Self-Determination and the Aboriginal Youth Justice Strategy

Research Report

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[1] Sections of this report also draw on work from a previous report by Cunneen, Porter and Behrendt (2018) *Report to Victoria Police on Youth Justice Cautioning*. I particularly acknowledge the work I have drawn on by Amanda Porter on the guiding principles and context for Aboriginal community-controlled organisations and of Larissa Behrendt on Aboriginal self-determination.

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EXECUTIVE SUMMARY

The report covers the issues related to Aboriginal self-determination in the youth justice sector. It focusses on diversionary programs and the current and potential role of Aboriginal community-controlled organisations (ACCOs) in this sector, identifying domestic and international (primarily Canadian) literature on mainly Aboriginal-run programs. It also comments on the possible requirements for legislative and policy reform within the Victorian landscape.

Aboriginal Self-Determination and Shifting the Decision-Making Process
There is a long history to recommendations from various inquiries over the last 30 years related to the need for Aboriginal self-determination and decision-making in youth justice. The report finds that self-determination and self-governance are critical to Aboriginal communities achieving their economic, social and cultural goals, and based on the evidence will lead to improved outcomes in the youth justice sector. Some of the key issues which arise include avoiding a 'one size fits all' approach and allowing for flexibility in Aboriginal Youth Justice which caters for localised contexts and enables localised input. Further issues which need to be addressed include:

- ensuring there is no gap between formal (legislative) recognition of Aboriginal powers in decision-making and the reality of limitations on operationalizing these powers
- consideration of the accreditation of Aboriginal organisations involved in youth justice decision-making, similar to what is required in the child protection sector
- ensuring Aboriginal design of structures, programs and processes, rather than simply Aboriginal participation in decision-making into pre-existing structures, programs and processes.

Aboriginal Young People's Voices
There is a recognised 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 the principle means for Aboriginal young people themselves. Some issues which require consideration include:

- working with the Koori Youth Council to ensure Aboriginal young people's voices are heard in the development of the strategy and to develop an ongoing mechanism or body for youth participation and engagement in strategy, policy and program development, and in implementation, monitoring and evaluation.
- whether there is merit in considering recommendation 2.1 from the Royal Commission into the Protection and Detention of Children in the Northern Territory, particularly in respect to a legislatively established Representative Council of Children comprised of young people who have experienced out-of-home-care / youth justice.

Legal Representation for Aboriginal Children and Young People
Effective, holistic and culturally appropriate legal representation for Aboriginal young people underpin many of the substantive issues facing Aboriginal young people in the youth justice system. An issue which requires consideration is:

- How do we ensure funding for a specialist holistic legal service such as Balit Ngulu?

Disrupting the Trajectories and Pathways from Child Protection and Out-of-Home Care into the Youth Justice System

The over-representation of Aboriginal children from OOHC in the youth justice system is a matter of long-standing concern in Victoria. There has been significant investigation of these issues by both the Commission for Children and Young People and Victoria Legal Aid and subsequently a range of recommendations. The critical issue is whether those recommendations have been or are being implemented and whether they are sufficient to remedy the problem.

Prevention and Early Intervention to Reduce the Number of Aboriginal Young People Entering the System

Early intervention strategies are important as a preventative strategy to subsequent youth justice involvement. Early intervention strategies can take various forms. The report canvasses various Aboriginal-focussed examples including family-based and education-based early interventions, cultural initiatives, broader community initiatives and recreation-based interventions. Some of the issues which emerge include the type of early intervention strategies which are going to be best suited to the Victorian context, the capacity of ACCOs to take on the responsibility of early intervention programs, and the need for suitable funding arrangements for the ongoing sustainability of programs.

'First Contact is the Last'. Diversion and Support at First Contact with Police

The report notes the need for differentiated responses and that a 'one size fits all' model of diversion at first contact with police may not target the diverse needs of young people. Based on existing evidence the features of successful interventions are canvassed and case study examples of good practice are provided. It is noted that there appears to be a dearth of diversion programs specifically aimed at 10-14 year olds, and there are few diversion programs that specifically target young Aboriginal women. Some of the issues which arise are:

- Who should authorise pre-court diversion and what point do Aboriginal organisations become involved in the decision-making process?
- Whether there should be specific offences excluded from pre-court diversion and whether there a requirement for a legislative base to pre-court diversion
- Whether pre-court diversion is linked to a police cautioning program, for example as part of the conditions attached to a caution
- Whether contractual arrangements between government agencies and ACCOs for the delivery of Aboriginal pre-court diversionary program are an important consideration.

Police Cautioning

The report notes the decline in the use of cautioning in Victoria and discusses the use of cautions administered by respected persons (Elders) in other Australian states. The use of conditional cautions is explained and there is a discussion of the attempts in NSW to increase cautioning for Aboriginal children. Some of the issues which arise include:

- Who should authorise the caution and at what point do Aboriginal organisations become involved in the decision-making process around cautioning?
- Should there be specific offences excluded from cautioning and/or should there be a limit on the number cautions an individual child can receive?
- Should the requirement to admit guilt be changed to a requirement of 'not deny' the offence?
- Is there a requirement for a legislative base to cautioning and how would this take account of the specific requirements for an Aboriginal Youth Cautioning Scheme?

Restorative Justice
The report discusses the introduction of restorative justice in Australia through the development of youth justice (or family group) conferencing, and notes some of the limitations. It is recognised that youth justice conferencing has been seen as an opportunity to involve Aboriginal and Torres Strait Islander Elders and community members in a cultural response to offending by young people and the report discusses case studies of relevance. Some of the issues which arise include:

- Where are the most appropriate spaces in the youth justice system for developing restorative justice: pre-court diversion, court diversion, sentencing, release from custody?
- Which ACCOs are most appropriately placed to be involved in convening restorative justice conferences?
- What lessons can be learned from the use of restorative justice and family group conferencing in the child protection sector?

Bail and Remand
The report discusses major factors in bail refusal and breach of bail conditions for Aboriginal children and young people. There is discussion of Section 3A of the *Bail Act 1977* Victoria and the limitations of this in reducing Aboriginal remand rates. The report looks at bail diversion programs and provides examples (case studies) of bail support for Aboriginal young people. Best practice principles for bail support programs are discussed. Issues which arise include:

- How to remedy the underutilisation of s.3A of the Bail Act
- Whether the Wulgunggo Ngalu Learning Place and/or Baroona Youth Healing Place can provide an appropriate model for Aboriginal young people, and whether the same model is suitable for Aboriginal young women and girls
- Whether the Koori Women's Diversion Program can be adapted for Aboriginal young women
- The limitations of the current Koori Intensive Bail Supervision Program.

Diversion from Court
This section of the report focusses on court diversion *prior to sentencing*. It discusses court diversion to youth justice conferencing in other jurisdictions and the Victorian Children's Court Pre-Plea Diversion Program. The Diversion to Aboriginal Healing Program in Ontario is presented as a case study and contrasted with the Victorian Pre-Plea Program. Questions which arise include:

- whether the Ontario model sufficient (ie the adjournment of the proceedings to undertake an Aboriginal-run healing program)
- whether the existing model in Victoria (Children's Court Pre-Plea Diversion Program) that can be utilised and improved
- whether there are existing ACCOs that can fulfil the required roles for Aboriginal-run healing programs.

Courts and Sentencing
This section of report discusses the legislative requirement to consider Aboriginality in sentencing and the recommendations from the Australian Law Reform Commission (ALRC) and the Victorian Aboriginal Legal Service (VALS). There is also discussion on the potential use of Aboriginal Experience Reports specifically for use in the Children's Courts, and the

work being done in other States in this regard. Expansion and other reforms for the Koori Youth Court are also canvassed.

- A key issue which emerges is whether the proposed changes recommended by the ALRC, VALS and others, in conjunction with current policies and programs such as the Children's Koori Court, are adequate to ensure shared jurisdiction between ACCOs and the non-Aboriginal system of courts and sentencing.

Alternative Sentencing Options to Detention

This section of the report looks at alternative sentencing options for Aboriginal children and young people and considers the role for community-based supervision and support through ACCOs as an alternative to custodial sentences. The report considers various case studies in Victoria, elsewhere in Australia and Aboriginal community-based programs in Canada under the Aboriginal Justice Strategy. Holistic community-based approaches that focus on culture and use mentoring, healing and justice circles are evident. Some of the community-based approaches utilise residential healing programs. Issues which arise include:

- Examining the potential role for ACCOs in the provision of case management, supervision and support services for young Aboriginal people on community supervision orders
- Consideration of legislative or policy reform to (i) enable ACCOs to undertake community supervision (eg WA community corrections agreements) (ii) enable the use of other alternative sentencing options (eg Healing Plans, community-controlled residential alternatives).

Detention and Alternative Approaches

The report discusses the need to raise the minimum age of criminal responsibility and provides arguments for doing so. The report also notes the need to consider placing age restrictions on the use of detention for younger children. The report identifies international best practice in detention, and notes in particular that best practice shows a movement away from larger prison-like facilities to small 'normalised' residential facilities which are locally based. This offers greater opportunities for involvement of local ACCOs which are more likely to have pre-existing relationships young people and their families and close knowledge of the environments from which the young people have come. Some of the questions which arise include

- What interventions and strategies need to be put in place for 10-14 years if detention is not an option?
- How do current Victorian government plans in terms of youth detention fit with international best practice?
- What strategies can be put in place to ensure ACCOs' active involvement with Aboriginal young people in detention?

Parole, Throughcare and Post-Release Support/ Reintegration

The limitations for Aboriginal people in accessing parole are discussed in the report.

- Would establishing an Aboriginal Youth Parole Board to determine parole for Aboriginal young people increase access to parole and better outcomes in compliance?

