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Principles in diversion of Aboriginal and Torres Strait Islander young people from the criminal jurisdiction

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ABSTRACT

The over-imprisonment of Aboriginal and Torres Strait Islander children within Australian youth detention facilities is one of the nation's most significant social and human rights issues. This article discusses findings from recent research on youth penalty combined with observations on the current offerings in youth diversion in Australia, to suggest nine principles of good practice in diversion of Aboriginal and Torres Strait Islander young people. It draws on interviews with Aboriginal and Torres Strait Islander young people who were detained in or recently released from youth detention facilities across three Australian jurisdictions (New South Wales, Queensland and the Northern Territory) and interviews with key stakeholders working in youth justice.

KEYWORDS

Aboriginal and Torres Strait Islander; diversion; Indigenous; juvenile justice; young people; youth detention.

Introduction

The over-imprisonment of Aboriginal and Torres Strait Islander children in juvenile detention deeply affects communities throughout Australia. As the Uluru Statement from the Heart (2017) recently stated:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future. These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

Aboriginal and Torres Strait Islander young people currently comprise 52% of Australian youth prison populations and are 23 times more likely to be in detention than non-Indigenous youth (Australian Institute of Health and Welfare [AIHW], 2019, p. 9). This ratio of over-representation in custody varies widely across states and territories and is highest in Western Australia (where Aboriginal and Torres Strait Islander youth are 38 times more likely to be in detention than non-Indigenous youth) and lowest in Victoria (12 times more likely) (AIHW, 2019, p. 9).¹ While the introduction of a range of diversionary

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¹The ratio of over-representation was not available for the NT because of small numbers (< 5) of non-Indigenous youth in detention, or in Tasmania and the ACT because of the small numbers (< 5) of Aboriginal and Torres Strait Islander youth in detention (AIHW, 2019, p. 9).

activities across these jurisdictions since the 1990s contributed to considerable reduction in youth detention populations, Aboriginal and Torres Strait Islander young people in Australia have clearly not benefitted from the decline in prison numbers to the same extent as non-Indigenous children.

The differential treatment of Aboriginal and Torres Strait Islander young people in youth justice has been well documented for many years (for example, Luke & Cunneen, 1995; Aboriginal and Torres Strait Islander Social Justice Commissioner [ATSISJC], 1995). Government inquiries have long identified the ‘problem’ of this over-representation and sought to address it through various recommendations (often repeated from one inquiry to the next). These inquiries stretch back at least to the Royal Commission into Aboriginal Deaths in Custody [RCIADIC] (Johnston, 1991).

Findings from successive royal commissions and inquiries have repeatedly recommended an increase in diversion from the criminal justice system as a strategy to reduce over-representation. For example, in its inquiry on the adequacy of youth diversionary programs in New South Wales [NSW], the Committee on Law and Safety recommended ‘that the NSW Government promote Aboriginal community control, and partnerships with Aboriginal communities, in the design and delivery of place-based diversionary programs for Aboriginal young people’ (2018, p. 163). Similarly, the Royal Commission into the Protection and Detention of Children in the NT [RCPDCNT] (2017b) recommended that ‘youth diversion programs in remote communities be developed and operated in partnership with, or by, Aboriginal communities and/or Aboriginal controlled organisations’ (Rec 25.14). Such recommendations have either been ignored, or legislative and policy action has largely failed to address the significant over-representation of Aboriginal and Torres Strait Islander children and young people.

High rates of imprisonment are both caused by, and also perpetuate, economic, social and health inequity. For Aboriginal and Torres Strait Islander young people and their families, this is compounded by intergenerational effects of colonisation and the impact of the Stolen Generations; continuing government intervention in the lives of Aboriginal and Torres Strait Islander families through high levels of child removals; and systemic racism within and beyond the criminal jurisdiction (Australian Law Reform Commission [ALRC], 2017; RCPDCNT, 2017b). These compounding experiences have resulted in poorer health outcomes for Aboriginal and Torres Strait Islander children, higher rates of suicide and lower reported levels of emotional wellbeing, as well as higher mortality rates and shorter life expectancies (AIHW, 2011, 2018).

Aboriginal and Torres Strait Islander young people in contact with the criminal jurisdiction often have complex support needs and become criminalised at a young age (Baldry, McCausland, Dowse, McEntyre, & MacGillivray, 2016). In comparison with their non-Indigenous counterparts, Aboriginal and Torres Strait Islander people with complex needs are twice as likely to have been in juvenile detention facilities; to have a lower age of first police contact, custody and conviction; to have a higher number of police convictions; and have a higher number of adult incarceration episodes (Baldry et al., 2016). There are also significant levels of disability amongst Aboriginal and Torres Strait Islander youth justice populations: Bower et al. (2018), for example, found that in a sample that was 74% Indigenous, 89% of all young people in youth detention in Western Australia had at least one severe neurodevelopmental disorder, and 36% had a foetal alcohol spectrum disorder (FASD) diagnosis.

The interaction between youth detention and child welfare systems also disadvantages Aboriginal and Torres Strait Islander children. Children subject to Care and Protection Orders are 20 times more likely than other children to also be under youth justice supervision and are also more likely to come into contact with the youth justice system at a much younger age: 60% of children aged 10 years at their first youth justice supervision were subjects of child protection notifications (AIHW, 2016b, p. vi). This particularly affects Aboriginal and Torres Strait Islander young people, as they are more likely than their non-Indigenous counterparts to be engaged by social welfare agencies from a younger age (AIHW, 2016a) and are twice as likely as their non-Indigenous counterparts to be placed in out-of-home care before the age of 16 years (Haysom, Indig, Moore, & Gaskin, 2014).

