

Submission to Council of Attorney Generals (COAG) Age of Criminal Responsibility Working Group

Aboriginal Justice Caucus Raising the Age Working Group

The Aboriginal Justice Caucus (AJC) is a self-determining body that works in partnership with the Victorian Government to improve Aboriginal justice outcomes, family and community safety, and reduce over-representation in the criminal justice system. Its members are the Chairs of the Regional Aboriginal Justice Advisory Committees, Aboriginal community leaders, and representatives from Aboriginal peak bodies and Aboriginal Community Controlled Organisations. The AJC are signatories to *Burra Lotjpa Dunguludja* (Aboriginal Justice Agreement phase 4).

The AJC is a conduit between the Aboriginal community and justice system in order to provide leadership, advocacy and spur change to address the drivers of offending, and to amend policy and systemic reform within the criminal justice system.

The AJC Raising the Age working group is a subgroup of the AJC who represent the views of the AJC in raising the age of criminal responsibility.

The Aboriginal Justice Caucus would like to acknowledge and pay our deepest respects to the traditional custodians of Victoria, Elders past, present and emerging.

February 2020



**Aboriginal
Justice Caucus**

Introduction

The Aboriginal Justice Caucus (AJC) has long advocated for raising the age of criminal responsibility from 10 to 14 years of age. Aboriginal children and young people are overrepresented at all stages of the youth justice system, which perpetuates marginalisation and can entrench children in the youth justice system into the adult criminal justice system. As the Council of Attorney's General review the age of criminal responsibility for Australia, the AJC wishes to present its hard line views regarding the age of criminal responsibility.

This submission will show how raising the age of criminal responsibility to 14 years can directly work towards tackling the overrepresentation of Aboriginal children and young people in the criminal justice system and, if coupled with an investment in prevention, diversion and early intervention, can lead to a reduction in crime. In addition, raising the age will work toward addressing the needs of vulnerable young people, their families and wider communities. Ultimately, this document will demonstrate the importance in raising the age of criminal responsibility to 14 years of age in Australia and show the benefits to Aboriginal children and young people, their families and communities.

Background and Context

Addressing the disproportionate high levels of Aboriginal children and young people in the criminal justice system requires sustained commitment from all jurisdictions of Australia. In Victoria, crime committed by youth has decreased in recent time, yet the prevalence of crime among younger age groups is higher. Section 3 of the Commission for Children and Young People define a child as *'a person who is under the age of 18 years'*¹. The majority of Aboriginal children and young people will never be involved in the criminal justice system as offenders. However, the vast majority of Aboriginal adults in Victoria's criminal justice system have had previous involvement with the system, with often their first contact being as a child. Victorian Aboriginal communities are young, with 60 per cent under the age of 15. Focussing attention on early intervention efforts is the primary lever to reducing overrepresentation. This is only possible when children are protected from early entry into the criminal justice system². Furthermore, Aboriginal children and young people who make contact with the criminal justice system tend to do so at an earlier age than non-Aboriginal young people. For example, Aboriginal children aged between 10-13 years are more than four times as likely as non-Aboriginal children aged 10-13 to be in contact with police as first time offenders. Raising the age of criminal responsibility will address the way behaviour is responded to because it will require supports outside of the criminal justice system.

¹ Commission for Children and Young People Act 2012 No. 79 of (VIC)

² Australian Human Rights Commission (2006) *A Statistical Overview of Aboriginal and Torres Strait Islander people in Australia*, accessed 17 February 2020 cited at <https://www.humanrights.gov.au/our-work/statistical-overview-aboriginal-and-torres-strait-islander-peoples-australia>

Contact with the criminal justice system represents systemic social and economic disadvantage faced by many Aboriginal children and young people, their families and communities³. Removal from home and disconnection from family and culture continues to lead young people to enter into the justice system at earlier ages. Currently, Aboriginal children and young people aged 10-17 are overrepresented 14 times in youth justice supervision and overrepresented 15 times in out-of-home-care than non-Aboriginal children and young people aged 10-17. The younger the individual is when they first come into contact with the criminal justice system, the more likely they are to have prolonged contact with the system as an offender in the future. Moreover, cycles of poverty, intergenerational trauma and grief, as well as experiences of systemic injustice that accumulate over a lifetime, are also contributing factors⁴. Life trajectory outcomes for young people who make contact with the criminal justice system are dire. They are less likely to complete their education or find employment, and are more likely to die an early death⁵. The financial burden of keeping young people in prison is significant. The total cost of juvenile justice services across Australia in 2011-2012 was \$640 million⁶.

