SUBMISSION TO COUNCIL OF ATTORNEY GENERALS (COAG) AGE OF CRIMINAL RESPONSIBILITY WORKING GROUP

FEBRUARY 2020

CONTENTS

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, youth, 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.

VALS also run a Custody Notification System (CNS) which requires Victoria Police to notify VALS within 1 hour every time an Aboriginal person in Victoria is taken into police custody. Since October 2019, this requirement is legislated under the *Crimes Act 1958.*[2] Once a notification is received, VALS will contact the relevant police station to carry out a welfare check and provide legal advice if required.

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. We 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. 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.

VALS also provides legal assistance to young people and their families in relation to child protection matters and Commonwealth family law matters. 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.

Our Community Justice Program provides services through the Custody Notification System to all Aboriginal children and young people who are notified to VALS once they are taken into police custody.

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.

[1] The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.
[2] Ss. 464AAB and 464FA, *Crimes Act 1958* (Vic).

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 and young people in Australia.[3] 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.[4]

VALS data regarding children and young people

In 2018-2019, VALS provided legal services to 132 children aged 10-17 years, including 97 children who were involved in the youth justice system. In 2017-2018, VALS provided legal services to 72 children aged 10-17 years, including 64 children who were involved in the youth justice system.

In 2017-2018, VALS received notifications through the Custody Notification System regarding 1,707 children under the age of 18, including 366 children under the age of 14 years and 664 children aged 10 to 14 years.[5] At the time of notification, 41 of the children aged 10-14 years were on remand. Children under the age of 14 years represented 21% of all child notifications and children aged 10-14 years represented 39.4%.

In 2018-2019, we received notifications in relation to 2,064 children under the age of 18, including 473 children under the age of 14 years and 910 children aged 10-14 years.[6] At the time of notification, 65 of these children were on remand. Children under the age of 14 years represented 22.9% of all child notifications and children aged 10-13 years represented 44% of all notifications.

Policy and Advocacy on Youth Justice Issues

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. VALS has been a strong advocate over many years in relation to youth justice and child protection issues, including:

- Raising the age of criminal responsibility
- Reducing remand rates for children and young people
- Diverting children and young people form the youth justice system at every possible stage
- Addressing the issue of over-criminalisation of children and young people in residential care
- Addressing the use of practice related to solitary confinement in Youth Justice Centres
- Compliance with the Aboriginal Child Placement Principle

[3] 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.
[4] Koori Youth Council (KYC), *Ngaga-Dji: Young Voices Creating Change for Justice* (2018), p. 53.
[5] VALS received 11,108 notifications in total, with children under the age of 18 years representing 15.3% of all notifications.
[6] VALS received 12,293 notifications in total, with children under the age of 18 representing 16.7% of all notifications.

- Permanency Arrangements for children and young people in out of home care
- Expansion of Children's Koori Courts

ACKNOWLEDGEMENT OF TRADITIONAL OWNERS

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.

SUMMARY OF RECOMMENDATIONS

To the COAG Working Group on the Age of Criminal Responsibility:

1. The minimum age of criminal responsibility should be raised to at least 14 years for all offences, in line with international standards.

2. The presumption of *doli incapax* should be extended to young people aged 14 to 17 years and legislated in all jurisdictions.

3. To ensure that *doli incapax* operates as an effective safeguard for young people aged 14 to 17 years, the following amendments should be made:

    - Create a legislative requirement for prosecutors to rebut the presumption;
    - Place legislative restrictions on the kinds of evidence that can be produced to rebut the presumption;
    - Increase funding to the Children's Court to improve the quality of clinical reports;
    - Increase funding to VLA to cover the cost of specialist reports requested by defence lawyers for psychologists specialising in working with young people under the age of 18, so that
    - Create a legislative requirement for all police and Crown prosecutors to undergo training on the presumption of *doli incapax*;
    - Incorporate mandatory training on *doli incapax* into training for admission to become a solicitor;
    - Require all criminal defence lawyers to undergo training on *doli incapax* as part of their annual CDP.

4. All Australian government should establish a minimum age of detention of 16 years, in line with international standards.

5. Commonwealth, State and Territory governments should collaborate to develop a detailed mapping of all existing services and programs across Australia that:

    - Support Aboriginal children and young people who are in contact with, or have been in contact with the youth justice system, as well as their families;
    - Support Aboriginal children and young people to avoid coming into contact with the youth justice system. This should include early intervention and prevention programs to support parents, families and communities, as well as initiatives in education, housing, health and community services.

6. Commonwealth, State and Territory governments should realign their youth justice and crime prevention policies/strategies/frameworks, so that justice reinvestment is a central and critical component. Policy reforms should prioritise community-led approaches that address underlying drivers for offending and divert children and young people away from the youth justice system at every possible opportunity. They must be underpinned by the right of Aboriginal Peoples to self-

determination and they must be supported by an integrated whole of government approach bringing together education, health, community services, child protection, justice and others.

7. All Australian governments should invest in and support justice reinvestment initiatives led by Aboriginal Community Controlled Organisations (ACCOs) and Aboriginal communities, building on the lessons learned from the *Maranguka Justice Reinvestment Project* and other justice reinvestment initiatives in Australia.

8. Commonwealth, State and Territory governments should collaborate to establish an independent justice reinvestment body, as recommended by the Australian Law Reform Commission's Inquiry into Incarceration of Aboriginal and Torres Strait Islander Peoples.[7] While justice reinvestment initiatives must be community-led, the national body would promote justice reinvestment approaches and provide expertise on the development and implementation of justice reinvestment initiatives.

9. All Australian governments should invest in culturally appropriate legal services for Aboriginal children and young people who are involved with youth justice, building on the experience of *Balit Ngulu,* which was the first independent Aboriginal legal service for Aboriginal children in Australia.

10. No new criminal offences should be created. The use of a child under the age of criminal responsibility to commit an offence is already criminalised through offences relating to incitement, exploitation and procurement of children. When the minimum age of criminal responsibility is raised, these offences will continue to apply.

To the Victorian Government:

11. The new Youth Justice Act in Victoria must:
    - Raise the minimum age of criminal responsibility to at least 14 years for all offences, in line with international standards;
    - Extend the presumption of *doli incapax* to young people aged 14 to 17 years;
    - Establish a minimum age of detention of 16 years, in line with international standards.

12. To ensure that *doli incapax* operates as an effective safeguard for young people aged 14 to 17 years, the new Youth Justice Act should:

    - Create a legislative requirement for prosecutors to rebut the presumption;
    - Place legislative restrictions on the kinds of evidence that can be produced to rebut the presumption;
    - Increase funding to the Children's Court to improve the quality of clinical reports;

[7] Australian Law Reform Commission (ALRC), *Pathways to Justice – An Inquiry into Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Final Report*, (December 2017), Recommendation 4-1 (hereafter referred to as "ALRC Inquiry"). See also, Senate Legal and Constitutional Affairs Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, (June 2013) hereafter referred to as "Senate Inquiry").