In addition to these processes of criminalisation of Aboriginal and Torres Strait Islander young people, police targeting is also a factor. The impacts of police violence, harassment and racial profiling is an everyday reality for Aboriginal and Torres Strait Islander communities and has been well documented (Human Rights and Equal Opportunity Commission, 1991; Johnston, 1991; Sentas & Pandolfini, 2017). Recent high-profile examples include the drowning of two boys in Swan River in Perth during a police pursuit² and the death of a 19-year-old man in Yuendumu.³

Writing 25 years ago on Aboriginal and Torres Strait Islander young people's contact with youth justice agencies, the Aboriginal and Torres Strait Islander Social Justice Commissioner noted that 'statistics are not a matter of bad luck. They represent an active denial of social justice' (ATSISJC, 1995, p. 11). With this in mind, this article examines youth justice diversion for Aboriginal and Torres Strait Islander young people in Australian states and territories. Based on interview material and an analysis of evaluative and other studies, we propose principles for good practice in the development of diversionary programs for Aboriginal and Torres Strait Islander young people.

Aboriginal and Torres Strait Islander young people and diversion

Contemporary youth justice policy in Australia is characterised by a commitment to early intervention and diversion from the criminal justice system. This commitment is consistent with the special regard and protection to be given to children by virtue of their age, as enshrined in human rights instruments (Goldson et al., *forthcoming*). However, diversionary practices differ considerably across geographical and racialised boundaries (Goldson et al., *forthcoming*) and apply selectively (formally or informally) depending on mental health, cognitive function, gender and race. There are limited programmes and diversionary alternatives specifically for Aboriginal young people, particularly in rural and remote communities, and diversion programs that do exist are often Eurocentric in nature (Cunneen & Tauri, 2017). One challenge of diversionary practice, therefore, is to ensure that there is something meaningful to divert the young person to. A second challenge, as evidenced in our interview material, is the everyday racism among public officials which discriminates against Aboriginal young people.

²The drowning of the two boys is being treated as a death in police presence, which is treated the same as a death in police custody and a coronial inquest into the circumstances and causes of the deaths is currently underway. <https://www.abc.net.au/news/2018-09-11/teenager-jumps-into-swan-river-and-drowns-after-police-chase/10229920>.

³The constable who shot and killed the 19-year-old man has since been charged with murder: <https://www.abc.net.au/news/2019-11-13/police-officer-charged-with-murder-yuendumu-shooting/11702408>

The way that police discretion is wielded determines the pathway into and through the criminal justice system, affecting an individual's criminal record, access to diversionary options and likelihood of imprisonment (Cunneen & Tauri, 2017, p. 71). There is a significant body of Australian research that shows the adverse use of police discretion in relation to Aboriginal and Torres Strait Islander young people: they are less likely to receive a police diversionary option and are more likely to be arrested, to have bail refused and to have their matter determined in a youth court when compared with their non-Indigenous peers. They are then more likely than non-Indigenous youth to be sentenced to detention (ATSISJC, 1995; Luke & Cunneen, 1995). During 2017 in NSW, for example, the majority (65%) of Aboriginal and Torres Strait Islander young people were proceeded against in court, with just 36% receiving a diversionary option from police such as a warning, caution or youth justice conference. In contrast, the majority (75%) of non-Indigenous young people were proceeded against by way of diversion. These trends are consistent over recent years (Committee on Law and Safety, 2018, p. 159).

Research methods

The principles developed in this article draw primarily from the Comparative Youth Penality Project (CYPP) and an unpublished Discussion Paper on Aboriginal and Torres Strait Islander self-determination and police cautioning prepared for the Aboriginal Justice Caucus (AJC) in Victoria.

The Discussion Paper for the AJC reviewed national and international literature on current police and other diversionary practices for Aboriginal and Torres Strait Islander youth, including several case studies of promising practices. The CYPP examined changes in youth penal policy and practice across four selected Australian states (NSW, Queensland (QLD), Victoria and Western Australia) and in England and Wales over the past 30 years. This article draws on the Australian aspect of the project. Ethics approval was obtained from the University of New South Wales and respective government agencies to conduct semi-structured interviews with 33 youth justice practitioners and 27 Aboriginal and Torres Strait Islander young people detained in or recently released from youth detention facilities in NSW, QLD and the NT.⁴ Youth justice practitioners included children's lawyers, family and children's court magistrates, juvenile justice managers and directors, youth workers and policy practitioners. Interviews were recorded and transcribed before being manually coded by the research team.

Good practice principles in youth diversion for Aboriginal and Torres Strait Islander young people

Self-determination: diversion programs should be Aboriginal and Torres Strait Islander-community developed, owned and driven, and incorporate young peoples' voices

A fundamental recommendation from the RCIADIC in relation to young people was the need for negotiation between authorities and Aboriginal communities on

⁴Ethics approval was sought but not granted to also interview children detained in youth detention in Victoria and Western Australia.

the causes of offending and the development of suitable responses (Recommendation 62). Recommendations 235 and 236 also required that the primary source of information about Aboriginal young people should derive from Aboriginal communities and organisations and confirmed that Aboriginal community-based and devised strategies were the most successful way of operating programs for Aboriginal youth.

Aboriginal and Torres Strait Islander organisations have consistently advocated for Aboriginal Elders and communities to play a key role in decision-making around diversion to address local issues (Dudgeon et al., 2016). The same principle is reflected in guidance by the United Nations Committee on the Rights of the Child (2009, p. 17) which encourages all states to support Indigenous peoples to design and implement traditional restorative justice systems and community-based services that consider the needs and cultures of Indigenous children, their families and communities (see also Articles 18 and 19, *Declaration on the Rights of Indigenous Peoples*).

The evidence suggests that self-determination and self-governance are critical to Aboriginal and Torres Strait Islander communities achieving their economic, social and cultural goals and lead to improved outcomes in the youth justice sector (Behrendt, Porter, & Vivian, 2018). Some of the key issues which arise include avoiding a 'one size fits all' approach and allowing for flexibility to cater for localised contexts and enable localised input. The importance of localised approaches was identified in CYPP interviews: 'What works in Dubbo doesn't necessarily work in Moree or work further out, so it's how that translates into a smaller community or a smaller town and what other things you put in place' (NSW Gov 7).

