SUBMISSION TO THE COMMISSION FOR CHILDREN AND YOUNG PEOPLE INQUIRY: OUR YOUTH, OUR WAY

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BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal community-controlled organisation (ACCO), which provides culturally safe legal and community justice services to Aboriginal Victorians[1] across the state. Our vision is to ensure that Aboriginal Victorians are treated equally before the law, our human rights are respected, and we have the choice to live a life of the quality we wish.

Our legal practice operates in the areas of criminal, family and civil law. We represent women, men and children who come to us for assistance, and are only hindered in doing this where there is a legal conflict of interest. If this is the case, we provide warm referrals to other suitable legal representatives. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers play, who are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

Client Services for Children and Young people

Our Legal Practice and Community Justice Program provide legal assistance to Aboriginal children and young people in contact with the youth justice system, and to young people and their families in relation to child protection matters and Commonwealth family law matters.

We provide legal assistance and represent Aboriginal children and young people in immediate court dealing such as bail applications, defending or pleading to charges and sentencing. This includes matters in both the mainstream and Children's Koori Court.[2] Many of our clients come from backgrounds where they may have been exposed to family violence, poor mental health, homelessness and poverty. We try to understand the underlying reasons that have led to the offending behaviour and ensure that prosecutors, magistrates and legal officers are aware of this. We support our clients to access support that can help to address underlying reasons for offending and reduce the risk of recidivism.

We also represent families in child protection matters, where we advocate for support to ensure that families can remain together, and for compliance with the Aboriginal Child Placement Principle wherever children are removed from their parents' care.

Policy, Advocacy and Community Legal Education

We operate in various strategic forums which help inform and drive initiatives to support Aboriginal young people in their engagement with the justice system in Victoria. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

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

[1] The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.
[2] In 2018-2019, VALS provided legal services to 132 children (aged 10-17 years) and 527 young people (aged 18 to 24 years). We also received police notifications through our Custody Notification System in relation to 1,730 children and 2,343 young people. In 2017-2018, we provided legal assistance to 64 children and received custody notifications in relation 1,487 children.

SUMMARY OF RECOMMENDATIONS

1. The Commonwealth and/or State Government should commit to fund Balit Ngulu,[3] the legal service for Aboriginal children and young people established by VALS in 2017.

2. The Victorian government should work with Aboriginal Community Controlled Organisations (ACCOs) to develop and implement a range of youth diversion programs, particularly in rural and regional areas.

3. Strengthen the role of ACCOs in Group Conferencing, including as Group Conference Convenors, and expand the scope of Group Conferencing so that it is available as a pre-charge alternative measure.

4. Amend Section 344 of the CYFA to raise the age of criminal responsibility to 14 years, in accordance with Australia's obligations under the Convention on the Rights of the Child.

5. Incorporate the following key changes into the CYFA and the new Youth Justice Act:
   - Create a legislative presumption in favour of alternative pre-charge measures, including verbal warnings, written warnings, caution and referral to cautioning program, youth justice conferencing;
   - Where pre-charge diversion is not possible, create a legal requirement to prioritise diversion at all stages of the legal process;
   - Create a legislative presumption in favour of diversion for all first-time offenders under 18 years;
   - Amend Section 356F CYFA to remove the requirement for prosecutors to consent to court-based diversion;
   - Repeal Section 356B CYFA to expand the circumstances and offences for which diversion can be made available.

6. Victoria Police and DJCS should commit to state-wide implementation of the Victorian Police Koori Youth Cautioning program, in partnership with Aboriginal communities.

7. Enhance the cultural safety of the Children's Court Youth Diversion (CCYD) Service, by ensuring that there are Koori Diversion Coordinators.

8. Victoria Police should establish a specialised Youth Division within Victoria Police, similar to the New Zealand Police Youth Aid Section.

9. DHHS and other relevant stakeholders should put in place a monitoring and evaluation framework for the Agreed Plan on reducing criminalisation of children and young people in residential care, including a mechanism for independent review of progress in implementing the Plan.

10. Develop and implement a robust accountability mechanism to ensure compliance with the Aboriginal Child Placement Principle (ACPP).

11. Amend the CYFA to enhance the rights and protection of grandparents and other extended family members, including:

[3] Balit Ngulu means "Strong Voice" in Wurundjeri.

- Allow parties other than DHHS to apply for a permanency care order;
- Afford rights equivalent to the rights of a parent, to any party to a child protection proceeding;
- Clarify when a person can be added as a party to a proceeding.

12. Develop and implement guidelines and training to increase understanding and application of the definition of parent under the CYFA, including its application to extended family members (particularly grandparents) who have full time care of their grandchildren.

13. DHHS should continue to invest in and support ACCOs to contribute to the development of cultural support plans, so that every Aboriginal child in OOHC has a Plan that supports then to establish and/or maintain connection to their culture and is not just a check-box exercise.

14. DHHS, Victoria Police and other stakeholders including residential care providers, should finalise the Agreement on Reducing criminalisation of children in residential care as soon a possible and put in place a mechanism for independent monitoring and review of implementation efforts.

15. The Victorian government should raise the age of leaving out-of-home-care to at least 21 years.

16. Amend the *Bail Act 1977* (Vic) as it relates to children and young people:
- Amend Sections 4AA, 4A, 4C and 4D of the *Bail Act* to exclude children and young people from the presumption against bail and the requirement to show exceptional circumstances or compelling reasons;
- Amend Section 30 of the *Bail Act* to exclude children and young people from the offence of failure to answer bail;
- Create a mechanism for effective oversight of police bail.

17. Ensure that Police are appropriately trained (including in relation to trauma-informed approaches and cultural appropriateness) so that they understand how the *Bail Act* applies to children and do not impose onerous and culturally inappropriate conditions on children.

18. Ensure that police are held accountable for non-compliance with the presumption of proceeding against children by way of summons, and that any complaints about police's failure in this regard are investigated by an independent body to ensure impartiality (e.g. IBAC).

19. Invest in and expand the Koori Youth Justice Workforce, including:
- Invest in the Koori Youth Justice workforce to ensure culturally appropriate and flexible supervision of Aboriginal young people on bail and on community-based orders;
- Increase the number of Aboriginal staff at Malmsbury and Parkville;
- Ensure that there is a Koori Youth Justice Worker at each Children's Koori Court.

20. The Victorian Government should prioritise investment in a residential bail support and therapeutic program for Aboriginal young people in the 2019-2020 State budget.

21. The *CYFA* and the *Sentencing Act* should be amended to include a legislative requirement to consider Aboriginality as a factor in sentencing, similarly to Section 3A of the *Bail Act.* A similar requirement should be included in the new *Youth Justice Act*.

22. In addition to expanding the Children's Koori Court to additional locations, Court Services should increase the frequency of Children's Koori Court hearing days and expand the scope of the Court to enable children to plead not guilty.