- Increase funding to Victoria Legal Aid to cover the cost of specialist reports relating to legal capacity;
- Create a legislative requirement for all police and Crown prosecutors to undergo training on the presumption of *doli incapax*;
- Incorporate mandatory training on *doli incapax* into all programs for admission to practice as a solicitor;
- Require all criminal defence lawyers to undergo training on *doli incapax* as part of their Continuing Professional Development.

13. In collaboration with relevant stakeholders, including ACCOs, the Department of Justice and Community Safety (DJCS) should carry out a detailed mapping of all existing services and programs in Victoria that:
    - Support Aboriginal children and young people who are in contact with, or have been in contact with the youth justice system, as well as their families;
    - Support Aboriginal children and young people to avoid coming into contact with the youth justice system. This should include early intervention and prevention programs to support parents, families and communities, as well as initiatives in education, housing, health and community services.

14. In developing responses for children under the age of 14 years, the government should:
    - Embed justice reinvestment approaches into all relevant policies, strategies and frameworks, including the new Youth Justice Strategy, the Aboriginal Youth Justice Strategy and the Crime Prevention Strategy;
    - Invest in and work with ACCOs and Aboriginal communities to design and implement justice reinvestment initiatives in Victoria, building on the experiences of existing Victorian programs and services as well as justice reinvestment initiatives around Australia;
    - Support the establishment of a national justice reinvestment body, as recommended by the Australian Law Reform Commission;[8]

15. The government should provide funding to the Victorian Aboriginal Legal Service to re-establish *Balit Ngulu* as a culturally safe legal service for Aboriginal children and young people in Victoria;

16. No new criminal offences should be created relating to the use of a child under the minimum age of criminal responsibility to commit an offence.

[8] ALRC, above note 7; Senate Inquiry, above note 7.

DETAILED SUBMISSIONS

VALS welcomes the opportunity to provide input to the Council of Attorney Generals' (COAG) National Working Group on the Age of Criminal Responsibility in Australia.

Aboriginal children and young people are over-represented in the youth justice system in every State and Territory in Australia.[9] In Victoria, the government has committed address this issue by reducing the number of Aboriginal children and young people in the youth justice system by closing the gap in the rate of Aboriginal and non-Aboriginal people under youth justice supervision by 2031.[10] In practice, this means reducing the number of Aboriginal children under youth justice supervision by 43 by 2023.[11] The low age of criminal responsibility is one of the main drivers behind over-representation of Aboriginal people in the youth justice and criminal justice systems in Victoria. Raising the age of criminal responsibility to at least 14 years is a key way to achieve Victoria's Aboriginal Justice targets.

VALS commends the Victorian government for its commitment to self-determination of Aboriginal peoples,[12] and its commitment to youth justice reform flowing from the 2017 Review of the Youth Justice System.[13] We strongly encourage the government to ensure that the age of criminal responsibility is incorporated as a key element in the ongoing processes to develop a Youth Justice Act, a Youth Justice Strategy, a Crime Prevention Strategy and an Aboriginal Youth Justice Strategy.

1. Raise the minimum age of criminal responsibility to at least 14 years for all offences[14]

VALS has been advocating for many years to raise the minimum age of criminal responsibility in Victoria and across other States and Territories in Australia.[15] This position is based on the following key arguments:

- Medical science shows that children below the age of 14 years lack the maturity to fully comprehend the impact of their actions;
- Australia's international legal obligations require a minimum age of criminal responsibility of at least 14 years;
- Raising the age of criminal responsibility will reduce recidivism rates;
- The presumption of d*oli incapax* is ineffective and routinely fails to protect our youngest children;
- Raising the age of criminal responsibility will reduce over-representation of Aboriginal children in the youth justice system;
- Criminalising children aged 10-13 years reinforces vulnerabilities and cycles of disadvantage;
- Detention is harmful for children and is a waste of resources.

[9] Australian Institute for Health and Wellbeing (AIHW), *Youth Justice in Australia 2017-2018*, (2019) p. 9.
[10] Aboriginal justice targets were introduced in 2012 under the Aboriginal Justice Agreement Phase 3 and are also included under *Burra Lotjpa Dunguludja: the Aboriginal Justice Agreement Phase 4.* See DJCS, *Burra Lotjpa Dunguludja*, (2018) p. 30.
[11] See Aboriginal Justice Target Milestone 2. Ibid., p. 30.
[12] Victorian government, *Victorian Aboriginal Affairs Framework 2018-2023* (VAAF), pp. 22-24.
[13] P. Armytage and J. Ogloff, *Youth Justice Review and Strategy: Executive Summary* (2017).
[14] This section responds to discussion questions 1 and 2.
[15] Victorian Aboriginal Legal Service (VALS), Position Paper: Age of Criminal Responsibility, (2017); VALS, *Submission to the Commission for Children and Young People (CCYP) Inquiry: Our Youth, Our Way,* (October 2019), pp.9-10.

VALS joins with over 100 other organisations across Australia that are advocating for this critical reform, including the Aboriginal Justice Caucus,[16] Koori Youth Council,[17] the Smart Justice for Young People Coalition in Victoria,[18] Change the Record,[19] the Law Council of Australia,[20] the Australian Medical Association,[21] the Royal Australasian College of Physicians[22] and the Australian and New Zealand Children's Commissioners and Guardians (ANZCCG).[23]

The reasons for raising the age of criminal responsibility to at least 14 years apply equally to all offences. As was noted by the Committee on the Rights of the Child, approaches that permit the use of a lower minimum age of criminal responsibility for serious offences are "usually created to respond to public pressure and are not based on a rational understanding of children's development."[24] VALS strongly encourages COAG to take a rational and evidence-based approach to this issue and not be swayed by public pressure (either real or perceived).

Medical science shows that children below the age of 14 years lack the maturity to fully comprehend the impact of their actions

There is a large body of neurobiological and medical scientific evidence demonstrating that maturity and capacity of abstract reasoning is starkly different between children and adults.[25] This is because child and adolescent brains are not fully mature until their early twenties.[26] For 10-13 year olds, developmental capacity is limited as their frontal cortex is still developing.[27] Neurological and psychosocial immaturity means that children do not under concepts of "serious wrong," meaning that their understanding of the behaviour forming the basis for a criminal charge is not enough to establish criminal culpability.[28]

