



Victorian Aboriginal Legal Service

3 July 2023

Australian Human Rights Commission
By email: youthjusticereform@humanrights.gov.au

To whom it may concern,

Re: VALS Submission to the Call for submissions: Youth Justice and Child Wellbeing Reform Across Australia

Background to the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service (**VALS**) is an Aboriginal Community Controlled Organisation (**ACCO**) with 50 years of experience providing culturally safe legal and community justice services to our people across Victoria. We provide legal services to Aboriginal people living in Victoria, with specialised legal services for; criminal law matters, family law matters, civil and human rights matters, police and prison accountability, and youth criminal law matters. Further information on our legal practices can be found on our [website](#).

We also provide community justice support services through our Community Justice Programs (**CJP**) team. Our CJP team is solely staffed by Aboriginal and Torres Strait Islander people who provide culturally safe services to our clients and community.

VALS pays our deepest respect to traditional owners across Victoria, in particular, to all Elders past and present. 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. We pay our respects to all Aboriginal and Torres Strait Islander Elders who have maintained the struggle to achieve justice.

Matters for the Commissions Consideration

Our submission draws on our previous publications in relation to youth justice that are available via the [publication page](#) on our website.

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We strongly recommend the commission utilise the [Our Youth, Our Way report](#) by the Commission for Children, Youth and Young People and the [Ngaga-dji report](#) by the Koorie Youth Council.

Factors contributing to children and young people’s involvement in the youth justice system

Aboriginal children and young people continue to be impacted by the ongoing legacy of colonialism in Australia. Aboriginal children are subjected to systemic racism from a very young age, leading to poorer outcomes and supports in health, housing, education and legal spheres of their lives. The intergenerational trauma inflicted by colonisation, continued through generations of unjust government action, has meant that severe social problems disproportionately affect Aboriginal people. The failure to properly respect the right to self-determination means that Aboriginal people in Victoria also continue to be actively harmed by the state through over-policing, systemic racism in policing, and a lack of cultural competence in social services.

Aboriginal children are far more likely to be removed from their families than non-Aboriginal children. The Australian Institute of Health and Welfare Child Protection Report highlights the extremely high levels of government intervention into Aboriginal families lives.¹ Aboriginal families are far more likely to have child protection intervention;

- Aboriginal children were in out of home care at a rate of 57 children per 1,000 Aboriginal children, whereas non-Aboriginal children were in out of home care at a rate of 4.8 per 1,000 children.
 - Aboriginal children represented just over 42% of children in out of home care in Australia.
- Aboriginal children were subject to care and protection orders at a rate of 77 per 1,000 Aboriginal children, compared to non-Aboriginal children who were on orders at a rate of 6.8 per 1,000.
 - Aboriginal children represented just over 40% of children on care and protection orders in Australia.
- Victoria has the highest rate of Aboriginal children in out-of-home-care and the highest rate of Aboriginal children on care and protection orders.²

¹ Australian Institute of Health and Welfare, [Child Protection in Australia 2021 – 22](#) (6 June 2023).

² Department of Health and Human Services, [Wungurilwil Gagapduir](#)

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A major area of concern for VALS is with the treatment of ‘crossover children’ – children who are involved in both the child protection and youth justice systems. This is arguably the most vulnerable group of children in Victoria, and the interaction of these two systems should be carefully tailored to provide individualised support to protect children’s development and improve their life chances. At present, this is not the case in Victoria, and children in need of protection are treated inappropriately by both child protection and youth justice actors. Aboriginal children are disproportionately likely to be ‘crossover children’ and to be exposed to the harmful effects of a system which does not do enough to protect vulnerable young people. In fact, more than half of Aboriginal children in the youth justice system have current or previous child protection orders, compared to around 38% of the overall population in the youth justice system.³

The Commission for Children and Young People’s landmark report on Aboriginal children’s experience of the youth justice system, *Our Youth, Our Way*, made a number of findings and recommendations about the interaction of the child protection and youth justice systems.⁴ Addressing the youth detention population, and its downstream effects on the growth in the adult prison population, requires substantial change in the child protection system and the way it interacts with the youth justice system.

Changes to youth justice needed to protect children and young people

A key reform that could be easily implemented by Governments is raising the minimum age of criminal responsibility to at least 14 years, and the minimum age of detention to at least 16 years old. Some states and territories have already committed to raising the age, but none have committed to raising the age in line with the recommendations of various expert organisations and advocates across Australia.

All States and Territories must urgently make a commitment to raise the age to at least 14 with no carve outs. Evidence shows that children have not reached the required developmental milestones to be able to form the relevant mens rea to commit criminal

³ Commission for Children & Young People (2021), [Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system](#), p294.

⁴ Commission for Children & Young People (2021), [Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system](#).