The young and rapidly growing Aboriginal population of Victoria represents an opportunity for addressing Aboriginal overrepresentation through early intervention, prevention and diversion. Evidence shows children remain in cycles of disadvantage and imprisonment due to a lack of early critical support services including health services, and a failure to invest in alternatives to criminalisation and imprisonment.

Some key statistics show the levels of overrepresentation of Aboriginal youth (10 – 17 years) in contact with the criminal justice system:

- In 2016-17, Aboriginal youth accounted for 16.9 per cent of all young people in youth detention despite comprising only 1.3 per cent of the Victorian youth population.
- The non-Aboriginal detention rate was 1.8 per 10,000 youth in Victoria, while the Aboriginal youth detention rate was 23.2 per 10,000, 12.7 times the non-Aboriginal rate⁷.
- Aboriginal youth aged 10-17 years accounted for 18.4 per cent of young offenders under community-based youth justice supervision on an average day.
- The rate of Aboriginal youth under community based supervision was 123.5 per 10,000, 14.3 times the non-Aboriginal rate of 8.6 per 10,000⁸.

³ Parliament of Australia, Chapter 2 Indigenous Youth and the Criminal Justice System: an overview, accessed 12 February 2020

https://www.aph.gov.au/Parliamentary_Business/Committees/Committees_Exposed/atsia/sentencing/report/chapter2

⁴ Australia Medical Association (2019) Minimum Age of Criminal Responsibility Policy Statement, Law Council of Australia, accessed 7 February 2020 <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>

⁵ Ibid

⁶ Australian Institute of Criminology (2013) *Counting Costs of Crime in Australia: A 2011 Estimate*, cited 27 February 2020 at <https://aic.gov.au/publications/rpp/rpp129/criminal-justice-system-costs>

⁷ Victorian Government, 2018 *Burra Lotpja Dunguludja* - Victorian Aboriginal Justice Agreement Phase 4

⁸ Ibid

AJC Recommendations in Raising the Age of Criminal Responsibility

The Aboriginal Justice Caucus (AJC) is the conduit between the Aboriginal community and Victorian government on issues directly relating to justice. The AJC strongly endorse raising the age of criminal responsibility from 10 to 14 years due to the disproportionate impact on Aboriginal and Torres Strait Islander children and young people. The AJC believes that there should be greater investment in evidence based intervention supports to reduce the likelihood of offending, and supports the findings of the 2018 AJC report on self-determination and the youth justice system, that *“Ten to 14 year olds should not be in detention. Instead, wrongdoing by young people at that age should be a child welfare issue.”*⁹

The AJC support the following recommendations in the national review of raising the age of criminal responsibility:

- Raise the age of criminal responsibility from 10 to 14 years due to the impact on vulnerable young people and disproportionate impact on Aboriginal and Torres Strait Islander children and young people. We recommend for this provision to be implemented in the new Youth Justice Act for Victoria.
- Remove the legal barriers that criminalise children and young people
- Criminalising the behaviour of children creates a cycle of disadvantage and marginalisation that may lead to vulnerable children to become entrenched in the criminal justice system.
- Raising the age of criminal responsibility must coincide with prevention, early intervention, diversion, rehabilitation/healing and a holistic approach to enhance the wellbeing of children.

International Standards and Human Rights Arguments

There is overwhelming evidence to suggest that early contact with the youth justice system is more likely to lead to contact with the criminal justice system later in life. Criminalising the behaviour of young and vulnerable children creates a cycle of disadvantage, and the younger a child has their first contact with the justice system the higher their chance of reoffending¹⁰. The low age of criminal responsibility in Australia has been criticised by the UN Committee on the Rights of the Child (UNCRC)¹¹. The United Nations had previously ruled that the minimum age of criminal responsibility should not be lower than 12 years of age as children under the age of 12 years do not have the emotional, mental or intellectual maturity to be held criminally responsible¹². However, in 2019 the United Nations Committee on the Rights of the Child

⁹ Jumbunna Institute for Indigenous Education (2018) *Self-determination and the youth justice system*, Workshop Report for the Aboriginal Justice Caucus 10 December 2018, University of Technology Sydney

¹⁰ Victorian Aboriginal Legal Service (2019) *Submission to the Royal Commission into Victoria's Mental Health System*, cited 20 February 2020 at https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-rcvmhs.files/9415/6688/7894/Victorian_Aboriginal_Legal_Service_VALS.pdf

¹¹ 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.

