



2 October 2024

The Chair
Legal and Constitutional Affairs References Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Chair and Committee Members,

The Victorian Aboriginal Child and Community Agency (VACCA) welcomes the opportunity to provide input into the Committee's inquiry into Australia's youth justice and incarceration system. 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 in Victoria. 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.

This submission addresses the Committee's terms of reference by examining:

- a) The outcomes and impacts of youth incarceration in jurisdictions across Australia
- b) The over-incarceration of First Nations children
- c) The critical importance of cultural elements, healing-focused approaches, and early intervention strategies in reforming the youth justice system
- d) The degree of compliance with human rights of children in detention
- e) The Commonwealth's international obligations regarding youth justice
- f) The benefits of enforceable national minimum standards for youth justice
- g) Related matters, including recent legislative developments and international best practices

Although youth justice is primarily administered by State and Territory governments, VACCA requests the Committee to leverage its significant national influence to champion comprehensive reforms across Australia. These reforms must be equitable, compassionate, and critically, must recognise and address the intricate web of interconnected factors that shape the lived experiences of Aboriginal children and young people. The Committee has a unique opportunity to lead transformative change that transcends jurisdictional boundaries and creates a more just system for all.

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

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- 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
- 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

There is extensive research available that 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 We know that parental incarceration is linked

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*.

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.

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 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

We urge the Committee 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 an 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 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.

For VACCA, the intersection between disability and criminalisation is of particular concern and an area where serious and urgent reform is required. For Aboriginal

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.

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

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 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.

Recent Legislative Developments: Victoria's Youth Justice Bill 2024

We would like to bring to the Committee's attention recent developments in Victoria that highlight the urgent need for federal leadership in youth justice reform. On 18 June 2024, the Victorian Government introduced the Youth Justice Bill 2024 into the State Parliament. This bill exemplifies both the progress and limitations of state-level reforms, underscoring the necessity for nationwide standards and federal guidance.

Key provisions of the Victorian bill include:

- Raising the minimum age of criminal responsibility from 10 to 12 years of age
- Providing police powers in relation to children aged 10 or 11
- Establishing alternative processes to court proceedings, including youth warnings, cautions, and diversion programs

While VACCA acknowledges this as a step forward, we believe it falls short of the comprehensive reform needed across Australia. The bill's original intention was to raise the age of criminal responsibility to 14, which aligns with international standards and expert recommendations. However, the final version only raises the age to 12 which not only demonstrates the challenges involved in implementing substantial changes at the state levels but also it is in juxtaposition to the upcoming social media ban¹³ for children where the federal government is considering the age limit to be 14-16. This raises the question: if a 14-year-old child is not deemed to be mature enough

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/wp-content/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

¹³ Prime Minister of Australia Office Media Release (2024, 10 September). [Weblink](#).

to use social media, can another child of the same age be potentially held criminally accountable for their actions?

VACCA is particularly concerned about the provisions allowing children aged 12 or 13 to be held criminally responsible under certain circumstances, and those granting police powers over children as young as 10 or 11. We know that these elements will have a disproportionate impact on Aboriginal children in the justice system and contradict evidence about children's developmental capabilities. The 'Care not Custody Report' conducted by Victoria Legal Aid (VLA), identified that one in three young people supported by VLA who are placed in out-of-home-care return to VLA for assistance for criminal charges.¹⁴ The young people they assist are twice as likely to face criminal charges.¹⁵ 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 offending behaviours such as involvement with child protection, trauma or mental health concerns.

This example from Victoria demonstrates why federal leadership is crucial. We urge the Senate to use its considerable influence to push for nationwide reforms that go beyond the limitations of state-level legislation. Specifically, we call for:

1. A unified approach to raising the age of criminal responsibility to at least 14 years across all jurisdictions, without exceptions in line with the United Nations Committee on the Rights of the Child¹⁶.
2. National standards that prioritise diversion, rehabilitation, and culturally appropriate support over punitive measures for all children under 14.
3. Federal initiatives to support states and territories in developing alternatives to police intervention for children showing concerning behaviours, including national requirements for police to take mandatory comprehensive trauma and cultural awareness training

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,

¹⁴ Victoria Legal Aid. (2016). *Care Not Custody report*.

