



30 June 2023

Ms. Anne Hollonds
National Children's Commissioner
Australian Human Rights Commission
3/175 Pitt Street
Sydney NSW 2000

Via email: youthjusticereform@humanrights.gov.au

Dear Commissioner,

The Victorian Aboriginal Child Care Agency (VACCA) welcomes the opportunity to provide input into the Commission's project, *Youth Justice and Child Wellbeing Reform across Australia*. VACCA is the lead Aboriginal child welfare organisation and one of the largest providers of justice support and advocacy to Aboriginal children and young people involved in the justice system. As such we are well placed to provide input and advice on the reforms that are required to protect the rights of Aboriginal children who come into contact with the youth justice system. Our feedback is based on our unique position as an ACCO providing a suite of services across the state supporting children, young people, families, and community members.

This submission looks at the experiences of Aboriginal children in contact with the youth justice system, with particular attention to the systemic injustices they are confronted with in their interactions with this system. It also outlines the key mechanisms we believe are required to address their over-representation in the justice system. Given the importance of the inquiry, VACCA believes that the restrictive word limit is unrealistic and does not correlate to an informed, respectful or effective manner for engaging key stakeholders. Given the word limitations, we also have attached several submissions, which provide further detail on these experiences, as well as promising practices and programs that VACCA is delivering to address the over-representation of Aboriginal children in the youth justice system into the future.

It is well established that the defining feature of Australian criminal justice systems is the over-representation of Aboriginal peoples, including children. In Victoria, what we know is that:

- Aboriginal children are 9 times more likely to be under youth justice supervision than non-Aboriginal children¹
- Aboriginal children and young people are over-represented in all stages of the youth justice system²
- Approximately 1 in 3 Aboriginal children and young people sentenced to a custodial order have a history of child protection³
- Aboriginal children are likely to be younger at first sentence or diversion than non-Aboriginal children⁴

¹ Australian Institute of Health and Welfare. (2022). *Table S7c: Young people aged 10-17 under on an average day by Indigenous status and age, states and territories, 2020-21 (rate)*. Retrieved from: <https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>

² Commission for Children and Young People. (2021). *Our youth, our way: inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, Commission for Children and Young People, Melbourne.

³ Sentencing Advisory Council. (2019). *'Crossover Kids': Vulnerable children in the youth justice system*. Melbourne: Sentencing Advisory Council.

⁴ CCYP. (2021). *OYOW final report*.



- Low age of criminal responsibility disproportionately affects Aboriginal children, accounting for 67% of these younger children in prison⁵

We contend that one of the greatest injustices within the criminal justice system has been the failure of Australian governments to act and implement the reforms that the Aboriginal community, as well as consecutive inquiries, have called for consistently since the release of the Royal Commission into Aboriginal Deaths in Custody report in 1991. In failing to act upon these opportunities to address ongoing harms done through laws and practices of the youth justice system, governments are failing in their duty of care towards Aboriginal children and young people and serious reform has remained elusive.⁶

The criminalisation of Aboriginal children and young people

As illustrated in the attached submissions, extensive research has looked at risk factors for young people entering the justice system, including poverty, experiences of out-of-home care (OOHC), family violence, trauma, alcohol and drug misuse, disrupted education, and unstable housing and homelessness.⁷ As detailed in **Appendix B & C**, we know that parental incarceration is linked with child protection and youth justice involvement.⁸ Parental imprisonment, particularly within the context of the overrepresentation of Aboriginal peoples across all aspects of the criminal justice system, contributes to a situation in which institutionalisation becomes normalised, placing young people at risk of justice involvement themselves.

However, individual and family risk factors alone cannot explain Aboriginal young people's involvement in youth justice systems. Mainstream approaches to youth justice often emphasise risk and protective factors on an individual level rather than recognising historical and societal factors and how these impact on entire communities. It is important to go beyond existing understandings of these factors, towards recognising the significant role played by historical, social, political, and systemic structures in influencing the over-representation of Aboriginal young people in youth justice.⁹ In particular, we note the need for responses that recognise how the attempted destruction of familial and kinship structures have made children more vulnerable to contact with child protection and youth justice systems.