¹² *ibid*

replaced their standard and now recommends that counties should be working towards a minimum age of criminal responsibility of at least 14 years. The UNCRC argue that a higher minimum age of criminal responsibility of 14 or 16 years contributes *'to a juvenile system which... deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected'*¹³.

Developmental Considerations

Australia's current response to children displaying antisocial behaviour fails to engage them in ways that are developmentally appropriate. The minimum age of criminal responsibility of 10 across all Australian jurisdictions is out of step with medical consensus regarding child brain development. The minimum age of criminal responsibility implies that a child has attained the emotional, intellectual and mental maturity to be held responsible for their actions¹⁴. Yet the presumption of *doli incapax* acknowledges the differences in maturity for young offenders, including that children aged between 10-14 years lack the psychosocial and developmental capacity to understand the implications of their actions. Yet, in practice, *doli incapax* is inconsistently applied whereby failing to protect children from criminal justice sanctions¹⁵.

There is widespread recognition of the developmental immaturity of children and young people, with this immaturity impacting a number of areas of cognitive functioning including reasoning, impulsivity and consequential thinking¹⁶. There are a number of substantiated arguments that support this position that younger children have rarely developed the social, emotional and intellectual maturity necessary for criminal responsibility before the age of 14 years. The first is the general proposition that children and young people are less psychologically mature than adults whereby impacting their decision making. The neurobiological evidence indicates that adolescent brains are not fully mature until their early twenties. The second proposition is that *'individual children of substantially identical age groups and demographics may demonstrate vastly different cognitive capacities for understanding'*¹⁷. The third proposition is that within an individual child, *'there may be present a sufficient capacity to make decisions, including moral decisions, regarding some aspects of their lives, but, on the evidence, the child demonstrates insufficient maturity in respect of an understanding of the concept of "serious wrong" to be criminally culpable of the particular actions forming the basis of the charge'*¹⁸.

Thus, research suggests that children's brains are developing throughout these formative years where they have limited capacity for understanding criminal behaviour. Children are unable to

¹³ UNCRC 2007, paragraph 33, cited in Cunneen, C. (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney. Available at <http://cyp.unsw.edu.au/node/146>

¹⁴ Penal Reform International (2013) *Justice for Children Briefing No. 4: The Minimum Age of Criminal Responsibility*, cited at <https://www.penalreform.org/resource/justice-children-briefing-no4-minimum-age-criminal-responsibility/>

¹⁵ Amnesty International (2018) *The Sky is the Limit: Keeping young children out of prison by raising the age of criminal responsibility*, accessed 27 February 2020 cited <https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>

¹⁶ Cunneen, C. (2017), *Self-Determination and the Aboriginal Youth Justice Strategy Research Report*. Jumbunna Institute for Indigenous Education and Research, University of Technology Sydney.

¹⁷ Ibid

¹⁸ Ibid

comprehend the criminal nature of the actions or the consequences of stigmatisation of being labelled as an offender¹⁹.

The Human Rights Law Centre (HRLC) submission to the Royal Commission into Victoria's mental health system further highlights the impacts of criminalisation and incarceration on a child's adolescent development, whereby compounding mental illness and trauma²⁰. The HRLC highlights that young people caught up in the criminal justice system have significant rates of mental health conditions and cognitive disabilities compared to the general population. They also support raising the age of criminal responsibility to 14 years old in order to support children and prevent early criminalisation. Early criminalisation can, they argue, be a precursor, causal and aggravating factor for mental illness in children²¹. Ending the early criminalisation of children is crucial in preventing exposure to practices and experiences that drive poor mental health outcomes. Added to this complexity is that imprisoned children and young people are likely to be exposed to multiple traumatic events, socioeconomic disadvantage, family violence and poor educational opportunities²².

There is also evidence to suggest that incarceration compromises cognitive functioning. The Youth Justice Review noted that *'depriving a child or young person of their liberty is detrimental to adolescent development, dislocates young people from any protective factors they may have, and must only be an option of last resort'*²³. The Australian Medical Association (AMA) and the Law Council of Australia (LCA) also support raising that the minimum age of criminal responsibility in Australia to 14 years. Furthermore, the AMA and the LCA believe the arrest, detention or imprisonment of a child from 14 years should be used only as a measure of last resort and should only occur for the shortest appropriate period of time. They also highlight that juvenile detention disproportionately impacts Aboriginal children and young people whereby detrimentally compromising their health and wellbeing²⁴. The Royal Commission into the Protection and Detention of Children in the Northern Territory supports this.