The report identifies some of the specific factors important to Aboriginal post-release re-integration. In particular the literature notes the strongly perceived need for greater involvement of family and community in the reintegration process and in achieving throughcare. The report discusses the NAAJA Throughcare Program (NT) as one of the few Aboriginal-specific through care programs. Questions which arise include

- How do we expand the roles of ACCOs in throughcare and post-release support?
- Should they be the primary provider of throughcare and post-release support for Aboriginal children and young people leaving detention?

Broader Models of Aboriginal Community Governance on Law and Justice Issues
This section of the report takes a broad perspective in considering how the development of Aboriginal youth justice strategies might be considered within a wider whole-of-community Aboriginal approach to law and order. Two case studies are examined: law and justice groups in the NT and the Maranguka Justice Reinvestment Project in Bourke. The two case studies provide consideration of how an Aboriginal Youth Justice Strategy can be considered within broader Aboriginal concerns about whole-of-community approaches to law and order.

Aboriginal Community Controlled Organisations
This section focusses on what can be drawn from the discussion of the various case studies and literature reviewed in this report in developing the role of ACCOs. The guiding or practice principles from the case studies are identified and there is a focus on the structure and process of self-determination for ACCOs engaged in the youth justice sector. The fundamental importance of shared jurisdiction and partnerships is noted. Other factors identified include:

- The importance of involvement of local cultural Elders
- The importance of 'On Country' or place-based diversionary practices
- Evidence of diversionary mechanisms being more powerful when they are delivered in a culturally safe way
- Benefits of strengths-based approaches
- Benefits of whole-of community approaches
- Benefits of mentoring, conferencing, healing plans

The potential barriers and enablers are also identified for developing Aboriginal self-determination in the sector.

Accountability, Monitoring and Evaluation
The final section of the report canvasses the importance of accountability, monitoring and evaluation. It notes that one of the barriers to developing Aboriginal diversionary approaches in the context of Aboriginal self-determination has been that many community-based diversionary programs do not have adequate mechanisms in place to collect data to allow thorough evaluation of program outcomes. It is also noted that *Burra Lotjpa Dunguludja* (the Victorian Aboriginal Justice Agreement Phase 4) envisages independent oversight and reporting of justice outcomes as a way of ensuring accountability, and the need to establish an independent Aboriginal Justice Commissioner.

1. Introduction

This research report covers a number of issues aimed at assisting the Aboriginal Justice Caucus in discussions on self-determination and the development of an Aboriginal Youth Justice Strategy in Victoria. The primary aim of the report is to identify where national and international approaches consider youth justice strategies in the context of Aboriginal self-determination.

The report covers a number of pre-determined focus areas of interest, including:

- Disrupting the trajectories and pathways from child protection and out-of-home-care into youth justice
- Prevention and early intervention to reduce the number of Aboriginal young people entering the youth justice system
- Access to youth specific Aboriginal legal services
- Diversion and support at first contact with police
- Restorative justice
- Bail and remand
- Diversion from court
- Sentencing, alternative sentencing options and alternatives to custody
- Detention, parole, throughcare and post-release
- Aboriginal community-controlled organisations

There are also a number of **themes** that underpin the discussion:

- Particular focus on Aboriginal children aged 10-14
- Particular focus on Aboriginal young women and girls
- Particular focus on diversion throughout the youth justice system that prevents escalation through the system
- The importance of hearing Aboriginal young people's voices, their experiences of, and ideas about changing the youth justice system.

The report contains a number of discussion questions appropriate to each of the focus areas.

2. Self-Determination: Importance for Improved Justice Outcomes

Not only is self-determination a right of Indigenous communities, but there is consistent Australian and international evidence that **self-determination** and **self-governance** are critical to Indigenous communities achieving their economic, social and cultural goals (Behrendt et al 2018: 20). The Victorian Government reflects these understandings:

> Self-determination is vital for improving Aboriginal people's health and wellbeing. Research conducted on self-determination by first peoples in other countries shows that first peoples suffer greatly when the right to make their own decisions is taken away. The devastating impact of failed policies can only begin to be turned around when Aboriginal people are supported to make their own decisions on matters such as governance, natural resource management, economic development, health care and social service provision (Victorian Government (no date (a)).

The Indigenous Community Governance Project (ICG Project) also concluded that 'when Indigenous governance is based on genuine decision-making powers, practical capacity and legitimate leadership at the local level, it provides a critical foundation for ongoing socioeconomic development and resilience' (Behrendt et al 2018: 21).

As the ATSISJC (2011: 26) has noted there are already significant processes and networks in many Aboriginal communities, for example, in the Aboriginal community-controlled health sector; Aboriginal and Islander child care services; community justice groups, women's groups and night patrols to name only some. In the health, child protection and criminal justice sectors, evidence shows that providing Aboriginal participation in decision-making and governance leads to improved outcomes, as do holistic Aboriginal programs aimed at family well-being, and culturally informed/ Aboriginal-designed treatment, rehabilitation and diversionary programs (eg, Kelaher et al 2014: 1-9; AIHW 2013: 1; SNAICC 2013: 9-11; SCRGSP 2014: 11.39-40).

In summary, Australian and North American evidence demonstrates that Indigenous communities which 'succeed' according to their own definitions, commonly demonstrate five features:

1) *Real decision-making authority:* The group making the decisions has the capacity to set the direction and priorities and to determine the goals about the issues that affect the community.
2) *Effective implementation bodies and mechanisms:* There are effective structures in place that are able to implement decisions and to make sure that things get done.
3) *Cultural match:* The approaches taken by the decision-making group and the decisions that are made align with the culture, norms and values of the community.
4) *Sustainable strategic planning:* The decision-making group is planning for the long-term.
5) *Community spirited leadership:* The decision-making group puts the community ahead of other interests (Behrendt et al 2018: 22).

There are clear reasons why Indigenous involvement in policy-making, program design and service delivery provide improved outcomes:

- Indigenous people understand the issues of concern and priority in their local areas and regions;
- Involvement of Indigenous people in policy, services and programs ensures 'buy-in' from the local community and ensures culturally appropriate solutions;
- Inclusion of Indigenous people in policy development, service delivery and programs builds community capacity and social capital;
- Involvement of Indigenous people is more likely to create culturally sensitive spaces and improve the cultural competency of non-Indigenous staff [thus] improving Indigenous engagement;
- Indigenous people are able to use their networks informally to engage people in programs and services who may not otherwise participate; and
- Indigenous people can use their community networks to work across agencies in communities (Behrendt et al 2018: 30).

A key hurdle for both Aboriginal organisations and government policy makers is that the relevant issues are complicated and conceptually challenging, and may not lend themselves to straightforward or immediate solutions. **This problem will be no less so with the development of an Aboriginal Youth Justice Strategy where there may be time constraints on developing and implementing particular models and approaches.**

Further, a 'one size fits all' policy approach has been repeatedly demonstrated to be unworkable and unsustainable and is likely to produce sub-optimal outcomes (Hunt and Smith 2007). We have argued elsewhere that flexibility is fundamental to developing culturally legitimate processes and institutions (Behrendt et al 2018: 30-1). **The limitations of a 'one size fits all' policy approach has particular resonance for an Aboriginal Youth Justice Strategy where there may be a counter policy imperative to ensure state-wide consistency in approach and outcomes.** A core question then is how do we balance flexibility with consistency, and how in practical terms does this interact with self-determination at local, regional and state levels?

Aboriginal self-determination also opens up unique possibilities for an expanded role for Aboriginal community-controlled organisations (ACCOs) within the youth justice sector. In this context, it is worth noting the research which discusses some of the limitations of contemporary 'law and order' approaches to youth justice. The *Review of Effective Practice in Juvenile Justice* examined the evidence gathered over more than 30 years from empirical studies conducted in Australia, the United States, New Zealand and Europe. The Review showed the ineffectiveness of traditional 'get tough' methods of reducing juvenile crime, such as juvenile incarceration and overly strict bail legislation. The report concluded that not only do these methods tend to be ineffective in reducing recidivism among young people, but they are also among the most costly means of dealing with juvenile crime (Noetic Solutions 2010b). Aboriginal self-determination and an expanded role for ACCOs offer the opportunity to re-think our approaches to Aboriginal youth justice.

Questions: Self-Determination

How is a negotiation framework developed with local Koori communities in relation to the development of an Aboriginal Youth Justice strategy?

How can flexibility in approach to Aboriginal Youth Justice be achieved to allow for localised contexts and enable localised input?

How is state-wide consistency in an Aboriginal Youth Justice Strategy balanced with the requirement for flexibility and localised negotiation, input and tailored responses?

3. Shifting the Decision-Making Process

There is a long history to recommendations from various inquiries related to the need for Aboriginal self-determination and decision-making in youth justice. The child welfare sector also provides some examples of the potentialities and problems that can arise in transferring decision-making to Aboriginal communities and organisations.

(i) The Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody (RCADIC) dealt extensively with the issue of Aboriginal young people in the juvenile justice system. Many of the recommendations were designed to remedy the issues of over-representation and to enable a greater role for Aboriginal communities in juvenile justice design and decision-making. There was an emphasis on the greater use of diversionary mechanisms, realistic bail conditions, and arrest and detention as an option of last resort. A fundamental recommendation in relation to young people was the need for negotiation between authorities and Aboriginal communities on the causes of offending and the development of suitable responses (Recommendation 62). Associated with this recommendation were two further recommendations (235 and 236) which required that the primary source of information about Aboriginal young people should derive from Aboriginal communities and organisations; and that Aboriginal community-based and devised strategies were the most successful way of operating programs for Aboriginal youth.