---

[16] C. Cunneen, *Self-determination and the Aboriginal Youth Justice Strategy: Research Report* (June 2019). Department of Justice and Community Safety (DJCS), *Aboriginal Justice Caucus Perspectives and Priorities for Self-determination in Youth Justice: Summary of Priority Issues Resulting from Workshops on 10/12/18, 30/4/19 and 21/5/19*, (2019).
[17] KYC, above note 4.
[18] Smart Justice for Young People (SJ4YP), *Youth Justice Principles* (2019).
[19] *Change the Record, Free to be kids: National Plan of Action*, 2017, p.5.
[20] Law Council of Australia (LCA) and Australian Medical Association (AMA), *Minimum Age of Criminal Responsibility: Policy Statement,* (December 2019). See also, LCA, "Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax" (26 June 2019).
[21] LCA and AMA, *Minimum Age of Criminal Responsibility: Policy Statement,* (December 2019). See also AMA, "AMA Calls for the Age of Criminal Responsibility to be Raised to 14 years of Age," (25 March 2019).
[22] Royal Australian College of Physician, "Doctors, lawyers, experts unite in call to raise age of criminal responsibility."
[23] 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," (16 November 2018).
[24] United Nations Committee on the Rights of the Child (hereafter referred to as "CRC"), *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, (18 September 2019) para 25.
[25] See for example, E. Cauffman and L. Steinberg, L., '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults', (2000) *Behavioral Sciences and the Law*, 18, 741–60; E. Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective', (2013) *Youth Justice* 13(2), 102–110; T. Crofts T, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility', (2015) *Current Issues in Criminal Justice* 27(1), 123–31; C. Fried C. and N. Reppucci, 'Criminal Decision Making: The Development of Adolescent Judgement, Criminal Responsibility, and Culpability,' (2001) *Law and Human Behaviour.*
[26] See for example: E. Sowell et al., 'Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation' (2001) 21 *Journal of Neuroscience* 8697, 8819; E. Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (2001); SJ. Blakemore and S. Choudhury, 'Development of the Adolescent Brain: Implications for Executive Function and Social Cognition' (2006) 47(3) *Journal of Child Psychology and Psychiatry* 296, cited in Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (March 2012) p. 11.
[27] C. Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility: Comparative Youth Penalty Project Research Project*, 2017.
[28] N. Lennings and C. Lennings, 'Assessing Serious Harm under the Doctrine of Doli Incapax: A Case Study', (2014) *Psychiatry, Psychology and Law*, 21(5), 791–800, 793, cited in C. Cunneen, above note 27.

In many aspects of the youth justice systems, the lack of maturity of young people is already recognised. For example, in 2016 the Victorian Government's Youth Parole Board recognised the relationship between brain development and the response of the criminal justice system to young people: "Young people require different treatment from adult offenders due to their lack of maturity, propensity to take risks, susceptibility to peer influence, undeveloped consequential thinking and, importantly, their capacity to be rehabilitated."[29]

Legal minimum ages for other rights and responsibilities of children in Australia reflect the fact that children aged 10-13 years are not considered to have a level of maturity and development. For example:

- A child under 13 years cannot sign up for a Facebook account;
- A child under 12 years cannot board a plane unsupervised;
- A child under the age of 15 years cannot apply for their own Medicare card.[30]

Australia's international legal obligations require a minimum age of criminal responsibility of at least 14 years for all offences

As a state party to the Convention on the Rights of the Child, Australia has binding international legal obligations, including in relation to the age of criminal responsibility.[31] According to the United Nations Committee on the Rights of the Child ("the Committee"), in complying with their obligations under article 40(3) of the Convention, state parties should increase the minimum age of criminal responsibility to at least 14 years.[32] This is consistent with the strong emphasis in the Convention on diverting children away from the criminal justice system wherever possible.[33] Although General Comment 24 and the findings of the Committee are not legally binding, they are highly persuasive interpretations of Australia's international legal obligations.

Australia's low age of criminal responsibility has received significant criticism from various UN human rights mechanisms, including the Committee[34] as well as the UN Special Rapporteur on the Rights of Indigenous People.[35] In September 2019, the Committee on the Rights of the Child specifically recommended that Australia should raise the minimum age of criminal responsibility to at least 14 years.[36] Internationally, 14 years is the most common age of criminal responsibility.[37] Implementing the Committee's recommendation will bring Australia in line countries such as Austria, Germany, Spain, Denmark, Norway, Finland, Iceland, Estonia, the Czech Republic and Portugal.[38]

---

[29] Department of Health and Human Service, *Youth Parole Board Annual Report 2015-16* (2016).
[30] Department of Human Services, *How to get your own Medicare card at 15 years old* (July 2019).
[31] United Nations Convention on the Rights of the Child, (adopted on 20 November 1989, entered into force on 2 September 1990) UNTS Vol. 1577, art 40(3)(a).
[32] CRC, above note 24, para 22.
[33] UN Convention on the Rights of the Child, above note 31, art. 40(3)(b).
[34] CRC, Concluding Observations of the Committee on the Rights of the Child: Australia, 21 October 1997, CRC/C/15/Add.79, para 11; CRC, Concluding Observations: Australia, CRC/C/15/Add.265, 20 October 2005, para 73(a); CRC, Concluding Observations: Australia, CRC/C/AUS/CO/4, 28 August 2012, para 82(a); CRC, Concluding Observations on the Combined fifth and sixth periodic reports of Australia, CRC/C/AUS/CO/5-6, 1 November 2019, para 47(a).
[35] V. Tauli Corpuz, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN GAOR, 36th sess, Agenda Item 3, UN Doc A/HRC/36/46/Add.2 (8 August 2017), para 75.
[36] CRC, Concluding Observations on the Combined fifth and sixth periodic reports of Australia, above note 35, para 48(a).
[37] CRC, General Comment No. 24, above note 25, para 21.
[38] See C. Cuneen, above note 16.

The international standard on the age of criminal responsibility was revised in July 2019 in light of new knowledge about child and adolescent development and other factors.[39] Prior to that, the Committee recommended a minimum age of criminal responsibility of 12 years.[40] There are several Australian states and territories that reviewed their youth justice legislation prior to 2019, and recommended that the age of criminal responsibility be raised to 12 years in line with international standards at that time.[41] In developing its recommendations, it is critical that the COAG Working Group on the Age of Criminal Responsibility is guided by current international standards which take into account the most recent neurological and scientific evidence.

Raising the age of criminal responsibility will reduce recidivism rates

Evidence shows that early involvement with the youth justice system significantly increases the likelihood of reoffending.[42] In this regard, raising the age of criminal responsibility will significantly reduce recidivism rates for children and young people.