The Victorian Aboriginal Justice Agreement

The Victorian Aboriginal Justice Agreement – *Burra Lotjpa Dunguludja* (AJA) was developed as a state government response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The AJA is a partnership between the wider Aboriginal community and the Victorian Government that aims to reduce the overrepresentation of Aboriginal people in the Victorian justice system. Victoria introduced Aboriginal justice targets in 2012, explicitly committing to *'close the gap in the rate of Aboriginal and non-Aboriginal people under youth justice supervision by 2031'*²⁵. Making progress towards closing the gap relies upon reducing the number of Aboriginal people entering the criminal justice system. The AJA aims to *'reduce the*

¹⁹ Human Rights Law Centre (2018) *Explainer: Raising the Age*, cited 26 February 2020

<https://www.hrlc.org.au/factsheets/2018/2/8/explainer-raising-the-age>

²⁰ Human Rights Law Centre (2019) *Decriminalising Mental Death: Submission to the Royal Commission into Victoria's Mental Health System*, 5 July 2019

²¹ Ibid

²² Ibid

²³ Penny Armytage and John Ogloff, *Meeting Needs and Reducing Offending* (Victorian Department of Justice, 2017), 15

²⁴ Australia Medical Association (2019) *Minimum Age of Criminal Responsibility Policy Statement*, Law Council of Australia, accessed 7 February 2020 <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>

²⁵ Victorian Government, 2018 *Burra Lotjpa Dunguludja - Victorian Aboriginal Justice Agreement Phase 4*

*average daily number of Aboriginal children aged 10-17 years under youth justice supervision in detention and the community by at least 43 by 2023*²⁶.

Another opportunity identified in the AJA, and a vision for the AJC, is furthering self-determination in youth justice. This includes ensuring that our children are strong in their identity. Safeguarding a connection to family, culture and community is the strongest deterrent for a young person making contact with the criminal justice system. The 2018 *'Self-Determination and the Youth Justice System'* AJC report confirms that a self-determined system requires sustainable and long term Aboriginal designed initiatives²⁷. An end-to-end Aboriginal youth justice system requires a fundamental shift that requires Aboriginal people to be the decision-makers. S. 18 of the *Children, Youth and Families Act 2005* provides precedent for this, stating, *"self-determination is doing business our way. Things work better if we implement community led solutions. If it is our vision we will work towards then our kids will grow up strong"*²⁸. Raising age of criminal responsibility is a step towards designing a culturally responsive youth justice approach.

Finally, the AJA calls for a child and youth centred approach guided by the voices of young people. Hearing and valuing the voice of Aboriginal children and young people is integral for youth participation and engagement in strategy, policy and program development, and in implementation, monitoring and evaluation²⁹.

Youth Justice Act for Victoria

The youth justice system of Victoria is shaped and influenced by a range of legislative instruments but has been primarily governed by the *Children, Youth and Families Act 2005* (Vic) (CYF). The CYF is the principle legislation for the youth justice system and provides the framework for the youth justice, child protection, out of home care and family services together with the constitution for the Children's Court of Victoria, a specialist court dealing with matters relating to children. As the Victorian Government commits to developing a standalone Youth Justice Act in 2020, the AJC wishes to see the legislative and strategic body implement the age of criminal responsibility to 14. The AJC has been widely consulted in developing a standalone Youth Justice Act for Victoria. Throughout this consultation the AJC has staunchly advocated for raising the age of criminal responsibility to 14, with contact from the criminal justice system from 14 years used only as a last resort.

As Victoria establishes its first Youth Justice Act the youth justice system must work closely with a range of stakeholders across disciplines in order to address offending behaviour and respond appropriately to the broader needs of children who are vulnerable. Raising the age of criminal responsibility means that children will be unable to make contact with the youth justice system before the age of 14 and will have the opportunity to be diverted in to culturally safe and welfare focused supports. Raising the age of criminal responsibility should be

²⁶ Ibid

²⁷ Jumbunna Institute for Indigenous Education (2018) *Self-determination and the youth justice system*, Workshop Report for the Aboriginal Justice Caucus 10 December 2018, University of Technology Sydney

²⁸ Department of Justice and Community Safety (2019) *Aboriginal Justice Caucus Perspectives and Priorities for Self-Determination in Youth Justice*, Summary of Priorities Issues – Resulting from Workshops on 10/12/18 and 21/05/19

²⁹ Victorian Government, 2018 *Burra Lotpja Dunguludja* - Victorian Aboriginal Justice Agreement Phase 4

combined with youth diversion and social services to respond to the needs of vulnerable cohorts.