(ii) Bringing Them Home

The Stolen Generations Inquiry reported in 1997 and its recommendations, in part, focus specifically on the importance of self-determination, including greater Aboriginal participation in juvenile justice decision-making. The Inquiry noted that self-determination could take many forms, and the level of responsibility to be exercised by Aboriginal communities must be negotiated with the communities themselves (NISATSIC 1997: 575–576). Recommendation 43 is the key recommendation regarding Indigenous self-determination. Part (c) of recommendation 43 authorises negotiations to include the complete transfer of juvenile justice and/or welfare jurisdictions, the partial transfer of policing, judicial and/or departmental functions, or the development of shared jurisdiction where this is the desire of the community (NISATSIC 1997: 580). Recommendation 44 of the Stolen Generations Inquiry requires the development of legislated national minimum standards for the treatment of Aboriginal children and young people. The recommended national minimum standards and rules relevant to youth justice cover:

- principles relating to the best interests of the child;
- the requirement for consultation with accredited Indigenous organisations thoroughly and in good faith when decisions are being made about an Indigenous young person, including decisions about diversion, bail, and other matters;
- minimising the use of arrest and maximising the use of court attendance notices;
- notification of an accredited Indigenous organisation whenever an Indigenous young person has been arrested or detained;
- protections during the interrogation process;
- minimising bail and detention in police cells;
- prioritising the use of Indigenous-run community-based sanctions;
- the consideration of relevant sentencing factors; and

- the minimisation of custodial sentences.

The development of national minimum standards recognised the need for immediate change in the level of control by Aboriginal communities and organisations in the decisions that affect the future of their children and young people. The Inquiry also envisaged that Aboriginal organisations involved in juvenile justice (and child welfare) decision-making would be accredited.[2]

(iii) The Royal Commission into the Protection and Detention of Children in the Northern Territory

The Royal Commission into the Protection and Detention of Children in the Northern Territory (RCPDCNT) acknowledged the importance of Aboriginal self-determination and its central place in the aspirations of Aboriginal and Torres Strait Islander peoples. The Commission referred to Articles 18 and 19 of the Declaration on the Rights of Indigenous Peoples which sets out the right of Aboriginal people to participate in decision-making and for their free, prior and informed consent to be obtained during these processes (RCPDCNT 2017a: vol 1, 258).

> The full realisation of these measures would ensure that decisions are informed by Aboriginal aspirations and would position them as key decision-makers in matters that affect their lives, rather than passive recipients of government largesse. The application of these rights is fundamental to the development of effective Aboriginal governance mechanisms, by allowing communities to determine and operationalise their own priorities (RCPDCNT 2017a: vol 1, 259).

The Royal Commission argues for the development of 'shared network governance' by which it means 'the forums and rules through which community representatives, service providers and other stakeholders, including government, engage together to improve the coordination and effectiveness of the service system' (RCPDCNT 2017a: vol 1, 264). The main recommendations relate to developing partnerships (Recommendations 7.1, 7.2, 7.3) built on principles of (*inter alia*) local solutions, local decision-making, shared responsibility and accountability, and the centrality of family and community to the wellbeing of children and young people.

(iv) Lessons from Aboriginal Child Welfare

Child protection legislation in various parts of Australia provides some examples of Aboriginal decision-making in government processes relating to children. This section considers some lessons which might be drawn from these examples.

Section 18 of the Victorian *Children, Youth and Families Act* 2005 provides for the delegation of authority for most of the functions of the Secretary, Department of Human Services to the 'principal officer' of a recognised Aboriginal organisation to make decisions on the care and custody of Aboriginal children. One potential limitation is that the delegated powers are dependent on the Secretary exercising their discretion to transfer these powers to an Aboriginal agency and this is still to be fully implemented in Victoria.

[2] Recommendation 45b: That the negotiations for national minimum standards legislation develop a framework for the accreditation of Indigenous organisations for the purpose of performing functions prescribed by the standards (NISATSIC 1997: 583).

Generally, in Australian child protection legislation there is some accommodation of Aboriginal concerns about permanently placing children outside their community. Section 323 of the Victorian *Children, Youth and Families Act* 2005 provides that when an Aboriginal child is to be placed permanently with a non-Aboriginal person, and Aboriginal agency must recommend the placement.

In general, Australian child protection legislation requires that Aboriginal organisations participate in significant decisions that involve Aboriginal children (eg section 12, *Children, Youth and Families Act 2005).* One significant limitation is that there is 'little structural support or guidance across the legislation for its implementation' (Libesman 2017: 324).

The transfer of decision-making to Aboriginal organisations in child protection far exceeds what has occurred to date in the juvenile justice sector. However, overall, Libesman (2017: 325) concludes that:

> While the reforms discussed above incorporate Indigenous people's input into decisions about their children, they do not develop an Indigenous pathway for participating in the care and protection of their children. Rather, they provide an avenue for Indigenous participation in the mainstream departmental process.

There is thus a gap between the formal (legislative) recognition of Aboriginal powers in decision-making and the reality of limitations on Aboriginal organisations in operationalizing these powers.

There is also a significant difference between Aboriginal participation in decision-making into existing structures, programs and processes, and Aboriginal design of those of structures, programs and processes.

Questions: Shifting the Decision-Making Process

How do we ensure there is no gap between formal (legislative) recognition of Aboriginal powers in decision-making and the reality of limitations on operationalizing these powers?

Is there a need to consider the accreditation of Aboriginal organisations involved in youth justice decision-making?

How do we ensure Aboriginal design of structures, programs and processes, rather than simply Aboriginal participation in decision-making into pre-existing structures, programs and processes?

4. Aboriginal Young People's Voices

The Victorian Indigenous Youth Advisory Council was established in 2003. It was renamed as the Koorie Youth Council (KYC) in 2012. The KYC is the representative body for Aboriginal and Torres Strait Islander young people in Victoria and advocates to government and community to advance the rights and representation of Aboriginal and Torres Strait Islander young people. In 2018 the KYC released the *Ngaga-dji* report (Cerreto 2018) which is the first time the stories of Aboriginal and Torres Strait Islander children in Victoria's youth justice system have been heard. It presents a broad plan for change across the various systems responsible for the over-representation of Aboriginal children in youth justice, including police, community, family and justice services.

There is a recognised need to hear and act upon the voices of Aboriginal young people in relation to youth justice and to recognise more generally that self-determination requires an understanding of what the principle means explicitly for Aboriginal young people themselves. Young people and children need to be seen as people – and self-determining – not simply as objects of the youth justice system. There is also a requirement that young people understand legal processes. It is not possible for young people to make informed decisions if they do not understand the relevant processes.

The *Ngaga-dji* report sets out three guiding principles to successfully implement solutions.

Ngaga-dji Report: Guiding Principles

Self-determination:

Aboriginal peoples have the right to self-determination. Self-determination enables Aboriginal people to freely determine their lives. Self-determined solutions bring deep knowledge and community ownership to supports for our children and future generations.

Youth participation:

To solve systemic problems like those affecting Aboriginal communities, we need solutions from the people who live through them. By using youth participation we actively listen and include children's voices in decision-making processes. This helps provide relevant and effective solutions that change children's and communities' lives for the better.

Culture, family, Elders and communities:

Strong connections with culture, family, Elders and communities are the foundations that enable Aboriginal children to live happy, healthy lives. By embedding the strengths of our culture, family, Elders and communities in solutions, we can address the disadvantage that leads many children into the quicksand of the justice system (Cerreto 2018: 42).

Further, the *Ngaga-dji* report identifies four broad areas for solutions:

Solution 1: Give children services that work

- Embed family, culture and community at every stage of supports to keep children connected within safe, supportive networks.
- Support children who are victims of crime with access to justice and early, community-centred services to address trauma resulting from removal, family violence, homelessness and other abuses.
- Provide a capable and consistent workforce across youth services.
- Provide culturally safe services that support young people's diverse identities, particularly those facing discrimination in the form of ableism, sexism, transphobia and homophobia.
- Use youth participation to focus services on the end goal of independence with skills that strengthen connections within local communities.

Solution 2: Keep children safe and strong in their culture, families and communities

- Support local Aboriginal organisations to ensure everyone has access to their culture.
- Support community designed and led responses to end intergenerational poverty.
- Strengthen community resources and infrastructure.

Solution 3: Community designed and led youth support solutions (pp50-1)

- Aboriginal Justice Forum to embed the *Ngaga-dji* solutions in the Koori Youth Justice Strategy.
- Sustainably resource Aboriginal community organisations to develop youth support systems that support children in their communities with localised services across health, social and emotional wellbeing, education, family, legal, cultural, and drug and alcohol services.
- Community-based out-of-home care and child protection.
- Raise the age of criminal responsibility to at least 14.
- End the imprisonment of children.

Solution 4: Create just and equitable systems

- End systemic abuses and institutional racism using self-determination, youth participation and cultural responsiveness.
- Create an inclusive education state that supports children's needs and pathways to independence.
- End police violence and discrimination.
- Create an informed Victoria that is free of discrimination.
- While developing a self-determined youth support system, strengthen and provide full access to existing services that embed Aboriginal knowledge systems and values (Cerreto 2018: 46-53).

Within many of these broad areas there are specific recommendations. These will be considered later in this report under the relevant sections.

It is also worth noting that in line with the view that Aboriginal young people's views on the youth justice system should be heard and acted upon, the Royal Commission into the Protection and Detention of Children in the Northern Territory recommended that:

> The Northern Territory 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. The Representative Council of Children should be located in and supported by the Children's Commissioner (Recommendation 2.1). (RCPDCNT 2017b: 27).

Questions: Aboriginal youth engagement strategy

How do we work with the Koori Youth Council to ensure Aboriginal young people's voices are heard in the development of the strategy and to develop an ongoing mechanism or body for youth participation and engagement in strategy, policy and program development, implementation, monitoring and evaluation.

Is there merit in considering recommendation 2.1 from the Royal Commission into the Protection and Detention of Children in the Northern Territory, particularly in respect to a legislatively established Representative Council of Children comprised of young people who have experienced out-of-home-care / youth justice?