Realisation of the principles of self-determination involves ensuring there is no gap between formal (legislative) recognition of Aboriginal and Torres Strait Islander powers in decision-making and operationalising these powers in practice; and ensuring Aboriginal and Torres Strait Islander design of structures, programs and processes, rather than simply participating in pre-existing non-Indigenous programs and processes. The Bourke Maranguka Justice Reinvestment Project in NSW provides an example of Aboriginal and Torres Strait Islander community-owned and driven practices. In contrast to justice reinvestment practice in the United States, justice reinvestment in Aboriginal and Torres Strait Islander communities in Australia has emerged as an '*opportunity to exercise authority*' (Cunneen & Tauri, 2017, p. 128, emphasis in original). As Cunneen and Tauri note:

Indigenous approaches to justice reinvestment transform an understanding of the process beyond simply a technocratic means of crime control and decarceration, to one that is centrally concerned with Indigenous controlled governance. (2017, p. 128)

This more radical vision of justice reinvestment aligns with the collective right of self-determination (Brown et al., 2016, pp. 131–138).

The Maranguka Justice Reinvestment Project illustrates how communities can work with a diverse range of service providers for youth diversionary efforts. The project is community-led, using a collective impact framework that brings together a diverse range of organisations and services to work on a common agenda. The justice reinvestment approach in Bourke is holistic, aiming to address the social determinants of law enforcement contact such as homelessness, child protection,

disability, violence, poverty, lack of appropriate services and drug and alcohol abuse. The partnership between police and community has been integral to the success of justice reinvestment. In August 2017, the Bourke Police Local Area Command and the Maranguka Community Hub instigated daily morning meetings to provide updates and share data, with a view to providing support to community members in need, with particular focus on children at risk of offending and their family members. This provides a space to workshop responses to situations requiring emergency action or support.

An impact assessment of the Bourke Maranguka Project (KPMG, 2018) found the project has led to significant improvements, including family strengthening, youth development and adult empowerment, as well as significant economic cost savings. For example, between 2016 and 2017, the Bourke community experienced a 23% reduction in police-recorded incidence of domestic violence; a 38% reduction in charges across the top five juvenile offence categories; and a 31% increase in year 12 student retention rates. Days spent in custody for adults also reduced by 42% (KPMG, 2018, p. 6).

In addition to the imperative for community design and delivery of youth diversion initiatives, there is a need to hear and act upon the voices of Aboriginal young people in relation to youth justice and to recognise that self-determination requires an understanding of what that means for Aboriginal young people themselves. This is consistent with the right to participation in the UN Convention on the Rights of the Child. The importance of youth involvement is acknowledged in the Victorian Aboriginal Justice Agreement Phase 4 (nd) and the NT Royal Commission (RCPDCNT, 2017b). The NT Royal Commission recommended that the government:

provide legislation for a Representative Council of Children who are or have been in out of home care and who have been in the youth justice system including in youth detention *to express their views on the development and implementation of laws and policies which affect children and young people in those systems and that those views be given due weight.* (Recommendation 2.1, RCPDCNT, 2017b, p. 27, emphasis added)

A good practice example of hearing and acting upon Aboriginal young people's views is the Koorie Youth Council (KYC). The KYC is the representative body for Koorie young people in Victoria and advocates to government and community to advance the rights and representation of Aboriginal youth. In 2018, the KYC released the *Ngaga-dji* report (Cerreto, 2018) which told the stories of Aboriginal children in Victoria's prison system and police custody. The report presents a broad plan for change across the various systems responsible for the over-representation of Aboriginal children in youth justice and sets out three guiding principles to implement solutions: self-determination, youth participation and the role of culture, family, Elders and communities (Cerreto, 2018, p. 42).

The requirement for self-determination across all policies affecting Indigenous peoples has been acknowledged in successive government inquiries and commissions and by international human rights bodies. We argue that the examples of recent successful local initiatives in NSW and Victoria indicate that self-determination must be a fundamental principle guiding all youth justice policy and practice.

Consistent with the principle of self-determination, discretion to access diversionary programs should not be solely in the hands of police

The development of restorative justice and youth justice conferencing has been one of the most significant developments in youth justice diversion in Australia in recent decades. In most state legislation, youth justice conferencing sits alongside police warnings and cautions to form the major pre-court diversionary options. The utilisation of these options is dependent on police discretion. There is substantial evidence that Aboriginal and Torres Strait Islander children are less likely to receive the benefit of these diversionary options compared to their non-Indigenous counterparts (Blagg, 1997; Cunneen, 1997; Cunneen, White, & Richards, 2015, pp. 153–159; Richards, 2010; Stewart & Smith, 2004).

Our research interviewees raised various problems with the adverse use of police discretion in relation to Aboriginal and Torres Strait Islander children. As one interviewee noted: ‘[it] can be very locally based as to how that discretion is operated, especially with young Aboriginal kids, they’re often unfortunately on the losing end of diversionary activities’ (Syd NGO 1). Many other interviewees commented that the relationship between young people and police was ‘not a happy one’ and ‘especially difficult for Aboriginal young people’ (Syd NGO 1). Others noted the problem of racism, targeting, harassment, differential policing and racial profiling (NSW Gov 6, Melb Sol 1):

No matter what one’s views are about racism in the police, it definitely exists, even in the form of unconscious bias, even if it’s not overt racism. So our clients no doubt are a target for the police. (Syd Sol 2)

I have no doubt that [racial profiling] also occurs in particular local area commands, particularly if there’s a high Indigenous population. (Syd Sol 1)

Young people themselves had similar concerns:

I see how they treat white people and then I see how they treat blackfellas. It’s disgusting. Like, it’s so different. The whitefellas are on platters and the blackfellas are like down in the dumps. It’s putrid. (JPDC 2)

They [police] make it hardest on us Aboriginals, more than people like themselves, you know? I dunno, it’s really hard for us to even come out of our house because we’re being targeted that much. We been getting harassed and sometimes even bashed for no reason. (OJJC 4)

I swear coppers are racist. Because they arrest more Aboriginal people than non-Aboriginal people. (JPDC 3)

The Victorian Aboriginal Legal Service (VALS) (2010) has recommended that diversionary programs should be available at all points of the criminal justice system and that magistrates should have power to override police decisions about access to diversion, to enable review of alleged discriminatory practices by police as gatekeepers.