In Victoria, the recidivism rate of children who were first sentenced aged 10–12 is 86% and for 13-14 year olds the rate is 84%.[43] In contrast, children who are first sentenced at the age of 17 years have a recidivism rate of 51% and those sentenced at 19-20 years have a recidivism rate of 33%.[44] In effect, every year increase in the age at first sentence equates to an 18% reduction in the likelihood of reoffending.[45]

In addition to the significantly higher likelihood of reoffending, children sentenced at age 10-12 years are also more likely to reoffend multiple times[46] and are much more likely to continue to the adult criminal jurisdiction.[47]

In VALS experience, the increased likelihood of reoffending is not only linked to sentencing; in fact, any involvement with the youth justice system at age 10-12 years (including arrest and remand) exposes our clients to the youth justice system and is likely to increase the risk of reoffending. This is particularly true in

[39] CRC, *General Comment No. 24*, above note 25, para 1.
[40] CRC, *General Comment No. 10 (2007)*, CRC/C/GC/10, 44th sess. (25 April 2007).
[41] Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, (2017) p. 46; B. Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Adviser to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence*, (8 June 2018) p. 13.
[42] Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria*, (2016), p. 26. See also: R. Loeber and D. Farrington, 'Young Children Who Commit Crime: Epidemiology, Developmental Origins, Risk Factors, Early Interventions and Policy Implications' (2000) *Development and Psychopathy* 12(4), 737; Walter Forrest and Ben Edwards, 'Early Onset of Crime and Delinquency among Australian Children', in Australian Institute of Family Studies (ed.), *The Longitudinal Study of Australian Children Annual Statistical Report 2014* (2014) 131–150, 131; Shuling Chen et al., *The Transition from Juvenile to Adult Criminal Careers*, New South Wales Crime and Justice Bulletin no. 86 (2005); Parliament of Victoria, Drugs and Crime Prevention Committee, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People, Final Report*, no. 218 (2009), 63; Don Weatherburn et al., *Screening Juvenile Offenders for Further Assessment and Intervention*, Crime and Justice Bulletin no. 109 (2007).
[43] Ibid.
[44] Ibid.
[45] Sentencing Advisory Council, above note 42, p. 26
[46] According to research carried out by the Sentencing Advisory Council in 2016, three-quarters of the children who were aged 10-12 (inclusive) when first sentenced continued offending into the adult criminal jurisdiction. See SAC, above note 43, p. 31.
[47] According to research carried out by the Sentencing Advisory Council in 2016, 36% of children who were aged 10-12 (inclusive) when first sentenced were sentenced to an immediate term of adult imprisonment before they were 22 years old, versus 15% of young people who were first sentenced at age 18 or older. Ibid.

the current context where more children are being remanded in Victoria due to punitive reforms to the *Bail Act* in 2018.[48]

While political mantras often emphasise the need for a tough approach on crime to keep our communities safe, recidivism rates prove that this is factually incorrect. Criminal responses to youth offending breed further offending and create additional risk for communities.

Raising the age of criminal responsibility will reduce over-representation of Aboriginal children in the youth justice system

Aboriginal children are disproportionality impacted by the low age of criminal responsibility as they are less likely to receive a caution[49] and are more likely to be involved with the youth justice system earlier than non-Aboriginal youth.

In Victoria, data from 2018-2019 shows that Aboriginal children aged 10-14 years are more likely to be detained or on a community-based order than non-Aboriginal children of the same age group:

- 1.6% (1 out of 42) of Aboriginal young people sentenced to custody were below the age of 15 years compared with 2.3% (4 out of 247) of non-Aboriginal young people;[50]
- 21.1% (15 out of 71) of Aboriginal children on remand were 12-14 years compared with 18.8% (72 out of 382) of non-Aboriginal children;[51]
- 16.3% (40 out of 245) of Aboriginal young people on community-based orders were 12-14 years compared to 11.6% (153 out of 1414) non-Aboriginal young people.[52]

Nationally, the situation is far worse: in 2017-2018, 39% of Aboriginal children under youth justice supervision 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.[53]

As noted above, Victoria introduced Aboriginal justice targets in 2012 which commit the government to close the gap in the rate of Aboriginal and non-Aboriginal people under youth justice supervision by 2031. To achieve this target, the current Aboriginal Justice Agreement requires the government to reduce the number of Aboriginal children under youth justice supervision by at least 43 young people by 2023.[54]

Given that Aboriginal children are more likely to be involved in the youth justice system between the ages of 10 and 13 years, and that earlier involvement with the youth justice system increases recidivism rates, it is clear that raising the age of criminal responsibility is critical for our young people. If the Victorian government is serious about its commitment to address over-representation of Aboriginal young people in the youth justice system by 2031, raising the age of criminal responsibility is an obvious place to start.

---

[48] Between 2017-18 and 2018-19, the number of young people on remand increased from 355 to 454 (99 more than the previous year) which is 21.9% increase. In the same period, the number of Aboriginal young people on remand increased from 57 to 71, which equates to a 24.6% increase. See DJCS, Youth Justice Report to the Aboriginal Justice Forum, October 2019, pp. 14-17.
[49] K. Shirley, "The Cautious Approach: Police cautions and the impact on youth reoffending," Crime Statistics Agency *In Brief No. 9*, September 2017, p. 10.
[50] DJCS, *Youth Justice Report to the Aboriginal Justice Forum*, above note 48, p. 10.
[51] Ibid., p. 15.
[52] Ibid., p. 20.
[53] AIHW, *above note* 9, p. 27.
[54] *Burra Lotjpa Dunguludja*, above note *10*, p. 30.

The presumption of doli incapax is ineffective and routinely fails to protect our children

The rebuttable presumption of *doli incapax* was designed to recognise the differences in maturity of young offenders, including the fact that children aged 10-13 years lack the psychosocial and developmental capacity to understand the implications of their actions. In practice however, the presumption is inconsistently applied and routinely fails to protect our children.

In VALS experience, the possibility for *doli incapax* to act as a legal safeguard is undermined by the following:

- Although the prosecution has the burden of proof to rebut the presumption, in practice, police officers regularly fail to discharge this burden unless they are specifically requested to do so by defence or the judiciary;
- The cost of Children's Court clinic reports is covered by the Court, however, these reports are often not sufficient and do not apply the test accurately, so defence counsel regularly seek an additional psychologist report and are required to cover the costs;
- There is a shortage of child psychologists both in metropolitan and regional areas, so there are often significant challenges (including delays) with obtaining a specialist report to establish that the child does not have legal capacity[55];
- It is often difficult to determine if a child knew that the relevant act was "seriously wrong at the time of offending", even with a specialist report from a child psychologist;
- It is common for the police to ask the child in the police interview if they thought the act was right or wrong and then rely on this evidence to rebut the presumption; often the prosecution is permitted to lead this evidence which would ordinarily be inadmissible;
- In regional and rural areas in Victoria, where there are no specialist youth crime prosecutors or defence lawyers, there is a lack of understanding of *doli incapax*, meaning that it is not routinely and consistently applied to all children under the age of 14 years;
- There is a perception amongst police that once charges have been withdrawn once because a child has been found not to have legal capacity, the child has 'had their chance' and police are reluctant to withdraw new charges;
- Systemic racism and unconscious bias in the youth justice system means that Aboriginal children are less likely to benefit from the legal protection provided by *doli incapax* and more likely to face the challenges noted above.

As a result of these challenges, the process of having charges dismissed on the basis of *doli incapax* can be long and arduous and can often take up to 12 weeks. During the process, the child and their support persons are required to keep coming back to Court, which is disruptive for the child's education, family and cultural life. Multiple attendances at court also increases the exposure of the child to the youth justice system and can have the effect of normalising the youth justice and criminal justice systems.