We note that the Commission is interested in the factors which contribute to children and young people's involvement in the youth justice system. However, we would urge the Commission to focus its attention on the *criminalisation* of children and young people. We contend that by flipping this concept it emphasises the role that institutions have in creating the conditions and premeditated factors, such as systemic racism and policing practices, that create greater risk factors for a Aboriginal child or young person when they come into contact with the justice system, rather than the so-called 'criminality' of children and young people which solely focuses on the individual which is inherently unfair.

In VACCA's experience, the criminalisation of children and young people is a built-in feature of the residential care system. Police engagement is sometimes used as evidence of upholding and

⁵ Australian Institute of Health and Welfare. (2022). *Table S7b: Young people under supervision during the year by Indigenous status and age, states and territories, 2021-21*. Retrieved from: <https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>

⁶ Cunneen, C., Goldson, B., & Russell, S. (2016). Juvenile justice, young people and human rights in Australia. *Current Issues in Criminal Justice*, 28(2), 173-189.

⁷ CCYP. (2021). Our youth, our way final report; VLA. (2016). Care not custody: A new approach to keep kids in residential care out of the criminal justice system. Melbourne, Victoria.

⁸ Australian Institute of Criminology. (2023). *Intergenerational incarceration in New South Wales: Characteristics of people in prison experiencing parental imprisonment*. Retrieved from: https://shineforkids.org.au/wp-content/uploads/2023/02/ti663_intergenerational_incarceration_in_new_south_wales.pdf

⁹ White, R. (2015). Indigenous young people and hyperincarceration in Australia. *Youth Justice*, 15(3), 256-270.



maintaining a level of safety or duty of care. It is clear however, that amongst children who experienced residential care, 55% did not receive their first sentence or diversion until after their first residential care placement.¹⁰ To live in residential care often means to live with a significant police presence in numerous ways. For example, the police are embedded in care teams for many of the young people VACCA works with, and whilst this can help with proactive planning, it also means that young people are actively being profiled and surveyed. Further detail on the criminalisation of Aboriginal children and young people in residential care can be found in **Appendix A**.

For VACCA, the intersection between disability and criminalisation is of particular concern and an area where serious and urgent reform is required. For Aboriginal children and young people living with a disability, such as an Acquired Brain Injury (ABI) or Foetal Alcohol Syndrome Disorder (FASD) systemic discrimination and barriers, in conjunction with an absence of support, are creating a pathway into prison, rather than into education, health and family supports.¹¹ In 2021-22, the majority (67.9%) of Aboriginal young people under youth justice supervision in Victoria had an intellectual disability; 12% had a language disorder, 6% had autism spectrum disorder and 6% had FASD.¹² As detailed in **Appendix A & C**, there are significant challenges in ensuring children and young people receive an accurate diagnosis, meaning that there is a strong likelihood that these figures are an underestimation.

What needs to change

To end the criminalisation of Aboriginal children and young people, there needs to be a systemic approach which holistically addresses the complex combination of social, political, historical, familial, and psychosocial factors that drive it. This means prioritising approaches to youth justice that consider the rights of Aboriginal children by focusing on restoring familial and kinship structures, and respect the role of Elders in community justice approaches. In the following we provide an overview of the key strategies which are needed, further detail, particularly about promising programs and practices, can be found in the attached submissions.

Upholding and implementing international human rights: Recognising the rights of Aboriginal and Torres Strait Islander peoples to self-determination

There are significant gaps in upholding and implementing the rights of Aboriginal peoples, particularly children, as the conditions to which children are subjected to in Australian child protection and youth justice systems clearly demonstrate. A lack of leadership at the federal level in relation to protecting children's rights means that there is a discrepancy in how children are treated based on the state and territory they live in, including at what age they might be found criminally responsible. This is unacceptable, and the federal government should act to enshrine key human rights mechanisms into law, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the United Nations Convention on the Rights of the Child (UN CRC), and the Optional Protocol on the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT).