23. Invest in programs that support families to maintain contact with their loved ones while they are in custody, including financial support to cover the cost of transport to Parkville or Malmsbury.

24. DCJS should ensure that the recommendations from the 2018 Report by CCYP and VEOHRC on *Aboriginal Cultural Rights in Youth Justice Centres*, are incorporated into the Aboriginal Youth Justice Strategy, as well as the new Youth Justice Strategy and Youth Justice Act.

25. The Royal Commission into Victoria's Mental Health System should further examine the youth justice forensic mental health system and develop recommendations to increase access to culturally safe forensic mental health services for Aboriginal young people.

26. The Victorian government must urgently implement recommendations from previous inquiries on the use of isolation, separation and lockdowns in the youth justice system, including the most recent 2019 Inquiry by the Victorian Ombudsman.

27. The Victorian government should adequately fund a National Preventive Mechanism to implement Victoria's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

28. The Victorian government should work closely with the Commonwealth government to ensure that there is long-term and sustainable funding for the Throughcare program run by VACCA for Aboriginal children leaving detention.

DETAILED SUBMISSIONS

VALS welcomes to the opportunity to provide feedback to the Inquiry of the Commission for Children and Young People (CCYP), *Our Youth Our Way*, into over-representation of Aboriginal and Torres Strait Islander children and young people in the youth justice system. We would also like to take the opportunity to commend the Commission and the Department of Community Safety and Justice (DJCS) for its work through the Koori Youth Justice Taskforce.

At the outset, we would like to acknowledge the critical work of the Koori Youth Council (KYC), including its 2018 report *Ngaga-dji* ("Hear Me").[4] We believe that there are significant opportunities to build on this work through the ongoing development of an Aboriginal Youth Justice Strategy. As an ACCO with a proud history of working with Aboriginal youth across Victoria, we are committed to work with Aboriginal young people, ACCOs, government and other stakeholders to close the gap in justice outcomes for our young people by supporting them to be strong in their culture and building a self-determined Aboriginal Youth Justice system.

Our submission outlines our primary concerns, based on our experience working with children involved in both the youth justice and child protection systems. In particular, we are concerned by the punitive approach that has crept into the youth justice system since youth justice was transferred from DHHS to DJCS and Corrections Victoria. Despite numerous inquiries and reviews of the youth justice system in recent years,[5] repeated incidents at youth justice centres indicate that the system is under serious strain and that Aboriginal youth are disproportionality bearing the brunt of this broken system.[6] We believe that there is a critical need to shift towards rehabilitative responses that are culturally appropriate and support our youth to heal from past trauma.

Case studies in our submission are de-identified and are provided with the consent of our clients, who are eager to see reforms that could lead to significant positive outcomes for their wellbeing, livelihoods, families and communities.

STRATEGIES AND PROGRAMS THAT ARE WORKING WELL

(a) Balit Ngulu ("Strong Voice")

VALS believes that all Aboriginal and Torres Strait Islander children and young people should have the choice of being able to access a legal service that is culturally informed, holistic, embedded in community and able to support our youth in making sure that their voices are heard.

From September 2017 to October 2018, VALS provided a culturally-safe community service for our children and young people across Victoria, by establishing the first Aboriginal legal service for Aboriginal children

[4] Ngaga-dji means "Hear Me" in Woiwurrung

[5] Commission for Children and Young People (CCYP), *The Same Four Walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, (2017); P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Executive Summary* (2017); Victorian Ombudsman, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville* (2017); Parliament of Victoria Legal and Social Issues Committee, *Inquiry into Youth Justice Centres in Victoria: Final Report* (2018); Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people*, (2019); 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).

[6] In 2017-2018, 41 (17%) out of 242 young people in Youth Justice Centres and Youth Residential Centres were Aboriginal. See Youth Parole Board, *Youth Parole Board Annual Report 2018-2019*, (2019), p. 31.

and young people in Australia.[7] Through a service model combining both lawyers and Client Service Officers, *Balit Ngulu* focused on maintaining and strengthening connection to culture and family, whilst also assisting clients to access education, employment and leadership opportunities. In doing so, the service was successful in diverting Aboriginal youth from the criminal justice system and prioritising and facilitating placement of children within a kinship network.

Balit Ngulu was founded on the right of self-determination of all Aboriginal peoples, and as such we ensured that our governing, management and service delivery frameworks were informed by our Aboriginal communities. We know that many Aboriginal youth prefer to use culturally-safe community services like Balit Ngulu and that culturally-safe and trauma informed community services are also more likely to stop youth reoffending.[8]

We strongly encourage the Victorian and Commonwealth governments to invest in this critical legal service, which was widely recognised and endorsed, including by the Law Council of Australia,[9] the Law Institute of Victoria,[10] KYC,[11] the Victorian Council of Social Services[12] and the Commissioner for Aboriginal Children and young People.[13]

James:[14] successful diversion

Our client was a 15-year-old boy in regional Victoria who had his first criminal matter in January 2018 and received diversion. He didn't engage at all with his previous lawyer and therefore failed to comply with the court's conditions.

The matter was referred to Balit Ngulu by the Diversion Co-ordinator, who was disappointed to have to file a report that would have seen a warrant issued for his arrest. We pleaded with the Magistrate to adjourn the matter for a month to give our unique service the chance to get him to attend court without police arresting him. Our application was granted, and thanks to our Client Service Officer, we were able to support out client to enrol in a TAFE course, engage in drug and alcohol counselling, and explore a community and social group. As a result of the support from Baliit Ngulu, James is now on track to avoid a criminal conviction.

(b) Aboriginal Youth Justice Strategy

Since mid-2018, the Aboriginal Youth Justice Unit (DJCS) and the Aboriginal Justice Caucus have been collaborating to develop an Aboriginal Youth Justice Strategy. Development of the Strategy was recommended by the 2017 review of the youth justice system and is one of the youth justice commitments under *Burra Lotpja Dunguludja*. The Strategy is community-led and seeks to move towards a self-determined youth justice response. It builds on the critical work carried out by Koori Youth Council in their

[7] From July 2017 to September 2018, Balit Ngulu provided support and legal assistance in relation to 184 criminal law matters, 59 child protection matters, and 11 civil law matters.
[8] Koori Youth Council (KYC), *Ngaga-Dji: Young Voices Creating Change for Justice* (2018), p. 53.
[9] The Law Council of Australia, *Alternative Report to the United Nations Committee on the Rights of the Child,* November 2018, p. 10.
[10] Law Institute of Victoria, "LIV calls on government to fund Balit Ngulu," 5 October 2018.
[11] KYC, *above note* 8, p. 37.
[12] Victorian Council of Social Services, *Delivering Fairness: Victorian Budget Submission 2019-2020*, p. 38.
[13] ABC, "Victorian Aboriginal Legal Service shuts down youth service," 28 September 2018.
[14] Not his real name.

Ngag-dji report by ensuring that the voices of children and young people are at the centre. VALS supports the strong commitment to self-determination in this process.