For this reason, VALS is aware that lawyers will often encourage their clients to accept diversion as the matter will be finalised faster than going through the *doli incapax* process. However, while this may provide

[55] In some cases, there may be a significant delay in obtaining a report; in other cases, the child and support person may have to travel to Melbourne to obtain a report, with additional costs for travel.

a practical solution in the short term, prosecutors are often less willing to accept *doli incapax* arguments for subsequent offending once a child has a diversion on their criminal record.

> ***Case study: lack of understanding of doli incapax by police, defence and judiciary***
>
> VALS acted for an 11-year-old client in Mildura who had been previously been represented by a non-VALS lawyer. Although the client had been convicted of an offence and was sentenced to a probation order, the client had never been assessed for *doli incapax.* We understand that this is because neither the police or defence counsel raised *doli incapax*, and the Magistrate accepted a plea when the child's legal capacity had never been assessed.

VALS experience with *doli incapax* is not unique. Indeed, research on the application of *doli incapax* in both Victoria and other jurisdictions has confirmed that the presumption is difficult to apply in court, and there is confusion as to who bears the burden of proving that a child doesn't have capacity.[56] Moreover, the availability and quality of child psychologists is an issue[57] and there is a failure to appropriately and rigorously screen and assess all children aged 10-13 years who come before the Children's Court.[58] For these, and other reasons, the presumption has been regularly criticised by the Committee on the Rights of the Child.[59]

Criminalising children aged 10-13 years reinforces vulnerabilities and cycles of disadvantage

Children and young people involved in our youth justice system are our most vulnerable children. They are not committing criminal offences because they are inherently criminal; they are involved in the youth justice system because our institutions and social services have failed them and their families. Rather than blaming, punishing and isolating these children, we need to accept shared responsibility for these failures and support out most vulnerable children to thrive.

The correlation between social disadvantage and the youth and criminal justice systems has been the subject of extensive research,[60] with a clear evidence base indicating that children and young people involved in the youth justice system are more likely to:

- be involved with child protection;[61]
- be disengaged from school;[62]

---

[56] T. Bartholomew, 'Legal and Clinical Enactment of the *Doli Incapax* Defence in Supreme Court of Victoria, Australia', (1998) *Psychiatry, Psychology and Law,* 5(1), 95-105; See W. O'Brien and K. Fitz-Gibbon, "The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform," (2017) *Youth Justice*, 17(2), 134-152.
[57] W. O'Brien and K. Fitz-Gibbon, "The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform," (2017) *Youth Justice*, 17(2), 134-152, p. 140.
[58] Ibid., p. 135. See also, C. Cuneen, above note 27.
[59] CRC, General Comment No. 10, above note 40, para 30; CRC, General Comment No. 24, above note 24, para 26.
[60] In 1991, 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. Research by AIHW has shown that social determinants not only lead to imprisonment for Aboriginal and Torres-Strait Islander people. See AIHW, *The health & welfare of Australia's Aboriginal & Torres Strait Islander people* (2017). See also, ALRC, above note 8, pp. 61-81.
[61] SAC, '*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*, (Jun 2019); Victorian Legal Aid, *Care not Custody* (2016).
[62] P. Armytage and J. Ogloff, above note 13, p. 9.

- come from lower socio-economic backgrounds[63];
- have poor health and/or mental health[64];
- experience housing instability or homelessness;[65]
- have a disability (including physical, mental, intellectual and/or sensory impairments)[66];
- be the victim of abuse, neglect or trauma, including intergenerational trauma;[67]
- experience family dysfunction.[68]

Aboriginal children and young people are further impacted by systemic racism within the youth justice system and broader institutional racism, meaning that they are even more vulnerable to involvement with the youth justice and criminal justice systems.

Case study: *underlying reasons for offending*

Daniel* survived severely traumatic incidents at a child and was removed from his young mother at the time of his birth. As his mother was incarcerated within a youth justice facility at the time of his birth he was unable to connect and felt rejected. Daniel spent some of his initial life in the care of his grandparents, however this could not be sustained and he transitioned into various residential care placements. After spending periods of time in residential care Daniel started offending and would regularly abscond from placement to return to his grandparents or his community. Daniel has self-described having little connection to his culture and blames himself for his disconnection with his family and siblings. Daniel does not have a pathway out of youth justice as he requires intensive support in housing, mental health and cultural connection to reduce his offending, which is not currently available.

When the system criminalises our children, it reinforces their existing disadvantages rather than addressing them. Children are at risk of further disengagement from school, further trauma and negative impacts on their mental health and social and emotional wellbeing. They may also be affected by the stigma of a criminal record, which has significant consequences for future employment opportunities. Children under the age of 15 years are particularly vulnerable to the negative impacts of being involved in the youth justice system. It is no wonder that they are more likely to reoffend.

In VALS experience, it is not only a custodial sentence that entrench existing vulnerabilities and cycles of disadvantage. Any involvement with the youth justice system is likely to have a negative impact, including

[63] Research by Jesuit Social Services and Catholic Social Services in 2015 found that in Victoria, 6% of postcodes account for half of all prison admissions. See. T. Vincent and M. Rawsthorne, *Dropping off the Edge 2015* (2015). See also, AIHW, *Youth Justice in Australia 2017-2018*, noting that young people under youth justice supervision in 2017–18 most commonly lived in lower socioeconomic areas before entering supervision. AIHW, above note 9, p. 12.
[64] See S. A Kinner et al, 'Complex health needs in the youth justice system: a survey of community-based and custodial offenders', *Journal of Adolescent Health*, 54 (5), pp.521-6.
[65] P. Armytage and J. Oggloff, above note 13, p. 9.
[66] For example, a recent study in Western Australia's Banksia Hill Detention Centre found the prevalence of FASD among Aboriginal youth detainees was 47%. It also found that nine out of ten incarcerated young people have at least one form of severe neurodevelopmental impairment. Carol Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1, 6 and 7.
[67] DJCS, *Youth Parole Board Annual Report 2018-19,* (2019) p. 29; P. Armytage and J. Oggloff, above note 13, p. 9.
[68] P. Armytage and J. Oggloff, above note 13, p. 9. See also, *House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Dong Time – Time for Doing: Indigenous youth in the Criminal Justice System*, (June 2011), p. 13.

police questioning or interviews, remand and appearing in court. Even if the charges are eventually dropped or the child is found not to have legal capacity, the damage is often already done.

Michael: 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.

Detention is harmful for our children

Youth justice centres are not places where children can thrive and go strong. They are not safe places for any children, but particularly not Aboriginal children and certainly not children as young as 10 years old.

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.[69] Trauma, including as a result of placement in a prison environment, can have a negative impact on brain development.[70] When not addressed early in life, trauma can "compound and interlock to create complex support needs in the justice system."[71]

These findings corroborate the experience of our clients who continue to be 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. Our client was already suffering from a long history of trauma and self-harm, which was further exacerbated by the long periods in lockdown.