There is a need for a fundamental shift away from approaches that blame, isolate and punish individual children, towards approaches that promote the social and emotional wellbeing of children, build connections to culture, families and communities. To ensure that the new Act facilitates this shift, a strong child-centred and human rights based approach and self-determined principles are required. Ultimately, the AJC hopes the Victorian Government will have the courage and leadership to implement these changes in its Youth Justice Act.

Ngaga-dji Report

Community designed and led youth support systems ensure the best care for Aboriginal children and young people and the future of communities. The Koorie Youth Council's Ngaga-dji report, which has been endorsed by the AJC, recommends sustainably resourcing Aboriginal community organisations to develop youth support systems that support children in their communities with localised services across health, social and emotional wellbeing, education, family, legal, cultural, and drug and alcohol services³⁰. The Ngaga-dji report endorses raising the age of criminal responsibility to at least 14 in order to give youth support services in communities the best chance to connect and support children who need them. Along with advocating for raising the age, Ngaga-dji sets overarching ways of working that underpin its proposed solutions through self-determination, youth participation, with strong connections to culture, families, Elders and communities.

The Ngaga-dji report also highlights issues of overrepresentation in the youth justice system and offers an Aboriginal-led perspective and holistic solutions to tackle overrepresentation. Aboriginal women are the fastest growing prison population in Victoria and across the country, with national rates of incarceration increasing by 248% since 1991³¹. Ngaga-dji notes that Victoria's system particularly targets Aboriginal girls by denying services that work for them and criminalising disadvantage instead of supporting them to stay out of the justice system. This lack of services and criminalisation of Aboriginal girls in Victoria is reflected in their high rates of contact with the system. For example, Aboriginal people make up 0.8 per cent of the Victorian population, yet Aboriginal girls make up 24 per cent of girls under youth justice supervision, compared to Aboriginal boys, who make up 15 per cent of the male cohort³². The Australian and State and Territory Governments may look towards Ngaga-dji as a solution focussed report that recognises the right to self-determination, respecting the voice and participation of children and young people, and the importance of strong connections with culture, family, Elders and communities³³.

³⁰ Koorie Youth Council, *Ngaga-dji Report*, 2019, accessed 17 October from <https://www.ngaga-djiproject.org.au/>

³¹ Australian Bureau of Statistics 2016, cited in Koorie Youth Council, *Ngaga-dji Report*, 2019, accessed 17 October from <https://www.ngaga-djiproject.org.au/>

³² Koorie Youth Council, *Ngaga-dji Report*, 2019, accessed 17 October from <https://www.ngaga-djiproject.org.au/>

³³ Human Rights Law Centre (2019) *'Equality for our kids'*, Aboriginal Justice Caucus submission on the development of a new Youth Justice Act for Victoria.

Early intervention and prevention

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) concluded that addressing various aspects of Aboriginal social and economic disadvantage is crucial for reducing Aboriginal involvement in the criminal justice system.

The benefits of cautioning are particularly strong for Aboriginal children and young people. Diversionary schemes for young people have demonstrated success in lowering recidivism rates. Most juvenile offenders grow out of offending behaviour with rates of offending peaking during adolescence and declining into early adulthood. The *Victorian Aboriginal Affairs Framework 2018-2023* contains an objective to increase Aboriginal participation in culturally safe and effective justice prevention, early intervention, diversion and support programs. Expanding and strengthening existing programs cost less than incarcerating young people, and reducing youth offending by diverting young people away from the youth justice system³⁴.

The AJC maintain early intervention and prevention are the cure for overrepresentation. These areas need greater resourcing, particularly schooling and families. In 2018, across Victoria 25 community based partnership projects were funded under the Koori Youth crime Prevention Grants, a partnership between the Department of Justice and Community Safety's Community Crime Prevention and Koori Justice Units. The focus for funding was on projects that delivered community strengthening, enhanced family relationships and parenting skills, and offered a holistic approach. More than \$1.5 million in grants were awarded to projects to empower and re-engage Aboriginal children and young people through camps, sporting activities, workshops and education to help prevent them from coming into contact with the criminal justice system. Projects that take a holistic approach to working with young people often have a 'ripple effect' by involving their families and communities members.