(c) Culturally appropriate youth support programs

VALS strongly supports existing programs that provide culturally appropriate support and mentoring to Aboriginal youth, to prevent them from coming into contact with the youth justice system and/or to provide support to children and young people who do come into the system. These include early intervention, mentoring and diversion programs, such as *Marram Nganyin* Youth Mentoring,[15] Dardi Munwurro Youth Journeys Program[16] and Bert Williams Koori Youth Justice Program,[17] as well as residential drug and alcohol programs such as *Bunjilwarra*[18] and *Baroona Healing Centre*.[19]

Despite these programs that are achieving positive outcomes for our youth, there is a shortage of culturally appropriate diversion programs, particularly in rural and regional areas. We strongly encourage the Victorian government to work with ACCOs to develop and implement a range of youth diversion programs, particularly in rural and regional areas.

(d) Consideration of Aboriginality in determinations under the Bail Act 1977

Victoria is the only State or Territory in Australia to include a legislative requirement when making a determination in relation to an Aboriginal person, to consider any issues that arise due to a person's Aboriginality including the person's cultural background or any other relevant cultural issue or obligation.[20] Section 3A was introduced in 2010 and according to the Australian Law Reform Commission, this provision should be replicated in relevant legislation in all States and Territories.[21]

In VALS experience, s. 3A of the *Bail Act* is a significant achievement and a powerful tool that allows us to advocate for the cultural rights of our clients in all determinations under the *Bail Act*. We remain concerned that s. 3A is not being used to provide maximum protection to Aboriginal people across Victoria and that further efforts are required to enhance understanding and implementation of this provision.

(e) Group conferencing

Group Conferencing[22] for children and young people who have been found guilty of an offence is a restorative justice tool that is currently working well when it is available. Group Conferencing allows the young person and the victim to tell their story about what happened and how the offence has affected them. It is currently available in situations where a child or young people has been found guilty of an

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[15] For Aboriginal young people aged 12 – 25 years. See https://www.yacvic.org.au/resources/youth-mentoring/

[16] For Aboriginal boys and men aged 10-18 years. See https://www.dardimunwurro.com.au/youth-journeys-program

[17] For Aboriginal children and youth aged 10 to 20 years. See http://www.vacsal.org.au/programs/bert-williams-center.aspx. Other programs include sporting programs run by Fitzroy Stars and Rumbalara Football and Netball Clubs; and the following programs run by VACCA: Koorie Tiddas Youth Choir for girls and young women; and Barreng Moorop for children aged 10-14 years.

[18] For young people aged 16 – 25 years. See http://bunjilwarra.org.au/#service_model

[19] For young people aged 14 – 22 years. See http://www.njernda.com.au/baroona-healing-centre/

[20] Section 3A *Bail Act 1977* (Vic). Section 3A of the *Bail Act* also interacts with Section 19 of the Charter on Human Rights and Responsibilities, which protects the rights of Aboriginal people to: enjoyed their identity and culture; maintain and use their language; maintain their kinship ties; and 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.

[21] Australian Law Reform Commission (ALRC), *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, 2018, p. 169.

[22] Pursuant to s. 414, *CYFA 2005* (Vic), the court can defer sentencing for up to four months so a group conference can be held and a report prepared for the court.

offence (other than homicide, manslaughter and sex offences) and the court is considering imposing a sentence that will be supervised by the youth justice service.[23]

We believe that the role and effectiveness of Group Conferencing could be strengthened by enhancing the role of ACCOs in the group conference process, including as Group Conference Convenors. We also believe that more needs to be done to increase the number of Koori Group Conference Convenors, including through identified roles.

Additionally, we strongly believe that Group Conferencing should be used as a pre-charge mechanism for youth who are believed to have committed an offence. As elaborated below, there is critical need to prioritise legislative reform and investment in programs aimed at diverting children and young people away from the youth justice system. In the Northern Territory, Group Conferencing is an important element of an effective pre-charge diversion scheme.[24] We recommend that Group Conferencing in Victoria is expanded so that it can be used as a legislatively based pre-charge alternative measure.

SYSTEMIC CHANGES TO REDUCE YOUTH JUSTICE INVOLVEMENT FOR ABORIGNAL YOUNG PEOPLE IN VICTORIA

Reducing youth justice involvement for Aboriginal children and young people in Victoria requires systemic reform across both the youth justice and child protection systems. There is a critical need to divert our young people away from the youth justice system at every possible stage, including by supporting families and preventing initial contact with the system; ensuring that young people's experiences of the system are culturally appropriate and trauma-informed; and supporting young people who are transitioning out of the youth justice system.

1. Prevent our children and young people from engaging with the youth justice system

(a) Raise the minimum age of criminal responsibility to 14 years

The current age of criminal responsibility in Victoria is 10 and there is a rebuttable presumption (*doli incapax*) that children under the age of 14 are not capable of committing a criminal offence.[25] VALS is strongly of the view that children below the age of 14 should not be behind bars and that the Victorian government should raise the criminal age of responsibility to 14 years.

In VALS experience, the current law is inconsistency applied and routinely fails to protect our children. Although the burden is on the police to prove that a child aged 10 to 13 years has capacity to be criminally responsible for his/her acts, in practice, police officers regularly fail to discharge this burden unless they are specifically requested to do so. Aboriginal children are disproportionality impacted by the low age of

[23] This includes probation, youth supervision order, youth attendance order, youth residential centre order or youth justice centre order.
[24] In the Northern Territory, Youth Justice Conferencing is one of four pre-charge alternatives that must be considered by the Police pursuant to s. 39 of the Youth Justice Act. See Royal Commission into the Protection and Detention of Children in the Northern Territory, *Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory: Volume 2b*, (2017) p. 253.
[25] When a child is over the age of 10 but under 14, there is an old, common law rebuttable presumption that the child lacks the capacity to be criminally responsible for his or her acts, known as "doli incapax" (incapable of crime). In order to rebut the presumption, it must be proved that at the time of an offence the child knew that his or her actions were seriously wrong in the moral sense. See *RP v The Queen* [2016] HCA 53.

criminal responsibility with many Aboriginal young people entering the youth justice system when they are aged 10 to 13 years.[26]

Criminalising children aged 10 to 14 years is in breach of international human rights law and is inconsistent with international standards, which provide that the minimum age of criminal responsibility should be 14 years.[27] In September 2019, the United Nations Committee on the Rights of the Child found reviewed Australia's compliance with the Convention on the Rights of the Child and recommended that Australia increase the minimum age of criminal responsibility to 14 years.[28]

The current legal minimum age of criminal responsibility is against medical evidence that children aged 10 to 14 years lack emotional, mental and intellectual maturity. Research shows that children's brains are still developing throughout these formative years where they have limited capacity for reflection before action.[29] Criminalising the behaviour of young and vulnerable children also creates a vicious cycle of disadvantage that can entrench children in the criminal justice system.[30] Studies by the Australian Institute for Health and Welfare (AIHW) and the Victorian Sentencing Advisory Council show that the younger a child has their first contact with the criminal justice system, the higher the chance of future offending.[31]

As a member of the Smart Justice for Young People (SJ4YP) Coalition, VALS stands alongside a growing number of organisations[32] in calling for the Victorian government to raise the age of criminal responsibility to 14 years. We strongly encourage the Victorian government to be a leader in the ongoing Council of Attorney Generals (COAG) review of the minimum age of criminal responsibility across Australia. Children should be in playgrounds and classrooms, not in prisons.