For this and other reasons, the Committee on the Rights of the Child recommends that State Parties do not detain children under the age of 16 years.[72] Moreover, the Committee recommends that: "children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum

[69] 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).

[70] P. Armytage and J. Ogloff, above note 13, p. 14. Research has also found greater levels of psychiatric disorders among children who have been incarcerated for a lengthy period of time. See N.S Karnik et al, 2010, 'Prevalence differences of psychiatric disorders among youth after nine months or more of incarceration by race/ethnicity and age,' *Journal of Health Care* 21(1), 237-50, p. 248.

[71] Amnesty International, *The Sky is the Limit: Keeping Young Children out of Prison by Raising the Age of Criminal Responsibility,* (September 2018). See also C. Cunneen, above note 2727, pp.8-9.

[72] CRC, General Comment No. 24, above note 24, para. 89.

disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility."[73]

Detention of Aboriginal children also removes them from their families, communities, culture and country, which are protective factors that underpin and contribute to social and emotional wellbeing. For Aboriginal children from regional and rural parts of Victoria – whose families may not be able to afford to travel to Melbourne – this may mean that they do not see family or community members for the entirety of their detention. Studies in Australia have demonstrated that strong connection to community and culture reinforces positive self-identity, resilience and emotional strength.[74] We should be reinforcing and not be stripping away these protective factors from our most vulnerable children.

Case study: *inadequate mental health care in youth justice centres*

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, 40% of whom presented with mental health issues and 22% had a history of self-harm or suicidal ideation.[75]

Justice reinvestment is more cost effective than youth detention

Youth detention costs Australian States and Territories a significant amount each year. Given the harmful effects of detention and increased risk of reoffending, locking children up and building more prisons is not an effective or smart use of taxpayer's money.

In Victoria in 2017-2018, there were approximately 202 young people aged 10-18 years in youth justice centres on an average day, including those on remand and sentenced. This is costing the state a significant amount per year. Additionally, the Victoria government has committed $278.4 million towards building a

[73] CRC, General Comment No. 24, para 28.
[74] Colquhoun, Simon, and A. Michael Dockery, *The Link between Indigenous Culture and Wellbeing: Qualitative Evidence for Australian Aboriginal Peoples* (2012) CLMR Discussion Paper Series 2012/01, 23-26; Armstrong, Stephanie, Sarah Buckley, Michele Lonsdale et al, *Starting School: A Strengths-Based Approach Towards Aboriginal And Torres Strait Islander Children* (2012).
[75] DJCS, *Youth Parole Board Annual Report 2016-2017*, (September 201) p. 16.

new youth prison.[76] Across Australia, the numbers are far greater, with approximately 719 children and young people aged 10-17 years in detention on an average day.[77] In 2018-2019, national expenditure on detaining children and young people under the age of 18 years cost $539.6 million.[78] Incarceration rates are increasing so this cost will continue to increase.

It is clear that the system is back to front: instead of investing in upstream preventative approaches that will address underlying reasons for offending and improve the safety of our communities, governments continue to invest in downstream solutions that further entrench social disadvantages and increase recidivism and crime rates. Prison is not a deterrent, meaning that this approach is not only costing more, it is also less effective.[79]

Although the general trend across Australia is towards increasing criminalisation and punishment, in recent years there has been increasingly more interest in justice reinvestment approaches,[80] which seek to redirect money from prisons towards preventative, early intervention approaches that strengthen communities and support individuals to address underlying reasons for offending.

The Maranguka Justice Reinvestment project in Bourke is a powerful example of an Aboriginal-led place-based solution and the most advanced model of justice reinvestment in Australia. The project is based on a "Life Course Approach" which focuses on opportunities to support children, youth, adults and families to build strength and independence, and to reduce contact with the justice system.[81] An assessment of the impacts of the project throughout 2017 (compared to 2016) found that there had been a 31% increase in year 12 student retention rates, a 27% reduction in the number of bail breaches by juveniles, and a 38% reduction in charges across the top five juvenile offence categories.[82] Moreover, it is estimated that during 2017, the Project resulted in a gross impact of $3.1 million. This is 5 times greater than the operational costs of $0.6 million (excluding in-kind contributions).[83]

2. Extend the presumption of *doli incapax* to children aged 14 to 17 years[84]

As outlined above, the presumption of *doli incapax* is ineffective and routinely fails to protect our most vulnerable children for the following reasons:

[76] Victorian Government Budget 2018-2019, p. 69. In September 2019, the government announced revisions to its original proposal, which reduce the facility from 244 to 140 beds. The estimated cost of the revised youth facility is $205.8 million. See Parliamentary Budget Office, *Cherry Creek youth justice facility Financial impact of reducing beds from 244 to 140*, October 2019.
[77] AIWH, *Youth Justice in Australia 2017-2018*, above note 9, p. 8. This is 7% of the total population of children and young people aged 10-17 years.
[78] Productivity Commission, *Report on Government Services 2020: Youth Justice Services.* (January 2020).
[79] Senate Inquiry, above note 7, p. 113.
[80] In Australia, interest in this area has developed over the last 10 years, with establishment of the Australian Justice Reinvestment Project in 2013, the Senate Inquiry into the Value of Justice Reinvestment in 2013, and the Maranguka Justice Reinvestment project in Bourke which commenced in 2012. In 2016, the Justice Reinvestment National Network was established to share knowledge and advocate for implementation of justice reinvestment initiatives in Australia. See also: Stubbs, J., (2016) 'Downsizing Prisons in an Age of Austerity? Justice Reinvestment and Women's Imprisonment' *Onatio Socio-Legal series* 6(1), 91-115; C. Cunneen (2013) 'Time to arrest rising Aboriginal prison rates' *Insight*, Issue 8, pp. 22-24; Schwartz, Melanie (2013) 'Redressing Indigenous over-representation in the criminal justice system with Justice Reinvestment', *Precedent*, Issue 118 (Sept/Oct 2013) pp.38
[81] KPMG, *Maranguka Justice Reinvestment Project: Impact Assessment* (27 November 2019), p. 9.
[82] Ibid., p. 22.
[83] Ibid., p. 6.
[84] This section responds to question 3.

- Although the prosecution has the burden of proof to rebut the presumption, in practice, police officers regularly fail to discharge this burden unless they are specifically requested to do so by defence or the judiciary;
- The cost of Children's Court clinic reports is covered by the Court, however, these reports are often not sufficient and do not apply the test accurately, so defence counsel regularly seek an additional psychologist report and are required to cover the costs;
- There is a shortage of child psychologists both in metropolitan and regional areas, so there are often significant challenges (including delays) with obtaining a specialist report to establish that the child does not have legal capacity[85];
- It is often difficult to determine if a child knew that the relevant act was "seriously wrong at the time of offending", even with a specialist report from a child psychologist;
- It is common for the police to ask the child in the police interview if they thought the act was right or wrong and then rely on this evidence to rebut the presumption; often the prosecution is permitted to lead this evidence which would ordinarily be inadmissible;
- In regional and rural areas in Victoria, where there are no specialist youth crime prosecutors or defence lawyers, there is a lack of understanding of *doli incapax*, meaning that it is not routinely and consistently applied to all children under the age of 14 years;
- There is a perception amongst police that once charges have been withdrawn once because a child has been found not to have legal capacity, the child has 'had their chance' and police are reluctant to withdraw new charges;
- Systemic racism and unconscious bias in the youth justice system means that Aboriginal children are less likely to benefit from the legal protection provided by *doli incapax* and more likely to face the challenges noted above.