5. Legal Representation (Balit Ngulu)

Effective, holistic and culturally appropriate legal representation for Aboriginal young people underpin many of the substantive issues which are discussed in the following pages. The Victorian Aboriginal Legal Service (VALS) established Balit Ngulu (meaning strong voice) in 2017 as an integrated and culturally appropriate legal service for Aboriginal children and young people. The specialist legal services were seen as particularly important in the context of increasing rates of child removal and incarceration.

Balit Ngulu was premised on the evidence that Aboriginal young people move in and out of the child protection and youth justice systems with patchy or little legal representation. VALS found that 'these children often come into contact with these systems due to intergenerational trauma, substance misuse, family violence, grief and poverty. Once they become part of these system they often rapidly move down a path of disconnected care, separation from their community and culture and perpetuate the existing cycle of loss, trauma, intermittent incarceration and disadvantage' (VALS 2018).

VALS was forced to close Balit Ngulu in September 2018 because of the lack of ongoing funding for this service from State or Federal governments. It was a major recommendation of the *Ngaga-dji Report* that the service be funded and supported to continue (Cerreto 2018: 53).

Questions: Legal Representation for Aboriginal Children and Young People

How do we ensure funding for a specialist holistic legal service such as Balit Ngulu?

6. Disrupting the Trajectories and Pathways from Child Protection and Out-of-Home Care into the Youth Justice System

The over-representation of Aboriginal children moving from out-of-home-care (OOHC) into the youth justice system is well established. Australian data shows that children subject to Care and Protection Orders are 20 times more likely to also be under juvenile justice supervision than children who are not subject to such orders (AIHW 2016ba). The same study found 41 per cent of young people in youth justice detention were also in the child protection system in the same year (AIHW 2016a). Indigenous youth were 17 times as likely as non-Indigenous youth to be in child protection *and* youth justice (AIHW 2018: 13).

Young people with experiences of child protection and OOHC placements are more likely to come into contact with the youth justice system at a younger age. For youth justice clients with child protection notifications, 21 per cent first entered supervision aged 10-13 compared with 6 per cent of those with no child protection notifications (AIHW 2012: vii). Three in five (60 per cent) of children aged 10 at their first youth justice supervision were also in child protection (AIHW 2016a: vi). Indigenous children are also more likely than non-Indigenous children to come into contact with welfare from a younger age, with median ages of 7 and 8 respectively (AIHW 2016b: 16), and are twice as likely to be placed in care before the age of 16 (Haysom et al 2014: 1009). Young Indigenous males are the most likely group to be both in OOHC and under youth justice supervision (AIHW 2018: 15).

The over-representation of children from OOHC in the youth justice system is a matter of long-standing concern in Victoria. The Commission for Children and Young People (2016: 97) acknowledged 'that many of the young people involved with youth justice have previously been placed in out-of-home care and have often been let down by a system that does not adequately support their transition to adulthood'. Victoria Legal Aid (2017) found in a recent review of their child protection client data found that:

- Almost one in three young people we assist with child protection matters who are placed in out-of-home care later returns to us for assistance with criminal charges;
- Young people we assist placed in out-of-home care are almost twice as likely to face criminal charges as those who remain with their families;
- Young people we assist placed in out-of-home care are more likely than other children to be charged with criminal damage for property-related offending (Victoria Legal Aid 2017: 1).

McFarlane found in a review of 160 case files in the NSW Children's Court that children in OOHC appeared before the Children's Court on criminal charges at disproportionate rates compared to children who were not in out-of-home care.

> The out-of-home care cohort had a different and negative experience of the justice system, entering it at a significantly younger age and being more likely to experience custodial remand, than children who had not been in out-of- home care. While both cohorts shared many of the risk factors common to young offenders appearing before the Children's Court, the out-of-home care cohort experienced significant additional disadvantage within the care environment… such that living arrangements designed to protect them from harm instead created the environment for offending (McFarlane 2017: 1).

It is widely accepted that situations arise where police are called to an OOHC residential facility to deal with behaviour by a young person that would be unlikely to come to police attention had it occurred in a family home. McFarlane notes that:

> The failure of care homes to implement appropriate processes to manage children who are likely to have experienced significant trauma leads to an over-reliance on criminal sanctions, notably in response to children who abscond or go missing from care placements and those with cognitive impairment or mental health issues. This literature points to evidence that children in OOHC, particularly those in residential care, are commonly arrested for minor matters that ought not to have incurred a police response …It has also established that the OOHC cohort progresses quickly and inexorably into the CJS when their peers do not, often for breach of bail conditions arising from over-scrutiny and policing of residential care homes, and a lack of alternate diversionary options and accommodation placements (McFarlane 2017: 5-6)

Similarly, Victoria Legal Aid found that:

> While serious offending by young people may warrant a police response, we also see cases where police have been called to a residential facility to deal with behaviour by a young person that would be unlikely to come to police attention had it occurred in a family home. We have represented children from residential care who have received criminal charges for smashing a cup, throwing a sink plug or spreading food around a unit's kitchen. As the case studies in this report demonstrate, frequently children who may never have had a criminal charge prior to entering care, quickly accrue a lengthy criminal history due to a cycle of "acting out" followed by police responses which develops in a residential unit (Victoria Legal Aid 2017: 1).

This has a significant impact on Aboriginal children in Victoria because of their over-representation among children in care.

There have been comprehensive recommendations in Victoria on improving the child protection system for Aboriginal children, and more specifically on preventing the criminalization of Aboriginal and other children while in OOHC (Commission for Children and Young People, 1000 Taskforce Report, 2016; Victoria Legal Aid 2017). Victoria Legal Aid found that 'further guidance, support and training for care providers are clearly needed about more therapeutic ways to manage challenging behaviour so as to minimise the need for police involvement in cases where there is no immediate danger to staff or other young people' (Victoria Legal Aid 2017: 2). It was found that the UK adoption of protocols in residential care facilities aimed at reducing young peoples' contact with the criminal justice system 'provided a clear and consistent structure for decision-making in residential units when a child exhibits challenging behaviour'. The protocols together with better training for residential staff led to significant reductions in criminal charges against children in residential care (Victoria Legal Aid 2017: 2).

The *Ngaga-dji* report has identified the need to 'stop the criminalisation of young people in care by supporting workers to eliminate children's contact with the justice system' (Cerreto 2018: 51). Victoria Legal Aid has recommended that the 'Victorian government work with relevant stakeholders to develop and implement an inter-agency Protocol to reduce the

contact of young people in residential care with police and the criminal justice system, akin to that recently implemented in NSW' (2017: 2).

The Commission for Children and Young People (2016: 18) has recommended:

> 6.23 DHHS to work in partnership with the ACF [Aboriginal Children's Forum] on developing a strategy to divert Aboriginal children in out-of-home care from entering or progressing in the youth justice system. This strategy should include building the capacity of ACCOs to develop and implement intensive diversionary strategies along the justice continuum as well as ensuring there are adequate resources and workers in the Koori Youth Justice program and the Koori Youth Justice Intensive Bail Support program.

The Commission further recommended that:

> 6.24 To assist in the development and implementation of recommendation 6.23, the Commission also recommends that DHHS collects data and reports on the gender, age, locality and number of Aboriginal children and young people who are:
>
> - on community-based orders
> - on remand
> - serving custodial sentences
> - dual child protection and youth justice clients.
>
> This data is to be reported by DHHS to the ACF and the Commission on a quarterly basis.

Questions: Disrupting the Trajectories from child protection/OOHS into Youth Justice

Have the recommendations from the Commission for Children and Young People and Victoria Legal Aid been implemented?

Are there other issues which need to be addressed in this context? Are the existing recommendations and responses sufficient?

7. Prevention and Early Intervention to Reduce the Number of Aboriginal Young People Entering the System

(i) Defining Early Intervention

Early intervention can be defined in various ways. It can refer to intervention which occurs in the early developmental stages of a child's life, or it can refer to intervention which occurs at the stage where a child or young person is at risk of offending or re-offending.

> The term 'early intervention' when considering the youth justice system describes the variety of activities, programs and initiatives designed to address problem behaviours in children and young people who may have reached a difficult point in their lives and have started exhibiting early signs that they are heading down a negative path. The goal of early intervention is to reduce risk factors, strengthen protective factors and provide children and young people with life skills and family and community support. Prevention programs are aimed at reducing the likelihood a child may offend or reoffend through addressing individual risk factors for offending behaviour (RCPDCNT 2017a: vol 2b, 411).

In the Victorian context, community-based Koori Youth Justice Workers support young Aboriginal people at risk of offending (that is, they engage in early intervention), as well as those children on community-based and custodial orders. The Program is discussed more fully later in section 14 of this report (Alternative Sentencing Options to Detention).

(ii) Evidence

The NT Royal Commission found that international analysis of prevention programs has shown substantial evidence in the capacity of family-based programs, including behavioural parent training, to reduce youth delinquency and antisocial behaviour. According to the Royal Commission, 'there is also strong evidence that family-focused interventions can be built into a public health approach to improving parenting capacity. School retention and engagement are important factors in reducing the risk of criminal justice involvement' (RCPDCNT 2017a: vol 2b, 412). Family-focused and education-based early interventions and the public health approaches as a preventative strategy to both child protection intervention and subsequent youth justice involvement are the subject of detailed discussion in Chapter 38 of the Royal Commission's report.