One of the most significant barriers to effective diversionary processes in the context of Aboriginal self-determination is the point at which Aboriginal organisations are involved in decision-making processes. Although in some states in Australia there are legislative provisions for the administering of a police caution by a person other than a police officer (NSW, QLD and Tasmania), little is known about their use, and more

importantly, they do not involve a role in deciding whether to divert. Currently there are no examples in Australia where Aboriginal and Torres Strait Islander organisations or Elders are formally involved in the decision as to whether or not an Aboriginal young person should receive a diversionary outcome such as a police caution.

VALS have recommended that Victoria Police should adopt a 'Failure to Divert Declaration' which would be submitted to court at the time of filing charges (2016, p. 2). The purpose of such a form is to ensure transparency and accountability in decision-making. Going further than the VALS recommendation, the Stolen Generations Inquiry (NISATSIC, 1997) advocated for consultation with accredited Aboriginal and Torres Strait Islander organisations thoroughly and in good faith when decisions are being made about an Indigenous young person (Recommendation 53). In youth justice matters that organisation must be involved in all decisions affecting Aboriginal and Torres Strait Islander children and young people in the criminal process, including decisions about pre-trial diversion, admission to bail and conditions of bail.

Diversions programs should ensure cultural safety and cultural security

Aboriginal and Torres Strait Islander culture is a source of strength and resilience, and cultural safety and cultural security are foundational to restoring and maintaining social order in Aboriginal and Torres Strait Islander communities (ATSISJC, 2011, pp. 123–134). Cultural awareness, cultural safety and cultural security form a pyramid, with cultural awareness at the bottom and cultural security at the top: addressing cultural awareness and then cultural safety are prerequisites for ensuring cultural security. Culture awareness recognises the importance of incorporating appropriate training for all those working within the youth justice system, including youth justice staff, police, magistrates and judges.

Cultural safety can be defined as ... [a]n environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience of learning, living and working together with dignity and truly listening ...

Cultural security is subtly different from cultural safety and imposes a stronger obligation on those that work with Aboriginal and Torres Strait Islander peoples to move beyond 'cultural awareness' to actively ensuring that cultural needs are met for individuals. This means cultural needs are included in policies and practices so that all Aboriginal and Torres Strait Islanders have access to this level of service, not just in pockets where there are particularly culturally competent workers. (ATSISJC, 2011, pp. 124, 127)

Interview participants spoke of the importance of employing Aboriginal and Torres Strait Islander staff and professionals to promote culturally safe service delivery in all youth justice agencies, which can contribute to increased participation and completion of youth diversionary programs (Circa, 2017, p. 58). As one interviewee stated, 'of course there need to be programs which are tailored for Indigenous kids and they need to be delivered by Indigenous people. And then they're likely to get some purchase with the kids' (WA 1).

Respondents from Aboriginal community-controlled organisations noted the importance of culturally appropriate services at the first point of contact with the youth justice

system, and also having people embedded within organisations ‘who understand not only cultural values but also the dynamics of who that person is, where they’re from, their history, their mob, their kinship ties, their family, their history, the whole package’ (Syd NGO 2). The significance of Aboriginal and Torres Strait Islander people delivering youth justice services was also recognised by several young people we interviewed. As one young person told us, ‘There’s Indigenous staff that work here that do understand us a lot ... so, like, if we don’t wanna open up to our family ... then I know that I can talk to ... one of the Indigenous staff members’ (BYDC 7). The importance of staff having an understanding of their culture was recognised as important by young people:

There’s Indigenous staff in here too that I get along with ... they ask about our culture. Like, ‘Where you from?’ And stuff like that. And I tell them about my culture. (TVL 1)

One of the staff that works here, she gets us a lot. She really understands us and, like, how things happen and everything, like, for Indigenous cultural things and everything. (BYDC 7)

The Tiwi Islands Youth Diversion and Development Unit (TIYDDU) provides an example of good practice in the provision of culturally appropriate diversionary programs (RCPDCNT, 2017a, p. 273). TIYDDU provides culturally appropriate formal and informal diversionary programs for Tiwi youth, focusing on developing attachment to family, community and school, working with at-risk youth in a traditional way through Tiwi Skin groups. An evaluation found that ‘the program was useful in reconnecting young people to cultural norms and ... directly addressed the factors that contribute to offending behaviour, such as substance misuse, boredom and disengagement from work or education’ (Stewart et al., 2014, p. vii). It also found that only 20% of participants had contact with police in the 12 months following, comparing favourably with standard reoffending rates for young people (Stewart et al, 2014, p. vii).

Another example is the Warlpiri Youth Development Aboriginal Corporation (WYDAC) which operates youth diversionary programs across four Warlpiri communities: Yuendumu, Lajamanu, Nyirripi and Willowra. The aim of the program is to support Warlpiri young people to create positive and meaningful futures as individuals, and for their communities, through diversionary, education, training and employment programs that develop a sense of self, family, leadership and culture (Shaw, 2015, p. 3). One of the cultural elements of the program includes weekly bush trips, where Elders and young people travel ‘out bush’ and engage in activities that promote positive relationships and cultural teaching (RCPDCNT, 2017a, pp. 272–273). An independent evaluation of WYDAC’s youth diversion programs found that the programs lowered levels of youth crime in communities and improved quality of life amongst program participants (Shaw, 2015). Notably, over 92% of program graduates in the evaluation cohort were employed after completing the program (Shaw, 2015).

The two examples highlighted here suggest that interventions are more powerful when they are delivered in a culturally safe way. This includes not only *how* the programs are delivered but also *where* (eg, whether in a community centre or on country) and also *by whom* (eg, Aboriginal staff, Elders or respected community members). Diversion is more powerful and has a more meaningful impact when delivered by and involving Elders and respected community leaders and in a culturally safe environment. Other examples where cultural safety and cultural security are paramount include Aboriginal-controlled

night patrols which focus on assisting young people, such as Street Beat in Redfern (Porter, 2016, 2018).