(b) Prioritise and strengthen diversion at every stage

Diverting young people away from the formal court system leads to a positive impact on youth reoffending behaviour.[33] Under the Convention on the Rights of the Child, Australia is obliged to promote measures for dealing with children without resorting to judicial proceedings wherever appropriate and desirable.[34]

Currently in Victoria, children and young people can be diverted away from the youth justice system through the following mechanisms:

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[26] In 2017-2018, 39% of Aboriginal children under supervision nationally where aged 10-13 when they were first sentenced to a custodial or community-based youth justice order, versus only 15% of non-Aboriginal children. Australian Institute for Health and Wellbeing (AIHW), *Youth Justice in Australia 2017-2018*, May 2019, p. 27.

[27] United Nations Committee on the Rights of the Child, *General comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, September 2019.

[28] United Nations Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, CRC/C/AUS/CO/5-6, September 2019.

[29] Andrew Becroft, 'From Little Things, Big Things Grow: Emerging Youth Justice Themes in the South Pacific' (Paper presented at the Australasian Youth Justice Conference on Changing Trajectories of Offending and Reoffending, New Zealand, 21-22 May 2013) 5 referring to Science Advisory Committee *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (May 2011), p. 24. See also Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (2011) 409 *Trends & issues in crime and criminal justice*, 4; Laurence Steinberg 'Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science' (2007) 16 *Current Directions in Psychological Science* 55, 56.

[30] AIHW, *Young people returning to sentenced youth justice supervision 2014–15* (2018); Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016) p. 26.

[31] Ibid. See also AIHW 2013.

[32] Australian Medical Association, "AMA Calls for the Age of Criminal Responsibility to be Raised to 14 years of Age," (25 March 2019). See also Law Council of Australia, "Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax" (26 June 2019); Australian and New Zealand Children's Commissioners and Guardians (ANZCCG), "Public Guardians and Children's Commissioners Australia and New Zealand Children's Commissioners and Guardians, Communique 12-14 November 2018,"; Royal Australian College of Physician, "Doctors, lawyers, experts unite in call to raise age of criminal responsibility."

[33] Crime Statistics Agency, *In Brief 9: The Cautious Approach: Police cautions and the impact on youth reoffending*, (2017).

[34] United Nations Convention on the Rights of the Child, Article 40(3)(b).

- Pre-charge caution by Victoria Police;[35]
- Referral to a pre-charge cautioning program, where available;[36]
- Court-based diversion through the Children's Court Youth Diversion (CCYD) Service.[37]

In VALS experience, there are challenges with the current cautioning and court-based diversion mechanisms, which mean that they are inconsistency applied. In particular, we believe that the lack of a legislative basis for pre-charge cautions, the discretionary powers of police in relation to cautions, and the police veto on court-based diversion undermine the potential for a rehabilitative approach to youth justice and instead channel young people into a cycle of reoffending.[38]

Michael:[39] arrest for minor offence

Our client was an Aboriginal boy from a regional town who was playing with friends late one evening in a public space. Our client's friends had committed some minor offences. Police attended, arrested the children and took them to the station. Although police knew where our client lived, they held him in a police cell overnight. They interviewed him at 4:00am, and returned him home in the morning. Our client was charged by police, but the charges were later withdrawn as it was determined that he didn't have legal capacity. As a result of being arrested by police and being held in custody, our client suffers from anxiety and is increasingly withdrawn. The impact of this experience has limited his school attendance.

To strengthen the mechanisms for diverting Aboriginal children and young people away from the youth justice system, we believe that there is a need for significant legislative and policy reform. In relation to the legislative framework, VALS believes that the following key changes must be incorporated into the *CYFA* and the new *Youth Justice Act*:

- Create a legislative presumption in favour of alternative pre-charge measures, including verbal warnings, written warnings, caution and referral to cautioning program, youth justice conferencing;
- Where pre-charge diversion is not possible, create a legal requirement to prioritise diversion at all stages of the legal process;
- Create a legislative presumption in favour of diversion for all first-time offenders under 18 years;
- Remove the requirement for prosecutors to consent to court-based diversion;[40]
- Expand the circumstances and offences for which diversion can be made available.[41]

[35] Under the *Victoria Police Manual – Procedures and Guidelines*, young people are eligible for a caution if they meet the following mandatory criteria: the individual admits to the offence; the individual is between the ages of 10-17 years; parent/guardian consents to the caution; and parent/guardian is present at the time of the formal provision of the caution.
[36] There have been several pre-charge cautioning pilot programs in Victoria, including: a 12-month Koori Youth Cautioning Pilot in Mildura (2007-2008); Youth Cautioning Pilot introduced in 2010 in Western Region Division 4, the Northern Grampians and Horsham Police Service Areas, the Eastern Region Division 2 Knox PSA and the Southern Metro Region Division 3 Casey PSA. Victoria police are currently working with Aboriginal communities in Echuca, Dandenong and Bendigo to develop and implement a new Aboriginal Youth Cautioning Pilot program.
[37] See s. 356 *CYFA 2005*. Court-based diversion has been available in all Children's Courts across Victoria since January 2017. The scheme is managed across Victoria by the Children's Court Youth Diversion Service (CCYD).
[38] According to research by the Crime Statistics Agency, Aboriginal young people are less likely to be cautioned than non-Aboriginal young people. See CSA, *above note* 33, p. 10.
[39] This is not his real name.
[40] Section 356F *CYFA 2005* requires the prosecutor to consent to diversion.
[41] Section 356B CYFA excludes diversion for the following offences: (a) an offence punishable by a minimum or fixed sentence; and (b) offences involving alcohol or drugs under s. 49(1) *Road Safety Act*.

Additionally, we believe that there is a significant need to invest in culturally appropriate pre-charge and court-based diversion programs that are gender-sensitive and respond to the intersectional needs of Aboriginal youth. We believe that ACCOs are the best placed to develop and implement such programs, building on the existing work by ACCOs in this space.[42]

In relation to pre-charge cautioning, we note that the current five-year Aboriginal Youth Cautioning Pilot (ACYP) program is a priority under *Burra Lotjpa Dunguludja* (AJA4), and we support this collaboration between Victoria Police and Aboriginal communities in the three pilot sites (Echuca, Dandenong and Bendigo).[43] However, we are concerned that this is now the second Koori specific youth cautioning pilot program in Victoria, and the government has still not committed to long-term sustainable funding to ensure that pre-charge cautioning programs are available across Victoria.