If the minimum age of criminal responsibility is raised to at least 14 years, then the presumption of *doli incapax* will no longer be relevant for children aged 10-13 years.

While many of the issues outlined above will be challenging to fix, VALS believes that *doli incapax* could still be a useful safeguard for children aged 14 to 17 years. As outlined above, evidence shows that child and adolescent brains are not fully mature until their early twenties.[86] Moreover, it is clear that the process of developing the capacities necessary for criminal responsibility does not take place at a consistent pace between individual children.[87] Additionally, the high rates of cognitive and intellectual disabilities amongst young people involved with the youth justice system means that many young people aged 14-17 years may also lack the emotional, mental and intellectual maturity to fully understand the impact of their actions.

We encourage the COAG Working Group on the Age of Criminal Responsibility to recommend extending the presumption of *doli incapax* to young people aged 14 to 17 years and legislating this presumption in all jurisdictions. Additionally, the Working Group should make the following recommendations to ensure that the presumption can operate as an effective safeguard for young people aged 14 to 17 years:

- Create a legislative requirement for prosecutors to rebut the presumption;

[85] In some cases, there may be a significant delay in obtaining a report; in other cases, the child and support person may have to travel to Melbourne to obtain a report, with additional costs for travel.
[86] See for example: E. Sowell et al., above note 26; E. Goldberg, above note 26; Blakemore and S. Choudhury, above note 26; SAC, *Sentencing Children and Young People in Victoria*, above note 26.
[87] Crofts, above note 25, p. 127, cited in C. Cunneen, above note 27 .

- Place legislative restrictions on the kinds of evidence that can be produced to rebut the presumption;
- Increase funding to the Children's Court to improve the quality of clinical reports;
- Increase funding to Victoria Legal Aid to cover the cost of specialist reports relating to legal capacity;
- Create a legislative requirement for all police and Crown prosecutors to undergo training on the presumption of *doli incapax*;
- Incorporate mandatory training on *doli incapax* into all programs for admission to practice as a solicitor;
- Require all criminal defence lawyers to undergo training on *doli incapax* as part of their Continuing Professional Development.

3. Establish a minimum age for detention of 16 years, in line with international standards

The central issue being considered by the COAG Working Group is whether to raise the age of criminal responsibility from 10 years of age.[88] This question has been the focus of COAG since November 2018, and the focus of many individuals and organisations in Australia for a number of years. In VALS opinion, it is critical that this issue is resolved in a timely manner and is not undermined by consideration of other issues which may be more controversial and elicit divided responses from governments, academics and civil society actors.

That said, there is a strong body of evidence demonstrating that detention is harmful for children and young people[89] and is an ineffective way of addressing youth offending and increasing community safety. In this regard, VALS strongly encourages Australian State and Territory governments to comply with their international legal obligations, including that arrest, detention or imprisonment of a child should be used only as a measure of last resort and should only occur for the shortest appropriate period of time.[90] In interpreting this obligation, the United Nations Committee on the Rights of the Child recommends that:[91]

- No child be should be deprived of liberty, unless there are genuine public safety or public health concerns;[92]
- State parties should fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age;[93]

[88] Council of Attorneys-General (COAG), *Council of Attorneys-General Age of Criminal Responsibility Working Group Terms of Reference,* 2018.

[89] 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. See 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). Additionally, Aboriginal children and young people in detention are removed from their families, communities, culture and country, which can act as protective factors.

[90] *Convention on the Rights of the Child*, above note 31, art. 37(b).

[91] Although General Comment 24 and the findings of the CRC are not legally binding, they are highly persuasive interpretations of international legal obligations.

[92] CRC, General Comment No. 24, above note 24, para 89.

[93] Ibid., para 89.

- Pretrial detention should not be used except in the most serious cases, and even then, only after community placement has been carefully considered;[94]
- Diversion should be prioritised at the pretrial stage as a way of reducing the use of detention;[95]
- Even where a child is to be tried in the child justice system, non-custodial measures should be carefully targeted to restrict the use of pretrial detention.[96]

4. Adopt government policies and frameworks that they are fundamentally grounded in justice reinvestment, and invest in Aboriginal-led justice reinvestment initiatives[97]

If Australian governments are serious about closing the gap in justice outcomes for Aboriginal and non-Aboriginal Australians, there is a need for a fundamental shift in the way that we support and respond to our children and young people. Instead of investing in prisons and "tough on crime" solutions, governments must invest in upstream preventative approaches that will address the underlying reasons for offending.

Justice reinvestment originated in the United States in 2003 and involves "the redirection of resources from the criminal justice system into local communities that have a high concentration of incarceration and contact with the criminal justice system."[98] Justice reinvestment is grounded in place-based community led solutions that target address underlying drivers for offending and prevent criminalisation. It is evidence based and fiscally sound. Evidence shows that justice reinvestment works because it:

- Reduces levels of crime
- Reduces the number of people in prison
- Reduces recidivism rates
- Improves community safety
- Strengthens community governing and decision making
- Offers long-term cost efficiency.[99]

In VALS view, justice reinvestment is critical in developing responses for Aboriginal children who are under the minimum age of criminal responsibility.

National reform agenda

Over the past 10 years, there has been growing interested in justice reinvestment in Australia. The includes: the development and implementation of the Maranguka Justice Reinvestment project in Bourke in 2012; the establishment of the Australian Justice Reinvestment Project in 2013; the Senate Inquiry into the Value of Justice Reinvestment in 2013; the establishment of the Justice Reinvestment National Network in 2016[100] and the Australian Law Reform Commission's Inquiry into the Incarceration Rate of Aboriginal and Torres

[94] Ibid., para 86.
[95] Ibid., para 86.
[96] Ibid., para 86.
[97] This section responds to questions 5 – 8.
[98] ALRC, above note 7, para 4.2.
[99] Just Reinvest NSW, 'What is Justice Reinvestment?' (web page).
[100] The Justice Reinvestment National Network was established to share knowledge and advocate for implementation of justice reinvestment initiatives in Australia.

Strait Islander Peoples in 2017. Justice reinvestment initiatives are also being implemented in most States and Territories.