Programs should incorporate elements of Aboriginal and Torres Strait Islander custom and law

One way of ensuring cultural security is through inclusion of Aboriginal and Torres Strait Islander custom and law. The National Crime Prevention Framework recognised that crime prevention programs in Aboriginal and Torres Strait Islander communities are more likely to be effective where they ‘emphasise Indigenous heritage, culture and law’ (Australian Institute of Criminology, 2012, p. 13). Evaluations of diversion programs for Aboriginal and Torres Strait Islander young people consistently highlight the importance of programs being focused on the cultural context of the young person and the need to incorporate Aboriginal and Torres Strait Islander custom and law. Blagg and Tulich write that in order to be effective:

[D]iversion has to involve diversion *not just out of one system but into another*. It is not just a question of doing less harm, but of promoting a positive good by channeling Indigenous youth into non-stigmatizing therapeutic alternatives, particularly in the emerging sphere of Indigenous on-country initiatives. (2018, p. 40)

Analysis of successful youth diversion programs indicates that initiatives that ‘draw on Indigenous cultural authority, rather than mainstream governmentality, for legitimacy and status ... are generally “place-based” and situated on, or close to, country: the latter being the source of Indigenous law and culture’ (Blagg & Tulich, 2018, p. 50). Many examples of best practice share in common that they are highly localised, holistic and involve whole-of-community approaches, taking place in the presence of Elders, reconnecting young people with cultural identity and sense of belonging to country. ‘On-country’ models in particular have the advantage of sharing ‘cultural match’ (Jorgensen, 2007), that is, cultural connections between specific Aboriginal nations, language, culture and country. The structure and format of such programs are capable of being adapted to local needs and the particular young people involved and are responsive to local needs and priorities (see Committee on Law and Safety, 2018, pp. 163–164).

The Yiriman Project is an example of an ‘on-country’ intergenerational cultural program, conceived and developed directly by Elders from four Kimberly language groups, Nyikinia, Mangala, Karajarri and Walmajarri, in the Fitzroy Valley. The project takes youth at risk of offending (as defined primarily by Elders and community) onto remote desert country to ‘build stories in young people’. A core element of the Yiriman Project’s success is that it is a community-owned and managed initiative, with the evidence suggesting that the rhythms of life on country are beneficial for people because they are not being bombarded with stimuli and are able to work within Indigenous notions of time (Blagg, Tulich, & Bush, 2015, p. 260). A three-year review of the Yiriman Project found that it has had a positive impact on the life of the community as well as a positive impact on the young people themselves (Palmer, 2013). Notably, the evaluation found that:

[T]here is good evidence that taking young people and other generations on country is important for their health. ... There is also evidence that Yiriman has assisted in the

campaign to minimise young people's involvement in the justice system. Indeed, some, including a magistrate, conclude that Yiriman is more capable in this regard than most other diversionary and sentencing options (Palmer, 2013, p. 122).

Several young people interviewed spoke positively of programs which incorporate outdoor activities with cultural components. One young person spoke positively about the Bush Mob program in the NT where the young people were taken out fishing (NT 5). Another respondent similarly commented that he would like to see young men taken out camping, fishing and travelling to other places (NT 2). Speaking on whether he enjoyed cultural programs in custody, one young person commented:

For my culture, when they have NAIDOC and stuff, they tell me to organise it. Like, they organise it, and then they tell me to, like, teach the boys how to dance. Yeah. Yeah! Like, I really enjoy dancing. I dance, like, all my life ... I just like it. I feel proud of myself when I do dance. (TVL 1)

In the urban centre of Redfern, NSW, the Clean Slate Without Prejudice program works through culture to steer young people away from contact with the justice system. Speaking about this program, CYPP interviewees commented on the power of this approach:

People are trying to retain and bring back language hubs, cultural identity—so that the linkage, where that's broken, is trying to be re-linked to redirect our kids into a safer future. (NSW NGO 2)

These kids are getting such strength out of their cultural identity, which wasn't a feature before because they are disconnected from their culture, but feeling proud to be an Aboriginal young person is really important. So respecting culture and respecting strength and empowerment that both rights and culture can give to you as a young person, is a really ... important right. (NSW Policy 2)

One young person interviewed commented that culture is 'really important to me. Like, I would never leave my culture behind for any other stuff' (TVL 1). His comments highlight the way that cultural strengthening can be used to support desistance among young people: 'I'm starting to think that I'm in here, and I'm letting my culture down. Yeah. So when I get out I just want to learn more about my culture' (TVL 1).

Programs should deliver family-centred support based on a holistic view of Aboriginal and Torres Strait Islander health and wellbeing

Effective diversionary programs view young people's needs holistically and provide a broad range of supports. Indigenous healing approaches are characterised by being 'under Indigenous control; use traditional Indigenous cultural approaches to healing; work with families and not just individuals; and see treatment as a community objective rather than an isolated program' (Cunneen, 2002, p. 38; see also Atkinson, 2013). Inquiries have regularly highlighted the importance of interventions that are inclusive of a young person's family and community. In 2009, a Victorian inquiry found that 'wrap-around programs that address youth offending in a holistic manner are needed to support diversionary interventions' (Drugs and Crime Prevention Committee, 2009, p. 215) and that the most successful diversionary strategies were generally 'those

grounded in and drawing upon the family, kinship, social and cultural networks of the young person' (p. 253).

Blagg and Tulich (2018, p. 51) report that a key message of their research regarding diversionary programs for youth with FASD in Western Australia was the requirement to work with and through family:

Indigenous people were critical of the Western paradigm which tends to individualise and atomise, cutting Indigenous people off from their collective. There was support for forms of healing that involved the whole family: as one justice worker said ... 'don't water one flower and expect the garden to stay alive'.