Regarding court-based diversion, we are concerned that the lack of culturally safe diversion programs, particularly for Aboriginal youth in rural and regional Victoria means that an Aboriginal young person may be eligible for Court-based diversion, but there are no programs available to support diversion. It is critical to ensure that the commitment under *Burra Lotjpa Dunguludja* (AJA4) to deliver community-based diversion programs is adequately funded and implemented in a timely manner.[44] Additionally, there is need to enhance the cultural safety of the CCYD, by ensuring that there are Koori Diversion Coordinators.

Finally, as was recommended by the Royal Commission into the Protection and Detention of Children in the Northern Territory, we believe that Victoria Police should establish a specialised Youth Division, similar to the New Zealand Police Youth Aid Section.

(c) Reduce criminalisation of children and young people in residential care

VALS represents a number of clients who reside in residential homes, and is concerned that children and young people in residential care are particularly vulnerable to early engagement with the youth justice system due to over-reliance on police to respond to behaviour issues in residential homes.

Amelia[45]: Criminalisation in Residential Care

Amelia is 16 years of age and living in residential care. She was removed from her parents at the age of 7 and was first placed in foster and kinship placements, before entering residential care at the age of 11. She has been extremely unhappy in this facility for some time, and has experienced significant periods of time without a child protection worker.

In 2018, she was granted youth parole after serving six months in custody. This was her first time in custody but she has been in contact with the youth justice system since the age of 11. Whilst on parole, police made multiple attempts to serve VALS with charges for alleged offending that occurred prior to Amelia's remand. The offending was minor, for example, one matter related to allegedly throwing a coffee cup in her residential unit. This created significant issues as she was required to attend court long after she had stopped offending.

[42] As mentioned above, programs such as Bareng Maroop, Dardi Munwurro Youth Journeys Program and the Bert Williams Koori Youth Justice Program are excellent examples of ACCO diversion programs.
[43] Under *Burra Lotjpa Dunguludja,* the Aboriginal Justice Forum has committed to implement this program in four sites over the next 5 years. See AJF, *Burra Lotjpa Dungulugja* (2018), p. 41.
[44] See *Burra Lotjpa Dunguludja*, p. 43. Development and delivery of community based diversion programs is yet to commence. See AJA4 in Action.
[45] This is not her real name.

Following on from Victorian Legal Aid's report, *Care not Custody*,[46] DHHS is currently leading a process to develop an inter-agency plan to reduce criminalisation of children and young people in residential homes. VALS is pleased to have been consulted on the draft Plan and commends DHHS and the other stakeholders for their work to date.

We strongly encourage DHHS and other stakeholders to put in place a rigorous monitoring and evaluation framework for the agreement, including a mechanism for independent review of progress in implementing the Agreement. We also support efforts in the Plan to limit information sharing between DHHS, Police and Residential Care Providers and ensure that Police are not involved in Care Team meetings for children and young people in Residential Care.

2. Enhance the cultural appropriateness of the child protection system

Children involved in the child protection system are over-represented in the youth justice system.[47] According to the Sentencing Advisory Council, 18% of children who received a sentence or diversion in the Victorian Children's Court in 2016 and 2017 where the subject of at least one child protection order and 18% of these children were Aboriginal.[48]

VALS notes that the child protection system has been the focus of previous inquiries by the CCYP and does therefore not intend to provide a thorough overview of our concerns relating to Aboriginal children and families involved in the child protection system. However, we would like to take this opportunity to highlight the following discrete points.

(a) Ensure compliance with the Aboriginal Child Placement Principle (ACPP)

VALS has recently become aware of multiple cases where Aboriginal children are removed from their grandparent(s), in apparent contravention of the Aboriginal Child Placement Principle (ACPP). While each case is unique, these cases appear to represent a pattern of non-compliance with the ACPP and marginalisation of grandparents from the care of their grandchildren.

While each case is unique, we have observed several cases involving the following factors:

- A child is placed on a Care by Secretary Order (CBSO) in the care of the grandparent, who believes that they have permanent care of the grandchild;
- After the grandparent has cared for the child for several years, they seek financial and emotional support from DHHS;
- The relationship between the grandparent and DHHS deteriorates and the child is removed from the grandparent's care as an administrative decision under the CBSO;
- The grandparent has limited capacity to challenge the decision, as are not a party to the proceeding and even if they are added as a party, they have limited rights.

[46] Victorian Legal Aid, *Care not Custody* (2016).
[47] AIHW, *Young People in Child Protection and Under Youth Justice Supervision (1 July 2013 to 30 June 2017)* (2019); AIHW, *Young People in Child Protection and Under Youth Justice Supervision (1 July 2014 to 30 June 2018)* ; Sentencing Advisory Council, *above note* 5.
[48] Sentencing Advisory Council, *above note* 5, pp. 47-48.

Rose:[49] removal of grandchild

Our client has played a significant role in caring her grandchild, as our client's daughter has a long history of mental health and alcohol/drug related issues. Our client cared for her grandchild approximately 50% of the time during the first 4 years of the child's life. When the grandchild was 4 years old, DHHS placed the child in our client's care on an order that eventually converted to a CBSO. At the time, our client understood that the CBSO gave her parental responsibility and that the child would remain in her care indefinitely.

Our client requested support from DHHS to manage her grandchild's behaviour when the child started refusing to go to school and self-harming, most likely due to bullying. Our client did not receive support from DHHS, and her grandchild was eventually removed to a non-Aboriginal family. The child was unhappy and continually contacted our client, who went each time to collect the child. Each time, DHHS removed the child from our client and returned her to her new carer.

We have made submissions for our client to be joined to the proceedings as a parent, as she had parental responsibility for her grandchild for a significant part of her life. The submissions have been rejected and our client does not have standing to apply to have the CBSO revoked, or to apply for a Family Preservation Order. The child has been away from her family for 12 months.

We strongly urge the government to develop and implement a robust accountability mechanism to ensure compliance with the Aboriginal Child Placement Principle (ACPP). We also recommend the following amendments to the CYFA to enhance the rights and protection of grandparents and other extended family members:

- Allow parties other than DHHS to apply for a permanency care order;
- Afford rights equivalent to the rights of a parent, to any party to a child protection proceeding, including the ability to request an internal review;
- Clarify when a person can be added as a party to a proceeding.

VALS also believes that there is a need for training to increase understanding of and application of the definition of parent under the CYFA, including its application to extended family members (particularly grandparents) that have parental responsibility (i.e. all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children).[50]

(b) Improve Cultural Support Plans

Under the *CYFA*, a Cultural Support Plan is required for every Aboriginal child in OOHC and should be made within 16 weeks of entering care.[51] The aim of these plans is to ensure that Aboriginal children in OOHC remain connected to their community and culture.