At the governmental level, the most comprehensive engagement with justice reinvestment has occurred in the ACT, with the development of the ACT Justice Reinvestment Strategy in 2015[101] and the "Build Communities Not Prisons" initiative announced in February 2019.[102] Justice reinvestment has also been incorporated into the Blueprint for Youth Justice in the ACT 2012-2020.[103] Under the ACT Justice Reinvestment Strategy, the government is also supporting two justice reinvestment trials, Yarrabi Bamirr (meaning "walk tall" in Ngunnawal)[104] and Ngurrambai (meaning "perceive" in Ngunnawal).[105]

In VALS view, justice reinvestment should underpin youth justice and criminal justice policies at all levels of government. In Victoria, it is critical that the new Youth Justice Strategy, the Crime Prevention Strategy and the Aboriginal Youth Justice Strategy are firmly grounded in justice reinvestment approaches. This is in line with the government's commitment to self-determination of Aboriginal Peoples in Victoria.[106]

Invest in Aboriginal-led justice reinvestment initiatives

Justice reinvestment has proven to be particularly relevant in addressing over-criminalisation and over-incarceration of Aboriginal Peoples as it aligns with Aboriginal self-determination. Aboriginal communities know what is best for their children and young people and must be supported with adequate resources and government collaboration to develop and implement underlying drivers for offending.

The Maranguka Justice Reinvestment project in Bourke is the most well-known example of justice reinvestment in Australia. It is a powerful example of Aboriginal leadership, to support children, youth, adults and families to build strength and independence, and to reduce contact with the justice system.[107] The Life Course Approach developed by the Maranguka Justice Reinvestment project in Bourke provides a powerful blueprint for identifying and understanding the different factors that influence an individual's experience over a lifetime, including their involvement with the youth justice system.[108] By identifying these factors, it is possible to develop integrated and community-led approaches which can support children, youth, adults and families to build strength and independence, and to reduce contact with the justice system.

Whilst the Maranguka Justice Reinvestment project is the most advanced, there are other important other examples of Aboriginal-led justice reinvestment initiatives and programs across Australia, including:

- Yarrabi Bamirr (ACT)[109]

[101] ACT government, *Justice Reinvestment Strategy,* 2015.
[102] The initiative will involve redirecting $14.5 million from prison infrastructure to community programs aimed at reducing crime. See ABC, 'Canberra's only jail is running out of cell, but the Government wants to "build communities not prisons,' 15 February 2019.
[103] ACT Government, *Blueprint for Youth Justice in the ACT 2012-2022*. See also, *Blueprint for Youth Justice Taskforce: Final Report*, May 2019.
[104] The program provides wrap-around support for select Aboriginal and Torres Strait Islander people when they leave prison in the ACT. See also https://www.justice.act.gov.au/justice-programs-and-initiatives-reducing-recidivism/building-communities-not-prisons/yarrabi
[105] Ngurrambai is designed to reduce the number of Aboriginal and Torres Strait Islander people on remand and their time spent on remand. See https://www.justice.act.gov.au/justice-programs-and-initiatives/building-communities-not-prisons/ngurrambai
[106] VAAF, above note 12.
[107] KPMG, above note 81, p. 9.
[108] Ibid., p. 9.
[109] See above at note 105.

- Ngurrambai (ACT)[110]
- Cowra justice reinvestment project (NSW)
- Katherine (NT)[111]
- Cherbourg (QLD)[112]

In Victoria, there are a number Aboriginal led programs and services that incorporate justice reinvestment approaches:

- Marram Nganyin Youth Mentoring;[113]
- Dardi Munwurro Youth Journeys Program;[114]
- Bert Williams Koori Youth Justice Program;[115]
- Baggarrook Women's Transitional Housing Program;[116]
- Wulgunggo Ngalu Learning Place (WNLP).[117]

Establish an independent justice reinvestment body with strong Aboriginal leadership

In addition to policy reform and investment in Aboriginal-led justice reinvestment initiatives, Commonwealth, state and territory governments should establish an independent justice reinvestment body. While justice reinvestment initiatives must be led by local communities with support from relevant Local and State governments, an independent national body can promote national and state-based policy reform and provide expertise, where relevant, on the development, implementation and evaluation of justice reinvestment initiatives.

As recommended by the 2017 ALRC Inquiry into Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, the body should be overseen by a board with Aboriginal and Torres Strait islander leadership and should have the following functions:

- Provide technical expertise in relation to justice reinvestment;
- Assist in developing justice reinvestment plans at local sites; and

[110] See above at note 106.
[111] F. Allison, *Justice Reinvestment in Katherine: Report on Initial Community Consultation*, (July 2016).
[112] See J. Guthrie, F. Allison, M. Schwarz and C. Cunneen, *Submission to the Australian Law Reform Commission Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples,* (September 2017), p. 5.
[113] Marram Nganyin is a youth mentoring program for Aboriginal 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. 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. See https://www.yacvic.org.au/resources/youth-mentoring/
[114] For Aboriginal boys and men aged 10-18 years. See https://www.dardimunwurro.com.au/youth-journeys-program
[115] For Aboriginal children and youth aged 10 to 20 years. See http://www.vacsal.org.au/programs/bert-williams-center.aspx.
[116] The Baggarrook program is designed to support highly vulnerable Aboriginal women as they transition from prison. The program involves participation and support provided by VALS and a number of allied organisations as well and the DHHS and Corrections Victoria. Each participant is provided with transitional housing, and a model of wholistic support. The program is designed with acknowledgment given to the significant and complex needs of Aboriginal women transitioning from prison, and is culturally safe, co-designed by VALS and the program partners.
[117] 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 behavior See http://www.atca.com.au/wp-content/uploads/2017/08/Wulgunggo-Ngalu-Learning-Place.pdf See also http://assets.justice.vic.gov.au/corrections/resources/dfe31119-db0b-42b3-9d96-ff074ab47c54/wnlp_evaluationfinal.pdf

- Maintain a database of evidence-based justice reinvestment strategies.

In 2013, the Senate Inquiry into *The Value of a justice reinvestment approach to criminal justice in Australia* also supported the establishment of an independent national justice reinvestment body.[118]

5. Invest in culturally appropriate legal assistance to support Aboriginal children and young people involved with the justice system

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.

Balit Ngulu ("Strong Voice")

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 and young people in Australia.[119] 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.[120]

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,[121] the Law Institute of Victoria,[122] KYC,[123] the Victorian Council of Social Services[124] and the Commissioner for Aboriginal Children and young People.[125]

James:[126] successful diversion

[118] Senate Inquiry, above note 7, p. 125.
[119] 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.
[120] KYC, above note 4, p. 53.
[121] The Law Council of Australia, *Alternative Report to the United Nations Committee on the Rights of the Child,* November 2018, p. 10.
[122] Law Institute of Victoria, "LIV calls on government to fund Balit Ngulu," 5 October 2018.
[123] KYC, *above note 4*, p. 37.
[124] Victorian Council of Social Services, *Delivering Fairness: Victorian Budget Submission 2019-2020*, p. 38.
[125] ABC, "Victorian Aboriginal Legal Service shuts down youth service," 28 September 2018.
[126] Not his real name.

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.