> ***Case study: The Pathways to Prevention Project, Inala, Queensland.***
>
> The finding that family support improved children's social relationships and capacities for self-regulation (or the management of negative emotions) further strengthens the argument that family support should have a more central place in youth crime prevention… While child social skills training, especially through cognitive behavioural approaches, has increasing evidence for its effectiveness, our findings suggest that improving parent efficacy and supporting families more broadly should be a complementary strategy to child-focused methods. Indeed, in the broader field of child development there is a growing call for approaches that strengthen 'the resources and capabilities of adults who care for them rather than continuing to focus primarily on the provision of child-focused enrichment…'

Source: Homel et al (2015: 9)

However, Higgins and Davis (2014) note, specifically in relation to Aboriginal children, that there is little rigorous research and evaluation evidence to show whether prevention and early intervention programs are working to reduce the over-representation of Aboriginal young people in the criminal justice system.

> Few programs have been comprehensively evaluated and shown to be effective. Despite this, promising practices identified in evaluations include:
> - programs that are designed for the right participants and address identified risk factors
> - adequately resourced interventions that are based on clear program logic
> - family-based programs, including behavioural parent training
> - community involvement and engagement (including Indigenous-specific programs where possible)
> - cultural appropriateness and cultural competence at all levels of program design and delivery (Higgins and Davis 2014: 1-2).

The Aboriginal Family Wellbeing program discussed below is an example of an Aboriginal program that has been evaluated and shows positive outcomes.

(iii) Aboriginal Family Wellbeing Program (FWB)

The Aboriginal FWB program focusses on the family as the site of intervention. The FWB program attends to the social and emotional wellbeing needs of the family to create supportive environments for children to thrive. Improving the health and wellbeing of children is vital to ensuring that good health continues into adulthood which has implications for positive social, cultural, educational and economic outcomes. The FWB was developed in the early 1990s by a group of Aboriginal leaders in Adelaide who had been affected by the Stolen Generations. The 150-hour program is enriched with material from complementary philosophies and empowerment principles and seeks to empower participants through personal transformation that involves harmonising physical, emotional, mental and spiritual aspects of life and applying this to practical, day-to-day living (<https://www.lowitja.org.au/page/research/research-categories/family-and-community-health/families/completed-projects/family-wellbeing-program-empowerment-research>).

The Family Wellbeing (FWB) program is an accredited six-month Certificate II training program delivered through the Australian vocational education and training sector. It is also provided in flexible delivery mode to small groups. It was developed in 1993, by and for Aboriginal people. The FWB program aims to empower Aboriginal and Torres Strait Islander individuals, families, organisations and communities to take greater control over their lives, to participate fully in education and employment, and improve health and wellbeing.

Evaluations of the FWB program over the last ten years demonstrate that program participants experienced improvement in domestic violence, alcohol and drug abuse, suicide prevention, school absenteeism, education, welfare dependence and employment. FWB can impact peoples' lives by developing resilience, problem-solving abilities, respect for self and others, and the capacity to address social issues. **Source**: The Lowitja Institute (2015: 1).

(iv) Night patrols

A considerable body of literature has considered the example of Aboriginal night patrols in Australia (Blagg 2003; Blagg 2008; Porter 2014). These studies found that the potential of night patrols include: evidence of improved community safety, the mentoring and care-taking of Aboriginal youth and improved relations with the local police. Challenges include difficulties in attracting and retaining funding, reliance on volunteers and low-paid staff, vulnerability to state co-option. While little information exists about Aboriginal night patrols in the state of Victoria, the case study below (Redfern Streetbeat) raises the idea of joint-delivery and shared responsibility of diversionary mechanisms for Aboriginal youth.

The NT Royal Commission found that night patrols are aimed at preventing antisocial and violent behaviours through culturally appropriate interventions using conflict resolution and drawing on local knowledge and understanding. Night patrols work preventively through community safety plans, respond to potentially violent situations to prevent escalation and take at-risk persons, such as those who are intoxicated, to safe places. Night patrols have been highly valued by Aboriginal communities in the NT as a community-owned justice response. The Royal Commission noted a 2011 review which found that:

> Building community safety requires a more 'coordinated approach to service delivery at the community level' and night patrols would be most successful if they established 'effective partnerships with other related community support services (such as police, safe houses, sobering-up shelters and health clinics) at a local level'. Again, this suggests the need for community-operated services such as night patrols to be supported as equal partners in a place-based shared network governance model instead of operating as isolated services trying to navigate the complexities of an externally managed service system (RCPDCNT 2017a: vol 2b, 285).

Case study: Redfern Streetbeat

The Redfern Streetbeat commenced operations in 1995 and is a distinct entity from the earlier AHC self-policing initiative. The service has a long history, operating with varying degrees of management by local Aboriginal organisations and individuals. The Redfern Streetbeat originally commenced as a trial experiment in policing youth justice issues, funded by the New South Wales Drug Programs Unit, a department of the NSW Police Service. The objective of the Streetbeat at this time was to provide transport through the Streetbeat outreach, as well as caseworker and counselling support. In interviews the researchers employed by the Drug Programs Unit stated that they were inspired by what was happening in Yuendumu which involved female Elders managing alcohol related matters in town.

The researchers employed by the Drug Programs Unit were aware from the beginning that if the initiative was to prosper, community engagement was essential. A number of meetings were held at the Settlement in Redfern about whether local organisations and local Elders thought it was a good idea and were willing to manage such a patrol, and how such a patrol might operate. Patrol Manager, Alex McAlees comments on this transition:

There were some teething problems but Lauri worked out that in order for the service to work, the control would have to go to an Aboriginal organisation. So she approached Brenda Maling who was the then coordinator of the South Sydney Aboriginal Resources Centre [an

Aboriginal Corporation under the CATSI Act] *and Brenda took on the auspice of the whole service including the managing of the bus etc. and that's when it actually became embedded in the community and the young people that used it started identifying very strongly that is was their service.* (Alex McAlees, Redfern Streetbeat)

From 1997, the Streetbeat was managed by the South Sydney Aboriginal Corporation Resource Centre ('SSACRC'), and Aboriginal and Torres Strait Islander Corporation, under the management and direction of respected local Elder Brenda Mailing. From this point, the Streetbeat started to run in conjunction with the Redfern Aboriginal Corporation Community Development and Employment Program ('CDEP'). The local Elder had strong connections in the South Sydney Aboriginal community, which allowed the program to forge links and better interact with the families of the young people they with whom they had dealings. The Co-ordinator (Alex McAlees) was responsible for overseeing the daily operation of the bus. The patrol was also assisted by a pool of volunteers, among them respected local Elder Willie Leslie. An Aboriginal flag was painted on the side of the bus, though the workers would pick up Aboriginal and non-Aboriginal kids. At this time the Redfern Streetbeat consisted of one paid driver and a pool of volunteers and CDEP participants. During the initial period of operations (1995-1997) the Streetbeat covered a large geographical area spanning the CBD, inner-west and eastern suburbs: including Redfern/Waterloo, Glebe, the inner-west and La Perouse. The Streetbeat thus covered a considerable distance, transporting young people across the entire Sydney metropolitan, inner-west and inner-south suburbia. In 2003, after concerns were raised by drivers concerning fatigue, meetings were held to set up a separate bus to service the La Perouse area. There was also some evidence of tensions existing between the Aboriginal communities of La Perouse and Redfern/Waterloo.

A Memorandum of Understanding between SSACRC and the NSW Police Service was negotiated in 1998 which outlined the terms and responsibilities for the use of the bus. In 2000, a second MOU was negotiated between the SSACRC and the Redfern Local Area of Command of Police for the Streetbeat Bus. A short trial of the Redfern Streetbeat in its revised form was conducted between June and September 1997, producing the *Report on the Trial of the Redfern Streetbeat*. The report found that there was a need for such a service in the area, however that the mode of operation at the time was not the most effective (Forell 1998). The report suggested that Streetbeat integrate with existing youth services to better support the service and also consider utilising two staff on the bus at one time to better support young people and record data. As a result of the research findings, SSACRC sought the support of local youth and community services and consulted with them to gain ideas and suggestions to improve the Streetbeat. Hence in 1999, the Redfern Streetbeat formed a partnership with South Sydney.

Current Operation of the Redfern Streetbeat

The Redfern Streetbeat provides a safe mode of transport for young people in urban Sydney. Although based in Redfern/Waterloo the Redfern Streetbeat covers a very large geographical area. The most common areas patrolled by the Streetbeat include Waterloo, Redfern, Glebe and Marrickville. Other common destinations included St Peters, Tempe, and Leichhardt. The Streetbeat thus covers a considerable distance—at roughly a 10 km radius from the central Redfern/Waterloo area. Contact is most commonly established via a phone call from the young people, though a small percentage of calls come from other services, including the police, refuges and the Department of Community Services ('DOCS'). In addition to this, contact is commonly established on the street when the young people see the vehicle and wave it down.

The patrol service currently operates Friday and Saturday nights between the hours of 10pm and 3am. The initiative also includes the Casework and Counselling Program which conducts intensive casework and counselling with Aboriginal young people during the day. Although these are the official hours, in real terms, workers finished between 3:30-4:00am due to logistic and practical realities. There were also significant seasonal differences; in the summertime the bus started earlier (at 8pm) and workers watch the Midnight Basketball, though the transport continues to operate from 10pm to 3am/4am as per usual. During the time I spent observing the patrol operations (11 February 2011 until present) the bus operated on Fridays and Saturdays and, by my conservative estimate, was used by at least 30 young people per night. On average, many more young people used the bus in the summer months than in the colder winter months. The staff of the Redfern Streetbeat is made up of one paid driver and several volunteers. In principle the service is provided for *all young people*, though in practice the large majority of young people who use the service and nearly all of the 'regulars' are Aboriginal. In the words of one patrol worker, "it's [Streetbeat] not specifically Aboriginal, but most of the kids are".