[49] This is not her real name.
[50] s. 3(1) *CYFA 2005* (Vic).
[51] s. 176 *CYFA 2005* (Vic). The legislative requirement for every Aboriginal child in OOHC to have a Cultural Support Plan was introduced in March 2016. Prior to March 2016, the CYFA only required Cultural Support Plan for some Aboriginal children subject to a Guardianship or long-term Guardianship order.

Despite multiple recommendations from CCYP and others,[52] VALS remains concerned that many Cultural Support Plans are grossly inadequate. For example, minimal efforts are made to identify the child's mob and many plans simply require a child to attend a NAIDOC week activity. At a minimum, the development of Cultural Support Plans should involve concerted efforts to identify the child's clan and country,[53] and the Plan should include activities to connect the child with their Elders.

We strongly support the increasing role of ACCOs, as a way of ensuring that Cultural Support Plans exist and are more than just a check-box exercise.[54] We encourage DHHS to continue to invest in and support ACCOs to contribute to the development of cultural support plans and programs for every Aboriginal child in OOHC. We also commend the work of the Youth Justice Collaborative Working Group to identify mechanisms for sharing DHHS Cultural Support Plans with Youth Justice and to ensure that all Aboriginal young people in youth justice have a Cultural Support Plan.

(c) Raise the age of leaving out-of-home care to 21

In VALS experience, there is a high risk of involvement with the youth justice system when young people leave OOHC, as they do not always receive the necessary support during this critical time. This is supported by National data which indicates that within 12 months, 50% of young people leaving care are unemployed, in prison, homeless or have become a new parent.[55]

William:[56] from care to custody

Our client has been in residential care since the age of seven. As a teenager, he moved frequently between residential care, Secure Welfare and Parkville youth Justice Centre. At the age of 17, just prior to leaving care, our client had a child and also lost his mother. Whilst he was initially able to access public housing, the transition out of care was extremely turbulent and our client was sentenced to 12 months in adult prison. As a result, he lost his DHHS house and after exiting prison was left with nowhere to live. With support from an intensive Aboriginal run program, our client has been able to re-establish himself, regain care of his child and remain out of the criminal justice system.

VALS supports the *Homestretch* campaign[57] in calling for care to be extended on a voluntary basis for young people until they reach 21. We commend the government's announcement to fund the *Homestretch* model with 250 young people over 5 years and strongly encourage the government to extend this support to all young people in care.

3. Reform the punitive bail system

[52] Victorian Ombudsman, *Own motion investigation into the Department of Human Services child protection program* (2009); Victorian Auditor General (VAGO), *Residential care services for children* (2014); CCYP, *'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), p. 72. In 2016, CCYP found that only 6.7% of Aboriginal children in OOHC had a cultural support plan. See CCYP, *'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), p. 23.

[53] We acknowledge that this may not always be possible due to the impact of child removal policies and Victoria's Stolen Generation.

[54] Victorian Government, *Korin Korin Balit-Djak: Aboriginal Health Wellbeing and Safety Strategic Plan 2017-2027* (2017), p. 61.

[55] See http://thehomestretch.org.au/

[56] This is not her real name.

[57] The Home Stretch campaign calls for the extension of care to 21 years for: those who wish to stay on in their foster care or kinship care placement and have the agreement from their carer, or: those who are not ready to go and wish to remain in a supported care environment but either cannot remain in the care placement past 18 years; such as those exiting residential care, or do not wish to remain in foster care. See http://thehomestretch.org.au/

VALS is concerned that the current bail system is having catastrophic consequences for Aboriginal children and young people in Victoria. More of our young people are on remand than ever before,[58] resulting in increased exposure to the punitive environment of custodial facilities, disconnection from family, culture and community and further entrenchment into the youth justice system.

In our work across Victoria, we experience the following key challenges relating to the bail system:

- Although the *CYFA* includes a presumption for proceeding by summons,[59] police regularly proceed by way of arrest;
- Children and young people alleged to have committed low-level offences are refused bail as they are unable to show cause;
- Police impose onerous and culturally inappropriate bail conditions;[60]
- Although it not a criminal offence in Victoria for youth to fail to comply with bail conditions,[61] children and young people are arrested and remanded for "breaching" bail conditions[62];
- Youth justice workers are inflexible and culturally inappropriate in bail supervision.

Jackson:[63] remanded unnecessarily in police station

Our client was placed in residential care at a young age as he was unable to reside with his parents and his grandmother relinquished care due to ill health.

At the age of 10, he was placed on bail with curfew conditions, and was then arrested for minor offences and remanded overnight to be presented to court.

At the age of 13, residential care staff contacted police as our client had not complied with his 10pm curfew. Victoria Police issued a safe custody warrant on the basis that our client had not complied with his bail conditions, and our client was remanded at the police station, due to the distance to Parkville Youth Justice Centre.

Our client spent two nights at a police station, despite the fact that he had not committed an offence and had not been charged with any offence. The police officer alleged new charges (breach of bail conditions) and required the client to show exceptional circumstances to be granted bail. The Bail Justice attended and refused bail.

VALS is extremely concerned that a 13-year-old was remanded in a police station for 2 nights rather than being served with an application to revoke bail. In our view, this indicates a fundamental lack of understanding of how the *Bail Act* applies to children.

[58] The number of children on remand almost doubled between 2010 and 2018, from an average of 37 children per day in the period from 2010–11 to 2013–14 to an average of 69 children per day in the period from 2014–15 to 2017–18. See Sentencing Advisory Council, Remand and Sentencing.
[59] s. 345(1) *CYFA 2005* (Vic).
[60] In VALS experience, the following conditions are imposed by police which are onerous and culturally inappropriate: non-association conditions which create challenges in community, especially if the requirement is for non-association with a relative; regular reporting to police stations, which can further stigmatise a young person and antagonise the relationship with police; conditions not to attend a specific place (e.g. a shopping centre) which is challenging in rural communities where attending that location may be the primary activity.
[61] s. 30A(3) *Bail Act 1977* (Vic).
[62] In some cases, this has resulted in our client being remanded over a weekend or public holiday when they should not have even been in custody.
[63] This is not his real name.

In light of the above, VALS believes that the following changes are critical to repair the broken bail system that is having a disproportionately negative impact for Aboriginal children and young people:

- Amend Sections 4AA, 4A, 4C and 4D of the *Bail Act* to exclude children and young people from the presumption against bail and the requirement to show exceptional circumstances or compelling reasons;
- Amend Section 30 of the *Bail Act* to exclude children and young people from the offence of failure to answer bail;
- Create a mechanism for effective oversight of police bail;
- Ensure that police are held accountable for non-compliance with the presumption of proceeding against children by way of summons, and that any complaints about police's failure in this regard are investigated by an independent body (e.g. IBAC).
- Ensure that Police are appropriately trained so that they understand how the Bail Act applies to children and do not impose onerous and culturally inappropriate conditions on children;

CULTURALLY APPROPRIATE RESPONSES TO YOUTH OFFENDING

While the mainstream youth justice system can never be culturally safe, significant changes must be made to ensure that the youth justice system is culturally appropriate and responds to the needs of Aboriginal youth. As foreseen through the ongoing process of developing an Aboriginal Youth Justice Strategy, enhancing the capacity of the youth justice system to understand and respond to the needs of Aboriginal young people requires a major shift towards self-determination in youth justice. A stronger role for ACCOs in the youth justice system is key to this shift and there is a critical need to invest in ACCOs as the key providers of culturally safe services.