First Contact is Last Contact

The disadvantage that Aboriginal people experience within the system continues once released from custody, upon release and during the community reintegration process³⁵.

Early contact with the criminal justice system increases the chances of incarceration, leading to progression into the adult criminal justice system. Raising the age of criminal responsibility would legislate the use of cautions and diversionary alternatives to charging, and ultimately criminalising, young people. Currently, Aboriginal children and young people are less likely to be cautioned and diverted from the formal criminal legal process in comparison to non-Aboriginal young people. Raising the age of criminal responsibility will work in addressing systemic inequalities and inconsistencies. Research confirms that once a child enters the formal criminal legal system they are more likely to return, particularly if they are detained³⁶.

The Australian Centre for Social Innovation (TACSI) Report is a project with the Aboriginal Justice Caucus, AJA4 Steering Committee and Koori Justice Unit highlighting five strategic

³⁴ Victorian State Government, *Victorian Aboriginal Affairs Framework 2018-2023*, cited from <https://www.aboriginalvictoria.vic.gov.au/victorian-aboriginal-affairs-framework-2018-2023> 29th November 2019

³⁵ La Macchia, M (2016) An Introduction to over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, *Australian Policy Online*.

³⁶ Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016), 4, 52

initiatives to reduce Aboriginal Overrepresentation in the Criminal Justice System. First Contact is Last Contact is a preventative initiative for young people ensuring the first contact a young person has with police is the last. This initiative supports young people by making them feel listened to and cared about, following up on their pathway through multiple entry points and offers supports at community, service delivery, and justice system levels and at any point of risk or crisis³⁷. This layered approach to support young people across the continuum of risk or crisis, ensures that young people's first time in contact with the justice system is the last. The objective of First Contact is Last Contact aims to prevent unnecessary escalation of contact with the system following exposure to violence or crime through healing and community support. This model will support young people right after they come into contact with the justice system, indirectly, through:

- Providing a collection of supports at community, programs and continuum levels
- Hearing the voice of the young person to inform the process to follow
- Supporting young people to build healthy and positive relationships
- Walking alongside young people, providing long term and ongoing support to helping them define boundaries, and get them connected to culture
- Keeping young people connected to support networks and understanding who can advocate for them

This model suggests a strategy for the protection of and response to young people who are at risk of coming in contact with the justice system or have had their first contact³⁸. The strategy offers 'ingredients' for preventing or responding; the expectation is that a variety and combination of community led initiatives, community groups and service providers comprise the different layers. Legislative implementation and broader funding commitment is needed to cement this initiative and provide protocols for diversion to ensure that a young person's first contact with the justice system is the last contact.

Aboriginal self-determined diversion measures, like First Contact is Last Contact, have the potential to support a child's connection to culture, family, country and community, which is central to Aboriginal children and young people's emotional and social wellbeing, as well as strengthening families and communities to respond to and prevent offending in the future³⁹. According to the TACSI report and evidence provided in this paper, Victoria should legislate diversion in a way that is broad, consistent and coordinated enough in order to identify at risk individuals and communities and provide a strong safety net of support services. Placed-based and wrap around service delivery should be implemented to improve individual, family and community outcomes. Furthermore, early intervention programs allow the youth justice system to effectively intervene in the lives of young people at risk of offending. Raising the age of criminal responsibility to 14 years will help foster this service delivery.

³⁷ The Australian Centre for Social Innovation (2018), *5 Innovations to Further Self Determination in the Justice System*, Project with the Koori Caucus, AJA4 Steering Committee, Koori Justice Unit and The Australian Centre for Social Innovation, April 2018.

³⁸ Victorian Government, 2018 *Burra Lotpja Dunguludja - Victorian Aboriginal Justice Agreement Phase 4*, <https://www.justice.vic.gov.au/justice-system/youth-justice/legislation-relating-to-the-youth-justice-service>

³⁹ Human Rights Law Centre (2019) *'Equality for our kids'*, Aboriginal Justice Caucus submission on the development of a new Youth Justice Act for Victoria.