Source and Further Reading:

* Porter, A. (2016) 'Night Patrols, Counter-Policing and Safety' *Theoretical Criminology.*

(v) Other Case Studies

Case study: The Murri School

The Murri School is an Aboriginal and Islander Independent Community School in Brisbane, Queensland. It is Aboriginal and Torres Strait Islander-owned and run and caters for children from preschool to Year 12. Around 95% of students are Aboriginal and Torres Strait Islander and 60% are the subject of a child protection, out of home care or youth justice order.

The Murri School is an important example in the context of family and child protection for several reasons. It provides a multidisciplinary approach to schooling that is healing and trauma-informed. It supports the family unit as well as the child in a culturally supportive environment. It is producing positive results for children and families.

The school fosters a 'community of care' approach, where children, families and agencies come together to understand and address the impacts of intergenerational trauma through a healing program focused on therapeutic intervention; service coordination and family case work; family camps; cultural and group activities; and (re)connection with educational and sporting activities. The Murri School can be described as a 'wrap-around service', where a bi-cultural healing team of health, family support and cultural experts provide a point of contact and referral to a broader network of education, health, child protection, housing, legal and counselling services.

In addition to improvements in the social and emotional wellbeing of young people, positive results include:

* long-term: improved participation and classroom behaviour, improved functioning, decreased time involved in the child protection system and increased help-seeking behaviours by families

* medium-term: increased referrals and uptake of support services by families, improved coping skills, families prioritising the wellbeing needs of children, and

* short-term: families feel safe and respected; children and families engage with and participate positively in healing activities; improved key stakeholder relationships.

A *Cost Benefit Analysis of the Murri School Healing Program* conducted by Deloitte Access Economics was commissioned by the Healing Foundation. The Analysis found that as a result of the healing program, there was improved mental health, less contact with child protection and less contact with the justice system.

The total economic benefit attributed to the Murri School is $6.5 million which is approximately $28,248 per student compared to the average Aboriginal student in a state school. The largest benefit is the savings from decreasing usage of child protection services, $17,105, followed by the improvements in mental health, $4,425.

The benefit cost ratio (BCR) for the healing program at the Murri School was calculated by dividing the benefits per student, $28,248, by the costs, $3,190. This results in a BCR of 8.8. This indicates that, on average, for every additional dollar invested in the healing program at the Murri School there is an $8.85 return in benefits (Deloitte Access Economics, Cost Benefit Analysis of the Murri School Healing Program, February 2017 p. v).

Source: RCPDCNT (2017a: vol 1: 280-81)

Case study: Tribal Warrior's Clean Slate Without Prejudice, Redfern

Tribal Warrior is a not-for-profit community organisation that operates a range of initiatives including mentoring programs, training programs and other cultural activities in Redfern, Sydney. One of its initiatives is Shane Phillips's 'Clean Slate Without Prejudice' ('CSWP') which started in 2009 as a partnership between NSW Police (at the level of the Redfern Local Area Command) and the Tribal Warrior Association. Clean Slate Without Prejudice is centred around a boxing program based at the National Centre for Indigenous Excellence which aims to provide an opportunity for Indigenous young people and local police officers to exercise and socialise in an informal setting. CWSP works with the both young men and women, and was commented upon as being a positive partnership involving Aboriginal and Torres Strait Islander people in Redfern and police.

The program is a grassroots community, holistic exercise, assistance and referral program focused on young people. Participants undertake boxing training three mornings per week and are offered assistance with accommodation, employment and training. Police officers and Aboriginal leaders train with the young people. Young people are referred by schools, social services, courts or the police. Participation in the program can form part of a suspended sentence and young people sentenced to prison can now participate. While not able to be verified as attributable to the program, it has been reported that between 2008 and 2014 robberies in the area dropped by 73 per cent, assaults on police dropped by 57 per cent and

break-and-enters nearly halved. Initially, the Clean Slate program was only offered to boys, however female Aboriginal mentors have now been employed, to encourage greater participation by young women.

In the words of the Youth Liaison Officer of the Redfern Local Area Command, "the boxing is the tip. That's what you see, but everything else behind it is probably more important."

In the words of one of the case workers, "the beauty of the Clean Slate Without Prejudice program lies in its simplicity: discipline and routine. Monday, Wednesday, Friday, you get up and train. Follow the drills, buckle down; when you're told to run, you run. Good habits are addictive. Train hard in the early morning and you feel great all day. You start to crave that feeling. Three nights a week you're more likely to head to bed than out onto the streets, because you've got to be at the gym again at six. A year later, not one of the 10 boys on Freudenstein's list had committed an offence."

The program is thought to have a number of positive aspects: participants attend morning sessions, and are then ready to go to work or study early; they are less likely to be out on the street late at night; the breakfast following training is an opportunity for participants to discuss issues affecting them; and the adults who attend can provide support, advice and mentoring.

The program takes a strengths-based approach, not a deficits-based approach. The Chief Executive Officer of the Tribal Warrior Aboriginal Corporation described the impact the program has had:

'Clean Slates has changed the way we interact with each other, the way policing happens, the way that police deal with Indigenous young offenders here, and with community-based policing. The idea is that they just do exercises in the morning at the 6.00am program. Everyone drops their guard, and at the end of the session, everyone's equal, and they learn about each other. After that, the kids go on to school or work, the police go to work, and when they see each other in the street, there's something simple that they do together, and they become friends. So it helps in the way the youth form, and if you're in a police car and you see one of the young guys who may in the past have had some difficulty with you, or vice versa, and you say, 'How y'a going? ' And they may be able to influence the other people that are with them. It sounds really simple, but it's huge. It's the human level of life.'

While research on Tribal Warrior's CSWP remains very limited, in 2016 the initiative won gold at the National Australian Crime and Violence Prevention Awards.

Sources and Further Reading: RCPDCNT (2017a: 212-4); Tribal Warrior CYWP website: http://tribalwarrior.org/clean-slate-without-prejudice/

(vi) Victoria

Arising from the Aboriginal Justice Agreement, in Victoria there has been a grant program, Frontline Youth Initiatives, which has funded prevention and early intervention initiatives on an annual and triannual basis since 2005. The Regional Aboriginal Justice Advisory Committees (RAJACs) encourage and support the development of relevant submissions by ACCOs and also sit in a governance group that makes recommendations on which submissions are to receive funding. These grants have funded many of the activities noted

below in the Aboriginal Cooperatives case study. The Koori Youth Justice Program funds the Koori Youth Justice worker, the Koori early school leaver, and the Koori Youth support service programs which also engage in early intervention work. One of the key issues for grant-based prevention and early intervention initiatives has been securing ongoing funding and support for successful initiatives.

Case study: Culturally appropriate programs: Aboriginal Cooperatives Victoria

A number of Aboriginal cooperatives from around the state have developed and engage Aboriginal youth in programs that divert them away from criminal offending. Some examples are: The Mildura and District Aboriginal Services, which offers Youth Justice Programs and Early School Leavers Program; Ballarat and District Aboriginal Cooperative, which offers Youth Services including after school programs and oversees the Aboriginal youth and Victoria Police teams that enter the annual Murray Marathon teams; and Dandenong and District Aboriginal Cooperative Limited, which offers youth services that meet each week to support young people in their school work, the aspirational goals and other challenges in life, as well as referrals into other supports.

In addition to the youth specific programs, Aboriginal cooperatives have a range of programs that support families with their parenting and life skills and provide cultural connectivity. Particularly in the regional areas… there is greater opportunity for people to be 'on country', it is possible that these programs could be utilised to meet the ends of diversion in a culturally safe space.

Source: Victorian Aboriginal Legal Service (2016: 4).

Questions: Prevention and Early Intervention to Reduce the Number of Aboriginal Young People Entering the System

Early intervention strategies are important as a preventative strategy to both child protection intervention and subsequent youth justice involvement. Early intervention strategies can take various forms and this section of the report has canvassed various examples. These include family-based and education-based early interventions, cultural initiatives such as the Yiriman Project (see Section 8), and community initiatives such as night patrols and recreation-based interventions such as Clean Slate Without Prejudice (Redfern). Many early intervention strategies are incorporated within broader programs that are coupled with the possibility of referral from justice agencies. For example, Clean Slate Without Prejudice can also include participation by young people as part of a suspended sentence. Some early intervention strategies such as those coupled with night patrols show the importance of shared responsibility of diversionary mechanisms for Aboriginal youth, others such as the Family Wellbeing Program are operated solely by Aboriginal organisations.

What type of early intervention strategies are going to be best suited to the Victorian context? Family intervention? Education and school retention? Community safety?

What existing ACCOs are available or suited to taking on the responsibility of early intervention programs? What is the effectiveness of the Koori Youth Justice Program in the context of early intervention? How can suitable funding arrangements be developed for the ongoing sustainability of programs?

8. ‘First Contact is the Last’. Diversion and Support at First Contact with Police

The aim of ‘First Contact is the Last’ is to increase responses and support for young people at an earlier stage in the cycle of offending particularly from first point of contact with police. Possible interventions include changes to police cautioning process (covered in Section 9); community-based pre-charge diversion, improved responses to early offending and cultural strengthening.

The NT Royal Commission has noted that when early intervention fails and young people engage in offending behaviours,

> Responses should be focused on diverting them away from the formal court pathway. Diversion responses should be based upon the risks and needs of the individual… Alternative diversion programs generally have a greater impact on reducing recidivism than formal engagement with the courts… Alternative programs are more likely to respond to the root causes of offending behaviours without the counter-productive consequences of participation in the criminal justice process (RCPDCNT 2017a: vol 2b, 413).

(i) Differentiated Responses

A ‘one size fits all’ model of diversion at first contact with police may not target the diverse needs of young people. There needs to be a genuine spectrum of options available which offer alternatives that are more likely to support rehabilitation. Some young people will be at low risk of re-offending or their offences will be minor such that issuing a caution and taking no further action will be an appropriate response. The NT Royal Commission has noted that

> Cautions must be considered in all cases involving children and young people. Where police consider a caution to be inappropriate, the presumption must be that intervention and diversion to alternative programs will be required. Young people who present with higher risks and needs should be responded to with a higher degree of intervention, and supported to engage with services and activities that target their particular individual assessed risks and needs (RCPDCNT 2017a: vol 2b, 413).