Because Aboriginal and Torres Strait Islander communities often face multiple and complex layers of disadvantage, the importance of programs that acknowledge and address the broader challenges faced by Aboriginal and Torres Strait Islander young people cannot be understated:

Unless non-criminogenic needs, such as grief, depression, spiritual healing, loss of culture and educational deficits are addressed, it may be impossible to address needs directly related to criminal offending, such as cognitive deficits and drug or alcohol abuse. (Gilbert & Wilson, 2009, p. 4)

A truly holistic approach means tailoring a program to the cohort with which it is working. A longitudinal study of youth and gang culture in the community of Wadeye, NT found that all the young people who were surveyed said that they respected their parents, in contrast to previous research which identified weakening of 'conventional bonds' as a risk factor for gang membership. Rather, Senior et al. found that '[t]he continuing importance of the family for gang members [pointed] to the need to treat Aboriginal youth within their family context' (Senior, Ivory, Chenhall, Cunningham, & Nagel, 2012, p. 47).

Diversion programs should include built-in education, training and employment pathways alongside mentoring specific to the needs of Aboriginal and Torres Strait Islander people

Consistent with data on the education experiences of justice-involved young people, almost all of those in the CYPP study cohort reported negative experiences with education systems (JH&FMHN, 2017), with most experiencing suspensions or expulsions and some attending specialist behavioural schools. The majority of young people connected their negative education experiences with their current involvement in the youth justice system. One young person told us: 'I went to this school that was for behavioural school ... it's for where kids that ... like misbehave ... that's when I started doing crime. Started meeting the wrong crowd' (OJJC 7). Another young person told us they stopped attending school 'in year eight. I got expelled and then I went to behaviour school, and then I stopped going after that' (JPDC 4).

Diversionary programs should incorporate education, on-the-job work experience, practical skills and other forms of support, such as mentoring, to support young people to build pathways outside the youth justice system. As one adult interview respondent highlighted, 'the amount of disadvantage that's in those communities, youth unemployment, educational difficulties' is compounded by 'multi-generational disadvantage'

(Bris Gov 3). Without appropriate support, young people may be unlikely to remain engaged: 'I get frustrated on the outside [at school]. I just walk out from school. Yeah. When I feel like I don't have help' (BYDC 6). Diversionary programs that incorporate built-in education and training must also be individualised and responsive to the needs of Aboriginal young people. As one young person explained: 'it was hard for me, that's why I didn't go to school. It's real hard for me' (TVL 2) and another told us: 'I'm like five years behind in school ... that's why I just didn't go to school, and that's when I started doing crime' (TVL 2).

Despite this, many young people identified education as a protective factor against future contact with the youth justice system: 'I really like going to school. Cos it keeps me out of trouble' (TVL 1). Others spoke of their aspirations to complete education and/or further training:

My goal is to graduate high school. That's my first goal. (BYDC 7)

I'm enrolled in TAFE now. Next [time] I go outside I want to go to TAFE and try to get an apprenticeship. And, like, I wanna be a mechanic ... and also a diesel fitter. So, I just wanna be a hard worker. (TVL 1)

I want to get out of here, live a happy life, try and get a job and get back on track. Like start a new life over again. (OJJC 8)

Diversionary programs with built-in education and employment may be more successful if they incorporate mentoring by assisting in establishing and strengthening relationships between young people and Aboriginal and Torres Strait Islander people from their local community (Cunneen, 2002; Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2011, pp. 61–63). Young people interviewed for the CYPP spoke of family and community role models and mentors as important in their lives:

I wanted to change. I wanted to put myself on the right track, stay out of jail, live a happier, better life. My older brother is a good role model and they pretty much believe in me. My older brother two years older than me graduated school, so that pushed me to graduate school ... then I had a family friend ... he was the youth worker in town when I met him and he became a family friend and he was a big help. (NT 3)

Yeah, my Dad, he's a stockman and he has his own farm. Yeah, so I just love working with horses too ... my dad and my mum is really hard workers. So it's like, if my mum and dad is really hard workers, I know I could be a hard worker myself. (TVL 1)

Approaches to diversion initiatives should be trauma-informed and involve healing plans specific to the needs of Aboriginal and Torres Strait Islander people

Many Aboriginal and Torres Strait Islander young people in conflict with the criminal law have complex support needs that arise out of trauma. It is well documented that 'victims/survivors of childhood trauma participate in high numbers in the child welfare and juvenile justice systems (and later in life in the adult criminal justice system)' (Atkinson, 2013, p. 6). The link between intergenerational trauma and disadvantage and the over-representation of Aboriginal and Torres Strait Islander young people in youth justice is similarly well established (Committee on Law and Safety, 2018, p. 157).

To be successful, diversionary programs must recognise the pain and distress that has been (and continues to be) caused by government policies by adopting a needs-focused, trauma-informed practice. Atkinson explains that such services:

understand trauma and its impact on individuals (such as children), families and communal groups; create environments in which children feel physically and emotionally safe; employ culturally competent staff and adopt practices that acknowledge and demonstrate respect for specific cultural backgrounds; support victims/survivors of trauma to regain a sense of control over their daily lives and actively involve them in the healing journey; share power and governance, including involving community members in the design and evaluation of programs; integrate and coordinate care to meet children's needs holistically; and support safe relationship building as a means of promoting healing and recovery. (Atkinson, 2013, p. 2)

Applying a trauma-informed approach to diversionary programs for Aboriginal and Torres Strait Islander young people 'shifts the emphasis of justice intervention from processing offenders to identifying solutions. It places emphasis on the co-location of services... a no wrong door approach to treatment, and respect for Indigenous knowledge' (Blagg & Tulich, 2018, p. 47). While there is increasing recognition of the importance of trauma-informed approaches in youth justice, the point we make here is that these approaches must be informed through an understanding of the specific context of Indigenous history, law and culture.