¹⁵ Ibid

¹⁶ 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.

structural, political, historical, intergenerational trauma, and psychosocial factors that drive it. This means prioritising approaches to youth justice that:

1. **Center Aboriginal culture and healing:** Embed Aboriginal ways of knowing, being, and doing in all aspects of the youth justice system. This includes implementing culturally therapeutic approaches that focus on protection, connection, and healing.
2. **Strengthen families and communities:** Invest in early intervention and prevention strategies that build on the strengths of Aboriginal families and communities. This includes supporting cultural camps, return to country programs, and other initiatives that strengthen cultural connections.
3. **Prioritise education and early support:** Develop Aboriginal-led programs to address issues like school refusal and keep Aboriginal children engaged in education, including implementing self-determination approaches to education, and cultural training for education staff across Australia that helps them to work with students in culturally safe, trauma-informed ways.
4. **Implement restorative justice practices:** Move away from punitive measures towards culturally appropriate restorative justice approaches that align with Aboriginal values and promote healing for all involved.
5. **Address underlying factors:** Tackle the root causes of youth justice involvement, including poverty and the impacts of intergenerational trauma, through comprehensive, culturally safe support services.
6. **Empower Aboriginal Community Controlled Organisations (ACCOs):** Ensure that ACCOs have the resources, authority, and flexibility to design and deliver culturally appropriate services that meet the unique needs of their communities.

Key strategies needed include:

- **Upholding and implementing international human rights:** 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) and the United Nations Convention on the Rights of the Child (UN CRC), to ensure there is no 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 as is currently case.

- **Raising the age of criminal responsibility:** We strongly urge all Australian governments to commit to raising the age of criminal responsibility to 14 immediately, without exceptions.
- **Ending the overrepresentation of Aboriginal children in out-of-home care:** Given the well-documented correlation between OOHC and youth justice, preventing children from entering out-of-home-care would also disrupt the number of children coming into contact with youth justice. Aboriginal self-determination, investment in early support, 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.¹⁷
- **Implementing an Alternative Service Model:** This model should implement culturally therapeutic approaches and prioritise early intervention, prevention, and culturally appropriate support for Aboriginal children and young people that is grounded in a culturally therapeutic approach framework of protect, connect and heal. It should redirect funding from youth justice systems to services that divert children away from formal justice systems and empower ACCOs to assess and provide appropriate services.
- **Develop a comprehensive early intervention framework:** A comprehensive early intervention framework is required to create a coordinated, well-resourced system of early supports that can identify and address potential issues before they escalate to justice system involvement. This includes strengthening family-centered approaches to develop and implement programs that work holistically with families, recognising that supporting the whole family is key to supporting children and young people.
- **Adopting international best practices:** We recommend considering elements from successful models in other countries, such as:
 - Scotland's Whole Systems Approach, which emphasises a 'child-centric, welfare-based' philosophy¹⁸ with the aim to invest in services and support such as youth work, educational outreach and restorative practices. This has resulted in dramatic reductions in offence referrals, criminal convictions for older children and receptions to custody¹⁹. A key difference between Australia and Scotland's approach is that unlike

¹⁷ Department of Health and Human Services. (2018). Balit Murrup: Aboriginal social and emotional wellbeing framework 2017-2027. Melbourne: Victorian Government

¹⁸ Scottish Government. (2024). Youth Justice - Whole system approach to young offending. Weblink

¹⁹ McAra, L., & McVie, S. (2023).

Australia's fragmented system, Scotland has implemented a nationwide, cohesive approach to youth justice.