1. Invest in a capable and consistent Koori Youth Justice workforce

VALS is concerned that there is a lack of and inconsistency in culturally appropriate supervision for Aboriginal young people on bail and community-based youth justice orders.[64] The Koori Youth Justice Unit is overstretched and unable to meet demand, meaning there is a gap in services.

We would like to reiterate the recommendation by KYC,[65] to expand and invest in the Koori youth justice workforce, including:

- Invest in the Koori Youth Justice workforce to ensure culturally appropriate and flexible supervision of Aboriginal young people on bail and on community-based orders;
- Increase the number of dedicated Aboriginal roles in Youth Justice Centres;[66]
- Ensure that there is a Koori Youth Justice Worker at each Children's Koori Court.

2. Increase access to culturally safe residential bail accommodation and bail support

[64] P. Armytage & J. Ogloff, *above note* 5, p. 45.
[65] KYC, *above note* 8.
[66] VEOHRC and CCYP, *Aboriginal Cultural Rights in Youth Justice Centres* (2018), p. 3.

As noted above, there is a significant shortage of culturally appropriate residential bail support, which can often result in a young person being remanded in custody rather than released on bail.

Under *Burra Lotjpa Dunguludja* (AJA4), the Victorian government and the Aboriginal Justice Caucus have committed to develop a residential bail support and a therapeutic program for Aboriginal young people that builds upon the Baroona Healing Place model.[67] This is a priority for the Youth Justice Collaborative Working Group. We strongly encourage the Victorian Government to invest in a residential bail support program in the 2019-2020 State budget.

3. Ensure that sentencing processes are culturally appropriate

While there are many positive aspects of the youth justice sentencing model, including Children's Koori Court, VALS believes that there are reform is still require to ensure that sentences are issued and implemented in a way that takes into account a child or young person's Aboriginality.

(a) Consider Aboriginality in sentencing

VALS has advocated over many years for the introduction of Aboriginal Community Justice Reports (ACJRs), modelled off Canadian Gladue reports.[68] ACJRs aim to ensure that sentencing decisions are made with regard to an Aboriginal person's community, needs and strengths.[69] They can be an additional tool to identify the underlying factors in offending and incarceration, and provide a mechanism to assist the offender and reduce incarceration rates.

Under *Burra Lotjpa Dunguludja* (AJA4), the Victorian government and the Aboriginal Justice Caucus have committed to trial ACJR's over a five-year period.[70] We commend the Aboriginal Justice Forum for this policy commitment and strongly enough the Victorian government to ensure that adequate funding is set aside to trial ACJRs over the next 5 years.

Additionally, VALS is pleased to be collaborating with leading universities as part of a three-year project to pilot ACJRs in Victorian from 2020-2022. The project will involve a report-writing service established at VALS, with the aim of completing ACJRs for 20 of VALS clients over a two-year period.

To ensure that an Aboriginal person's community, needs and strengths are considered as part of the sentencing process, VALS recommends that the *CYFA* and the *Sentencing Act* are amended to include requirement to consider Aboriginality as a factor in sentencing, similarly to Section 3A of the *Bail Act.*

(b) Expand access to Children's Koori Court

In VALS experience, the Children's Koori Court is often able to provide a more culturally appropriate sentencing process for Aboriginal youth who have been found guilty of an offence. We believe that Aboriginal children and young people should have access to this model across in Victoria. In this regard, we

[67] *Burra Lotjpa Dungulugja* (2018), p. 43.
[68] VALS, *Addressing Over-Incarceration: Aboriginal Community Justice Reports* (2017).
[69] In *Bugmy v The Queen* (2013) 249 CLR 571, 41, the High Court held that Indigenous background information in sentencing must be supported by 'material tending to establish that background.'
[70] *Burra Lotjpa Dungulugja* (2018), p. 39. Pre-sentence reports were also recommended by the 2017 Australian Law Reform Commission Inquiry into Indigenous Incarceration Rates, and the Royal Commission into the Detention and Protection of Children in the Northern Territory (2016-17). See ALRC, *above note* 21, p. 14; Royal Commission into the Detention and Protection of Children in the Northern Territory, *above note* 24, p. 323

note the commitment under *Burra Lotjpa Dunguludja* (AJA4) to expand the Children's Koori Court to an additional three locations, and the ongoing work of Court Services in this regard.[71]

In addition, we believe that the frequency of Children's Koori Court sitting days should be increased. In some locations, the Children's Koori Court only sits every six weeks, which means that accessing this court involves additional time on remand and our clients opt for a mainstream court.

As recommended by KYC, we also believe that the Children's Koori Court should be expanded to enable children to plead not guilty.[72] Additional research is required to identify how to move towards a reformed Koori Court model, in line with the government's commitment to self-determination in the youth justice system.

4. Provide culturally appropriate care and treatment in custody and post-custody

Keeping children and young people out of custody is always the best option. However, we recognise that a custodial sentence may be necessary in some cases. Recent incident at Malmsbury Youth Justice Centre[73] and previous incidents at both Malmsbury and Parkville indicate that there are serious challenges with the existing custodial facilities which must be addressed urgently.

(a) Support children and young people to be strong in their culture

Although connection to culture, country and community is a protective factor for the social and emotional wellbeing of Koori young people,[74] multiple inquiries have found that detaining Aboriginal youth in Victoria's youth justice centres undermines their connection to culture[75] and that there is a lack of appropriate programs and support for young Koori people in the youth justice system.[76]

VALS acknowledges the critical role of Aboriginal Liaison Officers in youth detention facilities and the cultural programs that are already being implemented,[77] as well as additional commitments under *Burra Lotjpa Dunguludja* (AJA4) to increase cultural activities, particularly at Malmsbury Youth Justice Centre.[78]

Despite these initiatives, VALS remains concerned by the impact of detention on connection to culture, including connection to family and community members. For families in rural and regional areas of Victoria, family members are often unable to visit their loved ones in detention, as they may not have the financial means to travel to Melbourne. We recommend that the government invests in programs to support families to maintain contact with their detained family members, including financial support to cover the cost of transport to Parkville or Malmsbury.

