System*, September 2005, p 124 (emphasis added).

<sup>51</sup> Bronitt, S and McSherry, B, *Principles of Criminal Law 4<sup>th</sup> Ed*, 2017, p 162.

<sup>52</sup> *Bugmy v R* (2013) 302 ALR 192.

<sup>53</sup> By way of background, in the 1999 Canadian case of *R v Gladue*, it was successfully argued that the defendant’s low socio-economic background was a result of colonisation and this was central to the commission of the offence.

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*Adam\** is a young Koori teenager. Adam was removed from his mother's care at less than 6 months old, and he had been placed in foster care before he had turned 3. At a young age Adam was diagnosed with an intellectual disability and, as a teenager, he was diagnosed with multiple complex mental health issues, including Attention Deficit Hyperactivity Disorder, anxiety and depression. An expert found he had mental age of a child less than half his biological age.

Adam was able to be placed with a relative after he had already spent his early childhood years in foster care. However, his relative found it increasingly difficult to care for him. By the time Adam was a young teenager, he had started using alcohol and drugs and was often running away from home. At around the same time he started offending, mostly in the company of his peers, and soon became involved in the youth justice system, amassing a string of charges.

A psychologist was recently asked to examine Adam to determine the underlying medical issues that may have contributed to his offending. The psychologist concluded that Adam's disrupted early attachment, complex psychosocial situation, intellectual disability, mental health issues, harmful influence of his peer group, hormonal changes and the impact of drugs on his developing brain, had all contributed to his behaviour.

Adam told his VLA lawyer that he rejects the authority of the judge, court or police. He says: "the only people I respect are my [Aboriginal] Elders". Adam's deep identification with his Aboriginal community and the respect he has for his Aboriginal Elders is, according to the psychologist, the key to Adam's rehabilitation. The psychologist recommends that a meeting with his Elders and community should be facilitated with this goal in mind.

*\*VLA client, not his real name.*

Gladue reports are not used in Australia. The Canadian Gladue decision has legislative underpinning.<sup>54</sup> In contrast, Victorian and other Australian sentencing legislation does not contain similar provisions and the courts have not followed suit. Bronitt and McSherry concluded in 2017 "The modern trend is firmly against the recognition of customary law and the "cultural context" of the offending behaviour in sentencing decisions".<sup>55</sup>

The Bail Act s 3A directs bail decision-makers to take into account the person's cultural background, including the person's ties to extended family or place, and any other relevant cultural issue or obligation. We recommend that Victorian sentencing legislation, including the CYFA, should include a similar provision.

Finally, it must be highlighted that the success of the Gladue report processes is underpinned by the involvement of Aboriginal community organisations. In Canada the Aboriginal Legal Service of Toronto prepares Gladue reports with specifically trained Aboriginal Gladue writers. A similar process, with appropriate funding, should accompany any legislative change.

### 5.3. Workforce competency

A key way to reduce the overrepresentation of Aboriginal children and young people in the youth justice system is to ensure that all decision-makers and service-providers are culturally competent and trauma-informed. It is critical that all relevant agencies, including child protection, youth justice,

<sup>54</sup> Section 718.2(e) of the Canadian Criminal Code requires the sentencing judge to pay "particular attention to the circumstances of Aboriginal offenders".

<sup>55</sup> Bronitt, S and McSherry, B, *Principles of Criminal Law 4<sup>th</sup> Ed*, 2017, p 162.

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law enforcement, prosecutions, defence lawyers and court staff, ensure ongoing cultural competency training, and actively demonstrate awareness of adolescent welfare, cultural context and the impact of trauma on these young people. In our view this would be best accomplished with clear targets for the entire youth justice workforce.

This is a particular issue for youth custody staff, as there is a high turnover rate of youth custody officers and their workforce suffers from frequent absenteeism. As a result, young people are frequently held in lockdown. The Victorian Ombudsman reported that Custody Officers at Malmsbury regularly use lockdowns and solitary confinement as a behaviour control tool.<sup>56</sup> This practice is aggravating the reactivity of young people in custody, resulting in disruptive behaviour.

Investment in resourcing and intensive training for the Youth Justice community workforce would improve quality and consistency in bail assessments and supervision, community assessments and supervision and parole planning and support. In VLA's experience, there is significant variability in the size and seniority of the youth justice workforce across Victoria. This results in insufficient support in the system and insufficient access to programs and plans.

There should be a consistent, specialised magistracy in Children's Court, trained in youth crime, child protection, child and adolescent brain development, culturally safe and trauma-informed practice, and communication with children. We recognise that this would require intensive training in the regions to ensure that the small number of magistrates in some courts have had the requisite specialist training.

Finally, Aboriginal Community Controlled Organisations already play a vital role in delivering culturally specific programs which are trauma informed. Adequate and appropriate funding should be provided to assist such organisations to continue their services. Similarly, *Balit Ngulu* was the first and only legal service that expressly catered for the needs of Aboriginal children and young people. We support the provision of funding to reinstate the service and with a state-wide reach.

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<sup>56</sup> Victorian Ombudsman, 2017, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville*.