According to the NT Royal Commission, programs should fit into the following categories:

- non-residential programs based on individual participation;
- non-residential programs based on group participation, and
- residential programs focused on the particular needs of program participants (RCPDCNT 2017a: vol 2b, 414).

(ii) Features of Successful Youth Interventions

The NT Royal Commission considered the evidence which underpins successful diversionary programs and noted the following:

- **Timely referral, assessment and participation:** To be most effective, particularly given a child's sense of time, any diversion and responsive action should closely follow apprehension by police. Delay will diminish any positive impact.
- **Availability without admission of guilt:** To require an admission of the offence before allowing the young person into diversion; may discourage some young offenders from participating.[3]
- **Availability for repeated referrals:** Some children and young people may re-offend after diversion, and placing automatic restrictions on their capacity to re-engage in further diversion programs would limit the value of the program.
- **Inclusion of a conference with the victim or family:** Conferences can encourage young people to take responsibility and be held accountable for their actions. Participation of the victim in a youth justice conference is important for the child or young person to be able to understand the effect of their offending.
- **A diversion plan and a specialist case manager:** An effective diversion system will include individual plans, tailored for the person, and a case manager who will work with the young person to complete the plan.
- **'Wraparound' services for the young person:** This would assist the young person to comply with the plan, and address their health, housing and education needs.
- **Engagement with the young person's family:** Having the family of the young person involved in developing the diversion plan connects the process to the young person's home and community and gives them support to achieve the plan.
- **Built-in education, rehabilitative programs, cultural activities, employment pathways, mentoring and community service:** Diversion programs should incorporate multiple components, address multiple needs and strengths, and work in multiple environments, such as family, peer group and education. Services such as mental health services and substance abuse services should also be available through the diversion program.
- **Culturally appropriate plans and programs:** A good diversion process must be culturally appropriate, working towards a stronger connection to and understanding of culture and cultural values.
- **Community input and control of diversion programs:** The Commission received numerous submissions from a range of organisations and individuals emphasising the need for diversion programs for children and young people to be designed and implemented by the communities in which they operate.
- **Measurable and evaluated outcomes:** Diversion programs should be evaluated against established criteria to determine whether the programs are leading to positive change. Measures might include engagement with education, training or employment; reconnecting with family; maintaining or securing stable accommodation; and the rates and/or types of re-offending participants compared with non-participants (RCPDCNT 2017a: vol 2b, 250-1).

[3] The requirements of acceptance of responsibility before diversion ought be clarified. In New Zealand, the young person is required to *'not deny'* the offence to have access to a family group conference. In New Zealand, *'not denied'* may indicate that the child or young person accepts that they are guilty of some conduct, but not necessarily the charge as laid by the police (RCPDCNT 2017:a vol 2b, 267).

According to Richards et al (2011: 6) the following features regarding pre-court diversion have emerged from the evaluation literature:

- focusing on issues of specific relevance or concern to Aboriginal communities (eg petrol sniffing) may help address the issue and secure support from the community;
- increasing the level of involvement from members of Aboriginal communities in crime reduction strategies (eg involving young people in crime prevention activities) may help to strengthen cultural and social structures and optimise self-determination (eg the Kowanyama and Palm Island Community Justice Groups);
- intergenerational, family and cultural support (or mentoring) mechanisms within Aboriginal communities (eg those included in the Panyappi, Gwich'in Outdoor Classroom interventions and Family Intensive Teams strategies) have been shown to have positive outcomes that may contribute to reducing juvenile offending; and
- where appropriate, focusing on younger juveniles rather than older juveniles to maximise early intervention into juvenile offending trajectories (indicated by the Gwich'in Outdoor Classroom and Family Intensive Teams interventions).

(iii) Case Study Examples of Good Practice

Case study: Yiriman Project

The Yiriman project commenced in 2000 in Jarlmadangah Burru, a small remote community in the West Kimberley region in Western Australia. The project is led by cultural Elders from the Nyikina, Mangala, Walmajarri and Karajarri peoples and involves supporting young Aboriginal people from remote communities connected culturally and linguistically with these groups. The goal of the project is to impart strength, resilience and skills while working with young people for extended visits on country. For example, a camel trek of ten days in the remote Mowla Bluff community, and the nearby cultural site of Yiriman provided one of the first experiences for the participants. On other occasions the project involved a 60-day trip to Jilji Bore (a remote part of the Great Sandy Desert) or a five-day treks to Nyikina and Mangala Country, depending on and responsive to local needs and issues. The rationale for doing so is that by giving primacy to the role of cultural Elders in knowledge transfer between generations, the Yiriman project provided an avenue for young people to reconnect with country, culture and family.

While the Yiriman project focuses on young people, there are instances where younger or older people may engage as participants. The project has been running for nearly two decades and the natural evolution is in-built into the design of the project, with some previous later participating as mentors.

The program incorporates a number of elements, as reported by Yiriman at the Aboriginal and Torres Strait Islander Suicide Prevention Conference presentation in Alice Springs, 2016 (cited in Thorburn et al, 2017: 3):

* back to country trips to visit the 'old people'

* bringing together young people with Elders, middle aged people and others from outside the community

* everyday, on country young people and Elders involved in deep learning and transmission of culture, skin (respect), language, old and new stories, 'sweat' on country and making artifacts

* giving young people and experience away from humbug, alcohol, drugs and self-harm

* taking care of country and being cared for by country

* giving young people opportunities for being on and with country, culture and law

At present, there is no single or stable source of funding for the Yiriman project. Rather, funding is provided for individual treks by a range of state and non-state agencies (past grants have been awarded by the Western Australian Police, the Western Australian Community Crime Prevention Fund, the Alcohol Education Rehabilitation Foundation, the Commonwealth Department of the Attorney General, the Kimberly Aboriginal Law and Culture Centre).

While the precise format and length of the trek varies according to local need (for example, previously, an intensive 60-day trip was organized out of concern for a group of eleven young people who were on a trajectory to be detained at Banksia Hill Detention Centre), the Yiriman project also shows promise as a potential for improving police/community relationships. For example, in 2015 the Western Australian Police funded a discrete project (a one-off grant for $25,000) in partnership the Yiriman project. It involved three camel treks which took place on Nyikina and Mangala country to the south of the Fitzroy River. The treks were on average five days each and included 34 young people and 13 Elders. The $25000 covered the costs of hiring camels, paying staff, transportation of Elders, resources and food. The budget also paid for meetings to plan the trips and coordinate the involvement of local police (Fitzroy Crossing police station), as well as project visits to communities and families to nominate participants.

Sources:

* Yiriman project website: http://www.yiriman.org.au/

* Thurburn, K. *et al* (2017) 'The Yiriman Project in the West Kimberley' Indigenous Justice Clearinghouse Current Initiatives Paper 5 (July 2017)

* Van Gent, A., Schwartz, M., Russell, S. and Strachan-Brown, M. (2018) 'Submission to the NSW Legislative Assembly Law and Safety Committee Inquiry into the adequacy of youth diversionary programs in NSW'.

* Brown, D., Cunneen, C., Schwartz, M., Stubbs, J. and Young, C. (2016) *Justice Reinvestment: Winding Back Imprisonment.* Hampshire: Palgrave.

Many of the early intervention and diversionary elements of the Yiriman project occurred on country, in the presence of Elders and in a cultural setting. The emphasis was on reconnecting young people with cultural identity and sense of belonging to country.

Warlpiri Youth Development Aboriginal Corporation (WYDAC), NT

In 1993, in response to ongoing concerns about the damaging effects of petrol-sniffing on young Warlpiri people, community Elders established a substance abuse rehabilitation program at an outstation 160 kilometres from Yuendumu. Community Elders ran the program at their own expense, supported by local organisations such as the school and shop, but with no initial formal funding. Young people were assisted to reconnect with culture, family, health and education in a culturally supportive remote bush environment. Since 1993, over 500 Warlpiri young people from over 14 communities have accessed the award-winning Mount Theo program (RCPDCNT 2017a: vol 1, 279). Building on its success in rehabilitation, in the early 2000s the Mount Theo program expanded its focus to a youth development program assisting Warlpiri young people. The Warlpiri Youth Development Aboriginal Corporation (WYDAC) now employs 50 staff delivering programs to young people across four Warlpiri communities (Yuendumu, Lajamanu, Nyirripi and Willowra) and the Mount Theo outstation. The WYDAC Board has representation from these four Warlpiri communities.

WYDAC receives referrals from the police, the courts, Territory Families, schools and the community, with 50% of its referrals coming from the police and the courts under the *Youth Justice Act NT* (RCPDCNT 2017a: vol 2b, 272-273). The physical space Mt Theo (Puturlu) has significance as a cultural site among Warlpiri people, containing powerful Jukurrpa (Dreaming) sites and stories (Dudgeon et al 2016: 20). The program operates youth justice conferencing and seeks to engage young people in 'positive, healthy, safe and interesting activities' including sports, art and craft, music and specialised activities like dance workshops (Shaw 2015).

Cultural elements of the program includes weekly bush trips, where Elders and young people engage in activities that promote positive relationships and cultural teaching (NTRC 2017: vol 2b, 272-273). 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: 3). WYDAC as **an example of best practice in reducing drug and alcohol use** for Indigenous young people and **the program 'fosters a strong link with Warlpiri culture** and with all the inherent benefits embedded in that culture for at-risk Warlpiri youth (Dudgeon et al 2016: 20). A strong, positive, healthy Warlpiri identity is 'forged, promoted, practiced and imparted' (Dudgeon et al 2016: 20). The program also incorporates **peer-to-peer youth mentoring**. Youth mentors will often have 'genuine, direct, honest and insightful advice on preventative behaviours, coping strategies and positive pathways. Peer status is particularly powerful and important in Warlpiri youth culture' (Dudgeon et al 2016: 21).