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[71] The Children's Koori Court is currently in Melbourne; Heidelberg; Dandenong; Mildura; Latrobe Valley (Morwell); Bairnsdale; Warrnambool; Portland; Hamilton; Geelong; Swan Hill; and Shepparton. Over the next 4 years, Children's Koori Court will open in Bendigo, Echuca and Wodonga.
[72] KYC, *above note* 8, p. 53.
[73] INSERT MEDIA
[74] P. Armytage and J. Ogloff, *above note* 5; VEOHRC and CCYP, *above note* 66, p. 4.
[75] VEOHRC and CCYP, *above note* 66, p. 5.
[76] P. Armytage and J. Ogloff, *above note* 5.
[77] This includes: Koori Cultural Education program (at Parkville College); a weekly cultural program run by Youth Justice Service and Parkville College at Melbourne Youth Justice Centre, a weekly program by Uncle Ron Murray at Malmsbury Youth Justice Centre and culturally mentoring program being piloted by Richmond Football Club's Korin Gamadji Institute. See Youth Parole Board, *above note* 6, p. 21; VEOHRC and CCYP, *above note* 66, p. 7.
[78] *Burra Lotjpa Dunguludja* includes a commitment to establish a Connecting to Country project at Malsmbury Youth Justice Centre and implement mentoring programs and in-reach Elder support for Aboriginal children and young people in youth justice centres. See *Burra Lotjpa Dungulugja* (2018), p. 45.

(b) Provide culturally appropriate mental health care

VALS is concerned that the mental health needs of young people in youth justice centres are increasing,[79] yet the forensic mental health sercices available to young people subject to custodial (and non-custodial) orders are inadequate.[80] Despite the findings and recommendations of the 2017 Youth Justice Review, [81] our clients continue to experience over-medication and insufficient access to mental health services.

Quetiapine (a sedating antipsychotic) is often used to sedate young people so that they are settled enough to engage and benefit from programs. This medication is regularly given when young people are locked down, not at bedtime, so that young people fall asleep early in the evening and then wake before morning. VALS is concerned about the use of sedating antipsychotics as a way of managing environments where appropriate psychological interventions or opportunities to modify the environment are not available.

Jonathan[82]: Prescribed Sedating Antipsychotics

Jonathan is a 16-year-old Aboriginal boy who has experienced multiple trauma, including removal from his mother at birth and removal from the care of his grandparents into a residential home at the age of 13. Jonathan has been diagnosed with a moderate intellectual disability and Attention Deficit and Hyperactivity Disorder (ADHD). He also has a history of self-harm and suicidal ideation, including two suicide attempts whilst in youth justice centres.

In 2017, whilst serving a sentence a Malmsbury Youth Justice Centre, Jonathan was prescribed quetiapine (a sedating antipsychotic) to help him sleep. The medication is not recommended as a hypnotic and an independent psychiatric assessment deemed that there was no evidence of a disorder which might merit its prescription. Additionally, the independent psychiatrist found that it was crucial for Jonathan to access expanded psychiatric services, and that it was not good enough to simply state that a young person "does not wish to engage" with therapy, whilst noting increasing self-harming and suicidal behaviours. At this stage, the clinical care available at Malmsbury included a psychiatrist for 1 day a week to address the needs of over 100 youth.

VALS notes that a number of reforms have been initiated since 2017, including:

- Community Forensic Mental Health Service (early intervention problem behaviour program for young people with mental illness and problematic behaviours);
- Dedicated secure two-bed forensic mental health unit at the Footscray Hospital for young people detained in Youth Justice centres who require compulsory inpatient treatment;
- Custodial Forensic Youth Mental Health Service in Youth Justice centres (services for young people with mental health issues requiring specialist treatment);[83]

[79] According to the Youth Parole Board, 48% of children and young people detained on sentence and remand at Parkville and Malmsbury Youth Justice precincts in 2018 presented with mental health issues and 27% had a history of self-harm or suicidal ideation. See Youth Parole Board, above note 6, p. 29.
[80] Since 2010, forensic mental health services for young people in the youth justice system have been provided by the Youth Justice Mental Health Initiative. This includes six clinical positions working exclusively with custodial and community youth justice services. See https://www.forensicare.vic.gov.au/youth-justice-mental-health-program/
[81] P. Armytage and J. Ogloff, above note 5, p. 13.
[82] This is not his real name.
[83] Youth Parole Board, *above note* 6, p. 17; Victorian Government, *Victoria's Mental Health Services Annual Report 2017-2018*, (2018) p. 31.

- Children's Court Mental Health Advice and Response Service (MHARS).[84]

While VALS is pleased to see increased investment in forensic mental health services for young people in the youth justice system, we are concerned that there is still a lack of culturally safe mental health services. We strongly encourage the Royal Commission into Victoria's Mental Health System to further examine the forensic mental health system during its work in 2020 and develop recommendations to increase access to culturally safe forensic mental health services for Aboriginal young people.

(c) Eliminate harmful practices in youth justice centres

Multiple independent inquiries have found that over-reliance of isolation, separation and lockdowns in youth justice centres is having serious harmful effects for children and young people, and that Aboriginal children and young people are disproportionality affected by these harmful practices.[85]

VALS is extremely concerned that despite these inquiries and recommendations, there are still serious issues at Malmsbury and Parkville, as indicated by the recent incident at Malmsbury leading to a staff walk-out.[86] The experience of our clients is that Aboriginal young people are still being subjected to harmful practices that undermine their social and emotional wellbeing and compound trauma. For example, in 2019, one of our clients aged 16 was placed in a room by herself for the entirety of her period on remand due to concerns for her safety. This included 21 days, followed by 52 days, followed by 21 days.

VALS calls on the government to urgently implement the recommendations from previous inquiries on the use of isolation, separation and lockdowns in the youth justice system, including the most recent Inquiry by the Victorian Ombudsman. We also urge the Victorian government to adequately fund a National Preventive Mechanism to implement Victoria's obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

(d) Support youth leaving custody

Victoria does not currently have a Throughcare program, however VACCA is currently partnering with Department and Prime Minister and Cabinet to develop and implement a new model of youth Throughcare for Aboriginal children and young people, as part of a project across Victoria, Queensland and the Northern Territory.

The program in Victoria will be available on a voluntary basis to Aboriginal young people aged 10-17 years, who have been detained for more than a week. The aim is to support young people to return to their families and communities safely and break the cycle of offending.

VALS is extremely supportive of this new program and encourages the Victorian government to work with the Commonwealth government to ensure that the program receives long-term and sustainable funding.

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[84] MHARS is being trialed at the Melbourne Children's Court with the view to explore expansion across all Children's Courts in Victoria. See Children's Court of Victoria, *Royal Commission into Victoria's Mental Health System: Children's Court of Victoria Submission* (2019), p. 16.
[85] CCYP, *above note* 5; P. Armytage and J. Ogloff, *above note* 5; Parliament of Victoria Legal and Social Issues Committee, *above note* 5; Victoria Ombudsman, *above note* 5.
[86] The Age, "Malmsbury will stay in lockdown until staff safety is improved," 6 October 2019; ABC, "Malmsbury Youth Justice Centre lockdown continues after alleged violent attacks on staff," 5 October 2019.