BushMob is one example of a program aimed at building the wellbeing of young complex-needs clients with significant primary care health issues. It provides treatment for young people in Alice Springs aged 12–25 years experiencing substance addiction, many of whom have had early life trauma and ongoing trauma as a result of poverty, substance abuse, lack of access to services, cultural isolation and the effects of intergenerational grief and loss (Pryor, 2009). The BushMob program model is trauma-informed; it reflects the importance of choices and informed consent of the young person engaged in the program; incorporates flexible arrangements such as multiple entry and exit points; ensures the involvement of positive role models and mentors and provides non-judgmental, interpersonal support (BushMob, 2016). A 2009 evaluation found that:

On a national scale, Bushmob is considered a mature model of adventure therapy practice. ... For BushMob participants, the full spectrum of human health needs are potentially addressed, including physical, mental, emotional, behavioural, social, cultural, spiritual, environmental and economic wellbeing. (Pryor, 2009, pp. 15, 43)

The core values of trauma-informed services include sharing power and governance (Atkinson, 2013, p. 7). The active participation of the young person is thus central to a trauma-informed practice, which in turn accords with a strengths-based approach to young people who are in conflict with the law. Consistent with the principle of self-determination, program evaluators have stressed that 'youth programs should involve young people themselves as designers and facilitators of restorative activities' (Senior et al., 2012, p. 6).

Because of the depth of trauma experienced by some young Aboriginal and Torres Strait Islander people, research and experience indicates that diversionary programs for this cohort should be informed by healing approaches. Healing is not simply about addressing offending as an individual phenomenon:

Indigenous healing approaches start with the collective experience and draw strength from Indigenous culture. Inevitably, that involves an understanding of the collective harms and outcomes of colonisation, the loss of lands, and disruptions of culture, the changing of traditional roles of men and women, the collective loss and sorrow of the removal of children, and relocation of communities. (Cunneen & Tauri, 2017, p. 129)

Healing is connected to Indigenous views of identity and belonging, which are ‘defined by kinship, spiritual relationships and responsibilities—all of which are inseparable from each other and the land and nature’ (Cunneen & Tauri, 2017, p. 130).

The effects of colonisation, genocide and dispossession continue to play out in the lives of Aboriginal and Torres Strait Islander young people today, with many of those we interviewed reporting significant trauma histories including experiences of violence, trauma, racism, addiction and early removal from families and communities. A number of young people identified the process of being removed from their family and experiences living in out-of-homecare as re-traumatising. Some had experiences of violence. As one young person told us: ‘I just seen too many violence in my life’ (TVL 1). Often, early drug use was described as being intertwined with such experiences of childhood trauma:

When I first started taking drugs I was 8, was only smoking yarndi. I started smoking cigarettes when I was 8 as well. And when I turned 13 I started drinking alcohol. And then this year I started ice injecting ... I lost my mum. So I started doing drugs and getting into all the heavy stuff. And then I started getting heavier this year. She had a hotshot and she died up here in Sydney in the city hospital. (JPDC 4)

In recognition of the ongoing effects of colonisation, some Aboriginal and Torres Strait Islander-run programs have a strong focus on healing and culture, including *Red Dust*, *Yiriman*, *Balunu* and *Rekindling the Spirit* (Standing Committee on Aboriginal and Torres Strait Islander Affairs, 2011, p. 105; see also Blagg & Tulich, 2018).

Diversion must be appropriately funded with strong evaluation frameworks

The NT Royal Commission reported that a lack of resources (and therefore of adequate programs) has inhibited full and effective use of diversion by courts in the NT (RCPDCNT, 2017a, p. 319). Similar findings were made in an NSW inquiry into the adequacy of youth diversionary programs, where it was recommended that ‘the NSW Government promote longer-term contracts with NGOs wherever possible, in response to evidence that a requirement to regularly bid for funding can lessen the ability of NGOs to focus on quality service delivery’ (Committee on Law and Safety, 2018, p. viii). The Standing Committee on Aboriginal and Torres Strait Islander Affairs stressed the important role of the Commonwealth in working with state and territory governments to ‘coordinate sustained and flexible funding support for a range of youth justice diversion and rehabilitation services which are developed with and supported by local Aboriginal and Torres Strait Islander communities’ (2011, p. xxxi). The lack of adequate long-term funding for diversionary programs particularly affects children and young people living in rural and remote areas (Victorian Aboriginal Legal Service, 2010).

In areas where you’ve got postcode justice there’s a lack of services, as opposed to in your metro areas where you’ve got services where you can have diversionary programs ... I see

that the postcode justice plays a lot with how our kids are disadvantaged within the system. (NSW NGO 2)

Those children deserve ... the services and therapeutic programs that we do know work. There are none available in remote communities and there are virtually none available in the NT generally, and it's patchy even in NSW. (Syd Jud 3)

Governments are increasingly calling on organisations to provide evidence for the success of their programs, but rarely is funding attached to facilitate thorough independent evaluation. Evaluation is a way of safeguarding against claims of ineffectiveness and as a tool to advocate for continued funding. In interviews with practitioners, a solicitor highlighted:

That's something we've been speaking about as programs come and go, and if there was a better monitoring and evaluation process for services and agencies, then you'd know what works, what doesn't work and there'd be a constant renewal or rejuvenation process which would only benefit that agency and the young people. (Melb Sol 1)

The centrality of evaluation was recognised by the NT Royal Commission, which recommended that 'specific evaluation plans be established as a mandatory component of policy and program development' (Rec 43.1) and that 'outcomes from evaluation be used to establish a local evidence base to support the existence and funding of policies and programs' (Rec 43.2, RCPDCNT, 2017a, p. 63). Provision for independent evaluation should be part of funding structures for diversion initiatives across all states and territories. In NSW it has been acknowledged that robust evaluation is essential, with recommendations that the NSW Government build evaluation requirements and funding for the same into contracts with NGOs for the delivery of youth diversion programs and services (Committee on Law and Safety, 2018, p. xvii; Noetic, 2010, p. 46; see also Senate Legal and Constitutional Affairs Committee, 2013, Rec 3; ALRC, 2017).

Diversion programs should be evaluated in a way that respects Aboriginal and Torres Strait Islander self-determination. The Victorian Aboriginal Justice Agreement Phase 4 (nd, p. 57) acknowledges that there 'should be Aboriginal input into all aspects of the evaluation including the design, ownership of data, data interpretation and publication of findings'. Importantly, evaluation of diversionary programs should not use recidivism as the sole measure of success, as it may fail to capture other positive outcomes such as improvements in social and emotional health and wellbeing, reconnection with family and reductions in harmful or risk-taking behaviour (Cunneen & Luke, 2007, pp. 197–199). Solely relying on recidivism as a measure of program success may disadvantage Aboriginal and Torres Strait Islander communities with high levels of policing (ALRC, 2017).