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offending, meaning that children do not have the developmental capacity to know that what they are doing is a 'criminal act'. The common law principle of doli incapax is meant to function as a protection for children who engage in offending behaviours without the capacity to form the required mens rea, yet it is often misapplied in practice and does not function to protect children.⁵

VALS has made several submissions that discuss the raise the age campaign, we recommend you read these submissions in your consideration of the matter.⁶ We also recommend you consider submissions and materials from other sector leading organisations, such as Victoria Legal Aid, Change the Record, the Commission for Children and Young People, and the Smart Justice for Young People Coalition.

In line with Target 11 of the National Agreement on Closing the Gap, the Government must ensure it is taking measures to reduce the incarceration rates of Aboriginal and Torres Strait Islander children.⁷ The target to reduce incarceration under the National Agreement is not ambitious – the Government should be aiming to reduce the number of Aboriginal children incarcerated to zero. Again, reducing the incarceration rate of Aboriginal children to zero is not ambitious, it has been done before by other Governments across the world.⁸

Contact with the criminal legal system is never rehabilitative and only functions to criminalise children, leading to protracted contact with the criminal legal system into their adult lives. Children who engage in negative behaviours should be supported to address underlying causes, rather than being forced to endure the traumas of the criminal legal system. Most, if not all, children who exhibit negative behaviours have experienced trauma in their lives that leads to risk taking behaviours. Responses to

⁵ The misapplication of doli incapax in practice is largely due to a lack of knowledge about the principle and its application. Our lawyers report that the lack of understanding of the principle of doli incapax is consistent across the legal sector and is rooted in a lack of specialised children's court training. Police, practitioners and the bench should all receive in depth children's court training.

⁶ [VALS Policy Brief – Raising the Age of Criminal Responsibility](#); [VALS Nuther-Mooyoop \(Submission\) to the Yoorrook Justice Commission: Criminal Legal System](#); [VALS Nuther-Mooyoop \(Submission\) to the Yoorrook Justice Commission: Child Protection](#); [VALS Submission to the Inquiry into Victoria's Criminal Justice System](#); [VALS Submission to the Department of Premier and Cabinet Consultation on Victorian Youth Strategy](#); [VALS Submission to the Commission for Children and Young People Inquiry: Our Youth, Our Way](#).

⁷ [Targets of the National Agreement on Closing the Gap](#).

⁸ Project Kealahou [website](#); Suarez, E et al., [Project Kealahou: Improving Hawai'i's System of Care for At-Risk Girls and Young Women through Gender-Responsive, Trauma-Informed Care](#).

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children who are exhibiting negative or risk-taking behaviours should be founded in healing and support, rather than punishment. A shift away from criminal responses and towards healing and rehabilitative responses would be a multi-sector approach that would require multiple Departments to work together and make commitments to placing children's best interests at the forefront of their practice. This would include cross-sector engagement across the residential care and youth justice sectors to ensure children in care do not continue to be criminalised.

The criminalisation of children in care is discussed in detail in other VALS submissions that have been referenced above. Children in care are far more likely to experience criminalisation for behaviours that would not warrant legal interventions for children who are not in care. The [Framework to Reduce the Criminalisation of Children in Residential Care](#) appears to be a positive step forward, but in practice it has not resulted in better outcomes for children in care. VALS practitioners believe this is because those who work in residential care facilities are not adequately trained to respond to behavioural incidents and instead default to calling the police. We have heard anecdotal evidence that residential care workers don't have the skills required to respond to incidents so instead call the police to 'teach the kids a lesson' to deter similar behaviour in the future.

Children in the youth justice system often have complex needs, and have invariably been let down by the adults and systems in their lives. We should not be punishing our children for the failures of others. Children must be given a chance to learn from their mistakes and grow up to be healthy, safe, contributing members of our communities. Rather than criminalising children and reinforcing inequalities, governments should be providing wrap around support and care at the earliest possible stage, to prevent contact with the youth justice system in the first place. This means that risk factors must be identified and addressed as early as possible, including early diagnosis of health issues and/or disabilities, providing safe and secure housing, ensuring that children remain engaged with school, and reducing the risk of child protection intervention by supporting families to take care of their children.

We are also deeply concerned about the ongoing use of solitary confinement for young people who are incarcerated in Victoria. Children being held in youth detention facilities are experiencing lockdowns of more than 22 hours a day due to staffing

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difficulties in youth justice facilities.⁹ Our clients are reporting being held in their cells nearly all day, with schoolwork and food being passed through the access holes in their cell doors. Ongoing isolation is detrimental for all people, but it is especially detrimental to children who are enduring the trauma of the isolation, but are also failing to meet developmental milestones due to their isolation. Over thirty years ago, the Royal Commission into Aboriginal Deaths in Custody recommended prohibiting “segregation or isolated detention” of Aboriginal people because of its harmful effects.¹⁰ The significant harm caused by solitary confinement is recognised under international human rights law, which prohibits prolonged or indefinite solitary confinement, as well as solitary confinement of people with mental or physical disabilities.¹¹ The Australian Children’s Commissioners and Guardians has recognised that “isolation practices are likely to be counterproductive as a behaviour management tool... have no recognised therapeutic value and often retraumatise children and young people in youth justice detention and exacerbate medical, psychological and social problems.”¹²

Isolation and solitary confinement are never rehabilitative or constructive. The use of solitary and isolation must be legislatively prohibited to ensure the wellbeing of the most vulnerable children in our society.