Racism and systemic bias

Although the rates of Aboriginal children and young people involved in the criminal justice system in Victoria are lower than most other Australian jurisdictions and national figures, they are high when compared to the non-Aboriginal population⁴⁰. One of the key issues in relation to the policing of Aboriginal people is the exercise of police discretionary powers. Police are less likely to divert Aboriginal children and young people away from formal court processing. In Australia, various studies have found that Aboriginal children and young people do not receive the benefit of a diversionary police caution to the same extent as non-Aboriginal children and young people⁴¹. Evidence from Victoria indicates that, when apprehended by police, Aboriginal youth are two or three times more likely to be arrested and charged with an offence than non-Aboriginal youth⁴².

Aboriginal children and young people are also not referred as frequently to restorative justice youth conferences as non-Aboriginal children and young people⁴³. Yet, a key rationale for the introduction of restorative justice youth conferencing in Australia was to provide a more culturally sensitive method of responding to offending by Aboriginal children and young people⁴⁴. The benefits of cautioning are particularly strong for Aboriginal children and young people. Diversionary schemes for young people based on demonstrated success in lowering recidivism rates. Expanding and strengthening existing programs cost the justice system less, as they cost less than incarcerating young people, and reducing youth offending by diverting young people away from the youth justice system⁴⁵.

The overrepresentation of Aboriginal children and young people combined with the less likelihood for diversion has seen the development of the Aboriginal Youth Cautioning Program (AYCP). This five year program is funded to increase and enhance the use of cautioning and diversion options through a community-led model, based on principles of self-determination, early intervention and harm-reduction, to address over-representation of Aboriginal children and young people in the criminal justice system. The consultation process for the three pilot programs, operating in Echuca, Dandenong and Bendigo, is informed by the engagement of the AJC, agencies and local police participating in the Aboriginal Cautioning Community Workshops and overseen by the Victorian Police Aboriginal Portfolio Reference Group.

Mob Working with children in community

For Aboriginal children and young people support will be more meaningful when administered by an Elder or respected person with cultural authority and importance in the child's life. Diversion schemes or services, including mentoring, that are facilitated by Aboriginal community controlled organisations, community members or Elders are more positive for strengthening cultural connection, re-establishing broken relationships and community

⁴⁰ Victorian Government, 2018 *Burra Lotpja Dunguludja* - Victorian Aboriginal Justice Agreement Phase 4

⁴¹ Cunneen, C. and Tauri, J. (2017) *Indigenous Criminology*, Policy Press: University of Bristol

⁴² Dudgeon, P., Milroy, H., and Walker, R. (2014). *Working together: Aboriginal and Torres Strait Islander Mental Health and Well-being Principles and Practice*. 2nd ed. Barton: Commonwealth Copyright Administration.

⁴³ Australian Institute of Criminology (2017) *Restorative Justice in Australia*, accessed on 26 February 2020 cited <https://aic.gov.au/publications/rpp/rpp127/restorative-justice-australia>

⁴⁴ Morris and Maxwell 1993; Consedine 1995; Cleland and Quince 2014 cited in Ibid

⁴⁵ Victorian State Government, *Victorian Aboriginal Affairs Framework 2018-2023*, cited from <https://www.aboriginalvictoria.vic.gov.au/victorian-aboriginal-affairs-framework-2018-2023> 29th November 2019

building. To be effective it is important that support programs are community focussed and involvement of Aboriginal people from initial assessment through to intervention and evaluation⁴⁶. Program development requires extensive consultations with the Aboriginal community, including the young people for whom it is intended.

The Government has committed to supporting Aboriginal participation in culturally safe and effective justice prevention, early intervention, diversion and support programs through the Victorian Aboriginal Affairs Framework 2018-2023⁴⁷ and the Aboriginal Justice Agreement. To be effective and responsive to the unique experiences of Aboriginal children and young people, the planning, design and implementation of programs must be driven by Aboriginal communities and supported through Government and ACCO partnerships with sufficient resourcing⁴⁸.

The Victorian Aboriginal community already has examples of successful approaches, whose impact could be strengthened through increased resourcing.

The Koori Youth Council (KYC), together with partner agency, Youth Affairs Council Victoria (YACVic), has been funded by the Department of Premier and Cabinet Office for Youth to support the development and delivery of Aboriginal youth mentoring programs across Victoria. Mentoring has been taking place in Aboriginal communities for generations. It is often innate, informational and carried out through the Elder's traditional role of sharing the wisdom, the knowledge and the spirit.