¹⁰ Sentencing Advisory Council. (2020). *'Crossover Kids': Vulnerable children in the youth justice system report 2: Children at the intersection of child protection and youth justice across Victoria*. Retrieved from: https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-03/Crossover_Kids_Report_2.pdf

¹¹ APO NT. (2017). *Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory*. Retrieved from: https://www.alrc.gov.au/wpcontent/uploads/2019/08/117._aboriginal_peak_organisations_nt.pdf

¹² Yoorrook Justice Commission. (2023). *Transcript of Day 5 – Public hearings*, p. 374. Retrieved from: https://yoorrookjusticecommission.org.au/wp-content/uploads/2023/05/WUR.HB5_.00004.02492-Hearing-Block-5-Day-5-3-May-2023.pdf



Aboriginal children and young people experience significant disadvantage and discrimination within Australian society, including regular breaches to their rights by youth justice authorities. Stronger adherence to the principles contained within the UNDRIP would be an important commitment toward improving outcomes for Aboriginal children and young people. Article 3 of the UNDRIP recognises the right of Indigenous peoples, including children, to self-determination, which includes the right to “freely determine their political status and freely pursue their economic, social and cultural development.”¹³ Implementation of UNDRIP would support increased Aboriginal community control over justice. A key message from the Royal Commission into Aboriginal Deaths in Custody is that to eliminate disadvantage and improve justice outcomes, there needs to be an end to domination and the empowerment of Aboriginal people through returning control of their lives and their communities to Aboriginal hands. Placing control back with community has the potential to counteract this problem in a number of ways, in particular by enabling the community to be strong enough to have control of justice initiatives.¹⁴ Milward argues that “calls for greater Aboriginal control over justice are motivated in large degree by a desire for autonomy to develop community-based alternatives to incarceration”.¹⁵

Aboriginal self-determination, trauma-informed approaches, and connection to culture and community are now recognised as central to any approach to working with Aboriginal children, young people and their families.¹⁶ An example of this approach is VACCA’s Youth Through Care (YTC) Program. It draws on strength and connection to culture and community, creating an opportunity to engage with children and young people in custody prior to and post release. The YTC program is an intensive, client-centred, holistic, culturally appropriate, trauma-informed program, with a strong connection to Country and family that supports Aboriginal and young peoples’ exiting detention. Further information on this program can be found in **Appendix A**.

We would also encourage the Commission to examine what learnings international models might have for the Australian context. We note that a number of European countries have had significant success in reducing the number of children coming into contact with youth justice systems¹⁷.

Raising the age of criminal responsibility

A key systemic change required to reduce Aboriginal youth justice involvement is to raise the age of criminal responsibility from 10 to 14 years of age, in line with the United Nations Committee on the Rights of the Child.¹⁸ Whilst we acknowledge the Victorian Government recently committed to raise the age from 10 to 12, and to 14 within four years with limitations, we are disappointed that the government failed to act in line with the overwhelming evidence that children under the age of 14 are not sufficiently mature to understand their actions. The majority of offences committed by this

¹³ United Nations. (2007). United Nations Declaration on the Rights of Indigenous Peoples, para. 2. Retrieved from: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

¹⁴ Milward, D. (2012). *Aboriginal Justice the Charter*, p.31 Vancouver: UBC Press.

¹⁵ Ibid.

¹⁶ Department of Health and Human Services. (2018). *Balit Murrup: Aboriginal social and emotional wellbeing framework 2017-2027*. Melbourne: Victorian Government

¹⁷ Diagrama Foundation. (2019). *A Blueprint for Change*. Retrieved from:

<https://ddhs.org.au/sites/default/files/media-library/documents/Blueprint%20for%20Change%20-%20Diagrama%20Foundation%20Report%20FINAL.pdf>

Winterdyk, J., & Antonopoulos, G. (2016). Reflections on Norway’s juvenile justice model: A comparative context. *Crime Prevention and Community Saety*, 18(2), 105-121.

McAra, L., & McVie, S. (2018). Transformations in youth crime and justice across Europe: Evidencing the case for diversion. In Goldson, B. (Ed.) *Juvenile Justice in Europe: Past, Present and Future*. London: Routledge.