Reforms that show evidence of positive outcomes

Balit Ngulu¹³

Balit Ngulu is VALS’s dedicated legal practice for Aboriginal children providing support in criminal matters. Balit Ngulu is designed to be trauma informed and provide holistic support and case management for Aboriginal and Torres Strait Islander youth and children that come into contact with the Justice System. Balit Ngulu is staffed by lawyers and support workers who work together to deliver culturally safe legal services to Aboriginal children engaged with the criminal legal system in Victoria. Balit Ngulu has been able to obtain beneficial legal outcomes for our clients as well as social

⁹ The Age, [Outrage at children locked in solitary confinement for 22 hours a day](#)

¹⁰ [The Royal Commission into Aboriginal Deaths in Custody](#), Recommendation 181.

¹¹ [The United Nations Standard Minimum Rules for the Treatment of Prisoners](#) (The Mandela Rules).

¹² Australian Children’s Commissioners and Guardians (2017), [Statement on Conditions and Treatment in Youth Justice Detention](#).

¹³ Victorian Aboriginal Legal Service, [Balit Ngulu](#).

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outcomes through the work conducted by our Youth Service Officers (YSO) and Aboriginal Community Engagement Workers (ACE).

Through a service model combining both lawyers and YSO/ACE workers, 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 legal 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.

Project Kealahou¹⁴

Project Kealahou is a federal program in Hawai'i that worked across various sectors to improve access to support services for young females who were at risk of running away, abuse, suicide, arrest and incarceration. The project built on previous System of Care Projects to deliver cross-sector supports to its participants. The project was founded in principles of self-determination and connection to culture, and allowed and encouraged program participants to reconnect with their land, themselves and their families. Project Kealahou engaged with participants and their families through a trauma-informed approach that was culturally informed by allowing participants to “talk story” before committing to treatment through the program. Once participants had agreed to proceed with treatment they received “gender-positive, trauma-informed, culturally-responsive, community-based services”. A review of the project found that children who participated in the project enjoyed significant improvements in key functional, mood and social domains.

Aboriginal Youth Cautioning Program (AYCP)¹⁵

¹⁴Suarez, E et al., [Project Kealahou: Improving Hawai'i's System of Care for At-Risk Girls and Young Women through Gender-Responsive, Trauma-Informed Care](#); Salvin, L et al, [Project Kealahou--forging a new pathway for girls in Hawai'i's public mental health system](#).

¹⁵Victorian Aboriginal Justice Agreement, [Aboriginal Youth Cautioning Program](#); Victoria Police, [Aboriginal Youth Cautioning Program](#).

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The AYCP was piloted under the Victorian Aboriginal Justice Agreement (**AJA4**) to reduce the criminalisation of children who are engaged with the criminal legal system. The program provides for enhanced cautioning practices by Victoria Police to ensure Aboriginal children who come into contact with police have an opportunity to connect with Elders and social services in their local region. The program is founded in principles of self-determination, early intervention and harm reduction. We have seen many young people benefit from the program.

However, we believe that there should be stricter requirements for police to consider diversions for Aboriginal young people in light of the massive overrepresentation of Aboriginal young people who have had contact with Victoria Police and the systemic racism that permeates all facets of the police force. Instead of allowing police to consider circumstances of the offending, such as the “nature and severity” and the “context in which the [behaviour] took place” we want to see police being required to balance the impact of criminalisation against the child’s wellbeing when deciding if a caution is preferable – which in all cases it should be.

Benefits in a national approach

There are many benefits of a national approach to youth justice reform. A national approach would provide for consistent application of reforms and service delivery across Australia. It would also allow for greater funding and funding certainty for services, like VALS and Balit Ngulu, who provide services and supports to children who are engaged with the criminal legal system.

However, a concern we have about a national approach is the State and Territory Governments using a national approach to delay any individual state or territory approach to reform. For example, many State and Territory Governments, including Victoria, delayed developing Bills to raise the minimum age of criminal responsibility on the basis of waiting for a consistent national approach. Children should not continue to suffer only because the Governments cannot develop a consistent national approach. Any approach to reform must be urgent in nature and developed in consultation with expert service providers who are on the ground delivering services to our communities.

A further concern we have with a national approach is that where governments cannot come to an agreement on the approach or basic standard to be met, there should

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never be a circumstance where the national approach lays at the lowest standard put forward by a State or Territory Government.

National approaches must be founded in self-determination and developed in consultation with various cultural and service delivery agencies across the nation. No one community or group of people should receive second-best outcomes.

Yours sincerely,

Nerita Waight

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CEO

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