The work of Marram Nganyin and the local mentoring projects seek to build upon this mentoring process combined with formal structures in order to improve outcomes for its young participants⁴⁹. Marram Nganyin is a youth mentoring program for Aboriginal children and young people aged 12-25 years old. The program is a community centred approach run by Aboriginal organisations that deliver the programs, with support from KYC and YACvic. It has been developed through consultation with young Aboriginal people to understand their needs in their communities. The program is built with the support of Aboriginal organisations in their communities with community ownership of the program. The Marram Nganyin program encourages its program mentees that have connected with their culture and found confidence within themselves to become mentors to a new generation of young people. Marram Nganyin is an example of a successful program developed by young people for young people. The program asserts self-determination for communities to have direct support for the prevention and diversion for young people making contact with the criminal justice system.

Wulgunggo Ngalu Learning Place

The principles of best practice in Aboriginal and Torres Strait Islander programs are those that focus on strengthening culture and self-determined in nature. Cunneen (2001) developed a

⁴⁶ Dudgeon, P., Milroy, H., and Walker, R. (2014). *Working together: Aboriginal and Torres Strait Islander Mental Health and Well-being Principles and Practice*. 2nd ed. Barton: Commonwealth Copyright Administration.

⁴⁷ Government of Victoria, *The Victorian Aboriginal Affairs Framework 2018-2023* (2018), 50

⁴⁸ Commonwealth of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011)

⁴⁹ <https://koorieyouthcouncil.org.au/projects/marram-nganyin/>

framework in the Australian context that outlines five principles for culturally appropriate diversion programs. These principles should:

- Adopt a holistic view of Aboriginal and Torres Strait Islander health and wellbeing
- Provide meaningful, not tokenistic, involvement of Aboriginal people
- Involve the participant's family and the community
- Emphasise Aboriginal and Torres Strait Islander heritage, culture and lore
- Assist in establishing and strengthening relationships with Aboriginal and Torres Strait Islander people who can become mentors and role models⁵⁰.

The Wulgunggo Ngalu Learning Place (WNLP) is a joint initiative of the Victorian Government and the Aboriginal community. This culturally sensitive learning place houses and supports up to 20 men who are undertaking Community Based Orders giving them the opportunity to learn new skills, reconnect, or further strengthen, their culture and participate in programs and activities to help them address their offending behaviour⁵¹.

A qualitative evaluation of the role of cultural strengthening at WNLP found that the WNLP cultural strengthening processes reflected best practice and had positive outcomes for participants⁵². The role of culture in Aboriginal diversion programs is integral in offering complex and nuanced rehabilitation initiatives.

WNLP represents a successful community driven, evidence based model that delivers culturally appropriate supports to its participants. Adapting a program like WNLP would encourage and support cultural strengthening for young people to prevent them from being entrenched in the youth justice system. Within a holistic program approach, cultural strengthening is integral in providing participants with a resilient foundation to build and improve their lives⁵³. In raising the age of criminal responsibility consideration should be given to the development of a youth specific program for Aboriginal children and young people, equivalent to Wulgungoo Ngalu.

Concluding remarks and Recommendation

Australia's current response to children coming to the attention of police fails to engage children in ways that are developmentally appropriate. Criminalising the behaviour of children creates a cycle of disadvantage and marginalisation that may lead to vulnerable children to become entrenched in the criminal justice system. Children and young people need to have adequate mental and physical assessments for developmental considerations. Reducing the overrepresentation of Aboriginal children and young people requires raising the age of criminal responsibility to 14 combined with early intervention services, such as diversionary schemes particularly for children at risk of making contact with the justice system. Government, working alongside Aboriginal communities, need to look at reengaging children and young people in education and social and emotional wellbeing as a prevention and diversion to the justice

⁵⁰ Clear Horizon Consulting (2013) 'Wulgunggo Ngalu Learning Place Final Evaluation Report', Prepared for the Department of Justice, May 2013

⁵¹ Australian Human Rights Commission (2006) *A Statistical Overview of Aboriginal and Torres Strait Islander people in Australia*, accessed 17 February 2020 cited at <https://www.humanrights.gov.au/our-work/statistical-overview-aboriginal-and-torres-strait-islander-peoples-australia>

⁵² Clear Horizon Consulting (2013) 'Wulgunggo Ngalu Learning Place Final Evaluation Report', Prepared for the Department of Justice, May 2013

⁵³ Ibid

system. This may be achieved through mentoring, diversion initiatives, and cultural programs to help build resilience, confidence and a connection to their culture, families and community.

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