¹⁸ Committee on the Rights of the Child. (2007, 25 April). General Comment No. 10 Children’s rights in juvenile justice, 44th sess, UN Doc CRC/C/ GC/10, paras 32–33.



age group in Victoria are property and deception offences.¹⁹ Given the over representation of Aboriginal children in child protection, we know these statistics, along with the greater likelihood of recidivism for young offenders identifies a deeply concerning risk for our children and young people in OOHC. The 'Care not Custody Report' conducted by Victoria Legal Aid (VLA), identified that one in three young people they support with child protection matters who are placed in OOHC return with assistance for criminal charges.²⁰ The young people they assist are twice as likely to face criminal charges. Whilst some charges are serious offences, the report recognised that others had received criminal charges for minor property damage. This is the result of the criminalisation of young people without recognising causal drivers for behavioural issues such as trauma or mental health. Alternatively, diversionary programs, with therapeutic interventions would be more beneficial for such young people to avoid early contact with the justice system.²¹ The Commission should call upon all Australian governments to commit to raising the age of criminal responsibility to 14 immediately.²²

Ending the overrepresentation of Aboriginal children in out-of-home care

Given the well documented correlation between OOHC and youth justice, it is not surprising that concurrent to growing over-representation in prison numbers, is a growing number in OOHC. In Victoria, 38% of children and young people under youth justice supervision have also had Child Protection involvement, with many having had experiences in OOHC.²³ Given this link, VACCA strongly believes that if we prevented children from entering OOHC, we would also disrupt the number of children coming into contact with youth justice.

Whilst we recognise that statutory intervention, including child removal and placement, is required in certain circumstances, prevention of harm and supporting safety and wellbeing in the care of the family is always preferable to protective intervention by the state. However, as detailed throughout the attached submissions, adequate policy attention and resourcing are not being directed towards preventing child removal. This is particularly the case in relation to the funding of ACCOs to design and deliver prevention, early help, and early intervention programs.

Our perspective on taking a national approach to youth justice and child wellbeing reform

From our perspective, any youth justice reform agenda must also include child protection systems. The Commission has asked for feedback on whether there are benefits in taking a national approach to youth justice reform, this would be dependent on the specific focus of such an approach. For example, we would not support a national approach which leads to the expansion of Australian prison systems. Any length of time spent incarcerated not only increases the likelihood of reoffending but also leads to significant harm to themselves, their family and future generations. This is particularly the case for children and young people whose brains are still development and have often experienced significant trauma.²⁴ The implications of locking up our most vulnerable children are life long, not only for the individual but for the state.

VACCA supports a national approach that would ensure that Aboriginal children and young people have their rights upheld and protected. Noting that the attached submissions contain substantive

¹⁹ Victoria Legal Aid (2016) Care not Custody Report

²⁰ Ibid.

²¹ Armytage, P., & Ogloff, J. (2017). *Youth justice review and strategy meeting needs and reducing offending*. Melbourne: Victorian Government, Department of Justice and Community Safety.

²² Richards, K. (2011). What makes juvenile offenders different from adult offenders?, *Trends & Issues in Crime and Criminal Justice*.

²³ CCYP. (2021). Our youth, our way final report

²⁴ Grover, C. (2017). 'Youth justice in Victoria', Parliamentary Library and Information Service, Parliament of Victoria. Research paper. No.2.



recommendations for change, our key recommendations for what this reform agenda should include are as follows:

1. That the Federal Government commit to enshrining UNDRIP & developing a national Bill of Rights for children
2. For all Federal legislative and policy reform to align with the UNDRIP and CRC, including the right of Indigenous peoples to be self-determining in issues related to child and family wellbeing, and youth justice;
3. Through the Federal Government's Safe and Supported Plan, invest in Aboriginal led solutions to prevention, early intervention and targeted support for Aboriginal children to address the disparity in investment in early intervention and family support for Aboriginal children where they live.
4. That all Australian governments commit to raising the age of criminal responsibility from 10 to at least 14 years of age and invest in Aboriginal led diversion and support programs to decrease or stop recidivism before the child turns 14yo;
5. That all Australian governments implement OPCAT
6. The development of a youth justice strategy to address risk factors contributing to the criminalisation of Aboriginal children and young people. That this strategy enable a holistic, whole of system response to the individual needs of young people, and incorporate education, health, AOD, social and emotional wellbeing, housing, welfare, and justice systems.
7. For all Australian jurisdictions to take immediate action to meaningfully implement all recommendations of the Royal Commission into Aboriginal Deaths in Custody

We welcome the chance to discuss this submission in more detail. For further information, please contact Sarah Gafforini, Director, Office of the CEO via sarahg@vacca.org.