- Spain's approach of referring children under 14 who show offending behaviours to multidisciplinary professionals for intervention and support and these offending behaviours are approached through a lens of 'protection', child safety and welfare²⁰. In the context of Aboriginal children, it is vital that a nuanced approach be taken where their connection to family and culture is maintained through the process.
- New Zealand's Family Group Conferencing as the primary justice mechanism, which incorporates Māori culture and conflict resolution practices. The use of Rangatahi and Pasifika Courts have been found to have lower rates of recidivism compared to Youth Courts in New Zealand²¹.
- Norway's focus on crime prevention rather than crime control²², resulting in very low youth incarceration rates in stark contrast to Australia's high rates of youth detention, particularly for Aboriginal youth.

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

VACCA supports a national approach that would ensure that Aboriginal children and young people have their rights upheld and protected. 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.

²⁰ Consortium for Street Children. (2019). What are the main laws and regulations on the criminal liability of minors in Spain? [Weblink](#)

²¹ Cheng, D. (2019, January 29), More Māori-based justice solutions being considered to reduce reoffending. New Zealand Herald, Retrieved from https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12197400.

²² Jesuit Social Services. (2017). Justice Solutions: Expanding the Conversation. https://cdn.jss.org.au/wp-content/uploads/2022/12/19160846/SUB-170623-Solutions-Tour-Long-Report-v.15.pdf?_gl=1*_am5ioc*_ga*NDU3NDM00DUyLjE3MTc2NDg0OTg.*_ga_D84XPJZM02*MTcxOTM2MTEwMi4xMS4wLjE3MTkzNjExMDIuNjAuMC4w

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 or 12 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 14.
5. That all Australian governments implement Optional Protocol to the Convention Against Torture (OPCAT).
6. The development of a holistic, whole of system response-based youth justice strategy to address risk factors contributing to the criminalisation of Aboriginal children and young people.
7. For all Australian jurisdictions to take immediate action to meaningfully implement all recommendations of the Royal Commission into Aboriginal Deaths in Custody.
8. Develop and implement a comprehensive, culturally grounded early intervention framework that prioritises Aboriginal-led solutions and builds on the strengths of Aboriginal families and communities; invest in cultural camps and return to country programs as part of early intervention and prevention strategies.
9. Implement culturally c approaches across all aspects of the education and youth justice system, ensuring all interventions focus on protection, connection, and healing.
10. Increase funding and support for ACCOs to design and deliver holistic, family-centered services, including disability assessments, mental health and youth justice services, that address the root causes of youth justice involvement.
11. Develop and implement culturally safe, trauma-informed training for all professionals working within the education and youth justice system, including police, court staff, and corrections officers.
12. Encourage all states and territories to implement measures similar to Victoria's, such as amending relevant legislation (e.g., Victoria's Child Youth and Family Act 2005) to ensure all children who enter the child protection system receive a developmental disability assessment.

13. Use federal influence to promote consistency across state and territory legislation related to youth justice and child protection, ensuring that best practices are shared and implemented across all jurisdictions.

Future Outlook

If these reforms are implemented, we anticipate:

- A significant reduction in the over-representation of Aboriginal children in the youth justice system
- Improved outcomes for Aboriginal children and young people in education, health, and social wellbeing
- Aboriginal children and young people are strong in their culture and connection to community and thrive
- Reduced recidivism rates and long-term cost savings for the justice system
- Greater alignment with and accountability to international human rights standards and obligations

However, if these reforms are not implemented, we fear:

- Continued over-representation and poor outcomes for Aboriginal children and young people
- Increased costs to the justice system and society as a whole
- Further breaches of Australia's international human rights obligations
- Missed opportunities for breaking the cycle of intergenerational trauma and disadvantage

Conclusion

The youth justice system in Australia, particularly its impact on Aboriginal children, requires urgent and comprehensive reform. By learning from international best practices, implementing the recommendations outlined above, and taking a unified, nationwide approach, we have the opportunity to create a more just, effective, and culturally responsive youth justice system. We urge the Committee to use its influence to drive these crucial reforms forward, ensuring a better future for all of Australia's children and young people.

We welcome the chance to discuss this submission in more detail.