Minimising the reach of criminalisation of children and young people through increasing the age of criminal responsibility

Minimising the reach of criminalisation of Aboriginal and Torres Strait Islander children can take various forms, including, for example, greater regulation of the use of police discretion, decriminalising various offences (such as drug offences) and removing penal sanctions from others (such as public order offences). While there is much that could be done in this context, we argue that a core reform is the need to raise the minimum

age of criminal responsibility. Diversion is inextricably connected to the attribution of criminal responsibility. When children are subject to pre-court diversion, there is the assumption that the child has legal capacity to commit an offence, to admit guilt and to comply with various undertakings (eg, youth justice conferencing). While diversionary measures 'provide an important alternative to prosecution, they do not prevent prosecution, and they can still have criminal justice consequences' (Crofts, 2015, p. 125). The minimum age of criminal responsibility in all Australian jurisdictions is 10 years and is well below internationally accepted standards. The UN Committee on the Rights of the Child recently recommended 14 years as the minimum age (UNCRC, 2019, p. 6). As one of our interviewees stated: 'If you're saying that a 10-year-old is responsible for criminal behaviour and activity and they understand what they are doing, then I think you don't take human rights very seriously' (NSW Gov 7).

While there are various arguments for raising the minimum age of criminal responsibility in Australia (Cunneen, 2017), we focus here on the failure of a criminalisation approach and the specifically adverse effects of a low age of criminal responsibility on Aboriginal and Torres Strait Islander children. It is well recognised that contact with the criminal justice system is itself criminogenic, with contact being one of the key predictors of future youth offending. Children first supervised between the ages of 10–14 are significantly more likely to experience all types of supervision—and particularly sentenced supervision—in their later teens when compared with children first supervised at 15–17 years (AIHW, 2013). This indicates that raising the age of criminal responsibility has the potential to reduce the likelihood of life-course interaction with the criminal justice system (Cunneen, 2017).

A low minimum age of criminal responsibility adversely affects Aboriginal and Torres Strait Islander children because they come into contact with criminal justice agencies at a younger age. For example, 39% of Aboriginal and Torres Strait Islander young people under criminal justice supervision in Australia in 2017–18 were first supervised when aged 10–13, compared with 15% of non-Indigenous young people (Australia Institute of Health and Welfare, 2019, p. vi). Furthermore, Aboriginal and Torres Strait Islander children constitute more than two-thirds of children under the age of 14 years who are placed in detention (AIHW, 2019, Table S40b).

Interviewees working in youth justice agencies attributed the early age of contact to various reasons including intergenerational issues and police practices prone to label behaviours of Aboriginal and Torres Strait Islander young people as 'criminal' at an earlier point, such that those young people are brought into the system and dealt with in harsher ways than non-Indigenous young people (Bris Gov 1). The ramifications of this are significant when early contact with the criminal justice system entrenches prolonged contact.

Some young people who come into contact with law enforcement and the cycle of youth detention might be developmentally delayed as a result of drug use or other factors, so their maturity does not reflect their chronological age (NSW Gov 1). As discussed in earlier sections, Aboriginal and Torres Strait Islander young people in contact with the youth justice system have considerably higher rates of mental health disorders and cognitive impairment when compared with non-Indigenous youth (JH&FMHN, 2017). One detention facility manager interviewed for the CYPP identified the mismatch between chronological and developmental age:

I think the youngest person who has been in one of our centres was 11. Whilst that young person might have had a chronological age of being 11, he could have just been 7 or 8. I think it's a bit too young, and I also think that we really need to be looking at where these young people are functioning. (NSW Gov 4)

The thing that concerns me is that we're recognising that young people, their brains don't mature until quite late ... I've got 12 year-olds, 13 year-olds there that can't really link behaviour and consequences ... So I think that 10 is very, very young. (NSW Gov 1)

In Australia over recent years there have been repeated calls to raise the minimum age of criminal responsibility. In 2018 the Australian Council of Attorneys-General agreed to examine whether to raise the age of criminal responsibility from 10 years of age (Council of Attorneys-General, 2018, p. 4).

While community-owned and led diversionary programs underpinned by the principles we develop here may help to address the over-representation of Aboriginal and Torres Strait Islander children in youth justice, there are legislative changes that should also occur as a matter of urgency. Raising the age of criminal responsibility in Australia to 14 would ensure that young children do not become enmeshed in the criminal justice web from such an early age.

Conclusions

Although the number of young people under youth justice supervision has fallen in recent years, Aboriginal and Torres Strait Islander children continue to be grossly over-imprisoned. The reasons for this are systemic and structural and directly correlated with Australia's ongoing colonisation and genocide of Aboriginal and Torres Strait Islander communities. Archibald (2006, p. 49) argues:

The experience of being colonised involves loss—of culture, language, land, resources, political autonomy, religious freedom and, often, personal autonomy. These losses may have a direct relationship to the poor health, social and economic status of Indigenous people. (Archibald, 2006, p. 49)

Over a third (36%) of young people under supervision in 2017–2018 were from the country's lowest socioeconomic areas (AIHW, 2019, p. vi). As one interview respondent for the CYPP noted, Aboriginal and Torres Strait Islander over-representation 'is really just an indicator of the fact that they come from significantly less fortunate socioeconomic circumstances. It's as simple as that' (NSW Jud 1). However, as we noted in the introduction, statistics are not just a matter of 'bad luck', they also represent the active denial of social justice, which for Aboriginal and Torres Strait Islander children are intimately connected to the outcomes of colonisation and the absence of meaningful government commitments to self-determination.

The nine principles outlined in this article provide guidance for the effective diversion of Aboriginal and Torres Strait Islander young people from the criminal jurisdiction. Throughout this article we have highlighted examples of how these principles have been implemented as part of specific initiatives or local programs. We argue that what is now needed is a more holistic and systemic approach to integrating these principles into government youth justice policy through negotiation with key Aboriginal and Torres Strait Islander community-controlled organisations.

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