A 2015 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. Despite this positive evaluation, the WYDAC continues to face challenges in securing long-term, stable funding (Shaw 2015).

The Central Land Council in a submission to the NT Royal Commission emphasised that in addition to the tangible benefits in youth development, the WYDAC program is 'very clearly valued by Aboriginal people for the way it is helping to strengthen culture and give them

greater voice and control, factors which in our view are central to achieving the successful outcomes'.

Source: van Gent et al (2018:18-19); RCPDCNT (2017a: vol 1 279; vol 2b, 272-3).

The WYDAC shows the importance a localised place-based diversion program (focussing on four Walpiri communities) with strong focus on culture. It has been evaluated with positive results and shown as 'best practice' in reducing drug and alcohol problems. Referrals to the program come from a range of agencies, of which about half are police/courts. It uses a range of interventions including **youth justice conferencing and mentoring**. Long-term, stable funding is a challenge.

Youth Diversion Program 'On Track', Maningrida, NT

In Maningrida, Malabam Health Board Aboriginal Corporation operate the 'Greats' Youth Services, which provide a range of programs and services for children and young people aged 10–20 years. One of the programs delivered is the Youth Diversion Program 'On Track' operated in partnership with the Northern Territory Government. It receives referrals from the police and the court. Most of the young people referred by the police are over the age of 14 and are referred by the police for offences such as, break and enter, property damage and stealing cars. Children who are referred may attend programs addressing sexual health, alcohol and other drugs, anger management, community wellness, back to country cultural engagement and community service.

Source: RCPDCNT (2017a: vol 2b, 273).

BushMob Aboriginal Corporation, (NT)

BushMob Aboriginal Corporation in Alice Springs provides treatment for young people aged 12-25 years experiencing difficulties with substance addiction. It includes a residential treatment facility and provides intensive outreach and case management and delivers adventure therapy bush trips (Pryor 2009). In 2015/16, 700 young people accessed BushMob, of whom 110 attended a residential program. The majority of residential referrals (70%) are from the justice system, and irrespective of the source of the referral, most (98%) are subject to a protective order (BushMob 2016). BushMob's Apmere Mwerre program works specifically with young people in conflict with the law. BushMob's clients come from all over the NT.

The BushMob service builds the health and wellbeing of young people, families and communities. All young people who enter BushMob are complex needs clients with significant primary care health issues. Many have experienced early life trauma and continue to experience 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). BushMob (2014) estimates that approximately 30 per cent of their clients are affected by Foetal Alcohol Spectrum Disorder (FASD). In recognition of the complex needs of those they support, the BushMob program model is trauma-informed. The BushMob model 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; and ensures the

involvement of positive role models and mentors and provides non-judgmental, interpersonal support for young people (BushMob 2016).

The community development ethos enables BushMob to draw on the cultural and community assets and strengths that exist within Indigenous families and in the Indigenous cultural context as the foundation for its work (BushMob 2016). BushMob has developed from the priorities expressed by Indigenous people in the Northern Territory about strengthening youth against high risk behaviours.

A 2009 evaluation found that BushMob was one of very few Australian examples of 'best practice adventure therapy industry standards' and one of few services that can be said to offer support across the full spectrum of public health needs in the area of mental health (including substance misuse). It also found that the BushMob model offers 'an incredibly cost effective health intervention', given its potential impacts across nine domains of well-being (physical, mental, emotional, behavioural, social, cultural, spiritual, environmental and economic (Pryor 2009: 43)), stating that 'it is possible the effects and effectiveness of BushMob's approach will compare favourably with any clinical health intervention' (Pryor 2009: 14-15).

BushMob achieves opportunities for individuals, families and communities to build self-reliance and leadership. These practices are undertaken in non-paternal, non-patriarchal, and non-colonising ways, and with an attitude of deep respect for all those involved (Pryor 2009: 43).

Source: van Gent et al 2018: 17-18

Baroona Youth Healing Place, Victoria

The Baroona Youth Healing Place is a residential centre catering for 14-22 year olds. The aim of the centre is 'to reduce alcohol and drug abuse amongst young Aboriginal people in the Echuca and surrounding areas by providing a safe and culturally specific healing environment'.

The centre offers a 16 week residential *Journey to Heal the Spirit.* The program is delivered, with a number of important aspects:

* A Cultural & Spiritual base

* Personal Development

* Education & Employment

* Healthy Life style choices

* Traditional & Contemporary Healing ways

The residential component is then followed by a Post Support Program over a time decided by staff and the young person themselves. Referrals can be made as follows:

* Self-referral

* Parent / Guardian Referral

* Referral by another agency or service

* Court Order /Bail Order Referral

* Police Referral

* Child Protection / Court Order Referral.

Source: http://www.njernda.com.au/service/baroona-healing-centre

The Victorian Aboriginal Justice Agreement Phase 4 is committed to, over the next five years, developing a residential bail support and therapeutic program for Aboriginal young people that builds upon the Baroona Healing Place model (*Burra Lodjpa Dunguludja* nd: 43).

Diversionary programs that focus on the delivery of mental health, and drug and alcohol services are often necessary to address the underlying causes of a child or young person's offending behaviour. The WYDAC, 'On Track' Maningrida and Baroona programs focus on addressing drug and alcohol issues. All of these programs tackle drug and alcohol problems within a strong Aboriginal cultural and healing context. WYDAC and Baroona are also residential programs or have residential components. Bush Mob also addresses mental health issues. However, it has been noted that diversion for children and young people to mental health treatment is more limited (RCPDCNT 2017: vol 2b, 274).

(iv) First Contact Diversion for 10-14 Year Olds

There appears to be a dearth of diversion programs specifically aimed at 10-14 year olds. Indeed the NT Royal Commission noted the absence in this area and the need for the development of specific programs catering for this group. One example is the Barreng Moorop program in Victoria.

Barreng Moorop, Melbourne

Barreng Moorop is a small intensive case management program for Aboriginal children aged 10-14 years old and their families, delivered in North Eastern and Western Metropolitan Melbourne. The program was developed in recognition that young Aboriginal children who have their first contact with the criminal justice system aged 14 years or younger are among the highest risk indicators of subsequent involvement in the criminal justice system.

The Barreng Moorop program focuses on diverting young people away from the justice system by addressing the underlying issues that impact on their offending behaviour. It works in partnership with the Victorian Aboriginal Legal Service (VALS) and the Victorian Aboriginal Child Care Agency (VACCA) to deliver a culturally responsive service which focuses on meaningful engagement, building trust and connecting children to community and culture to strengthen their Aboriginal identity.

Each participant is assessed individually and personalised case and cultural care plans are developed in collaboration with the participant and family. The program is a trauma-informed and culturally responsive diversionary program designed to work with Aboriginal children who have had contact with police. The program targets children aged 10–14, ensuring intervention at the '*earliest*' stage of interaction with the youth justice system. The program provides *'a wrap-around case-work based response, including an understanding of the composition of Aboriginal families, in which the extended family plays an active role'.*

Source: Jesuit Social Services https://jss.org.au/helping-aboriginal-children-stay-out-of-the-justice-system/ ; RCPDCNT (2017a: vol 2b, 272-3).

(v) Successful programs targeting young Aboriginal women

There appears to be few diversion programs that specifically target young Aboriginal women. Bartels (2010) refers to two examples from Western Australia which were operating in the early 2000s. These were the **Strong Sisters,** an activity group for eight to 15 year old girls to increase their self-esteem and pride and the **Young Mums** group, which provided parenting support and education for young women in a safe, culturally appropriate environment. According to Bartels (2010: 3) 'both of these programs were part of the Aboriginal Healing Project, which was run through the Women's Health Policy and Project Unit of the Western Australian Department of Health from 2006 to 2008. By the end of 2007, over 500 women had participated in various projects and according to survey data, around 90 percent of participants felt the programs had taught them ways to self-nurture, protect their children and increase their safety. Unfortunately, however, the funding for these projects was not renewed'.

Strong Sisters, Safe Mums
Strengths of the program include an evidence-based design that recognised that Indigenous programs face significant challenges to effective implementation, such as suitable sectoral partnerships, inter-agency coordination, staff training and skills, funding, community politics, program elements which are predominantly reactive rather than proactive, staff safety concerns and staff 'burn out'. Other strengths were a holistic approach, which addressed social, cultural, spiritual, emotional and physical dimensions of wellbeing of the individual in the context of family and community, a clinical focus (including adult and child health assessment), peer support, mentoring and Indigenous cultural focus. Some of the findings from the evaluation were:
* clients reported increased self esteem, confidence and cultural connection. They also stated that the program equipped them with the skills and knowledge to move from a life of violence and to a journey of healing; and
* clients gained communication and conflict resolution skills through participation in the program, which enabled them to address the reasons for, and consequences of, family violence.[4]'

Source: Bartels (2010: 3).

[4] Steering Committee for the Review of Government Service Provision (SCRGSP) 2009. *Overcoming Indigenous disadvantage: Key indicators 2009*. Melbourne: Productivity Commission http://www.pc.gov.au/__data/assets/pdf_file/0003/90129/key-indicators-2009.pdf

Questions: Pre-Court Diversion

Who should authorise pre-court diversion and what point do Aboriginal organisations become involved in the decision-making process?

Should there be specific offences excluded from pre-court diversion?

Is there a requirement for a legislative base to pre-court diversion and how would Aboriginal pre-court diversion sit with other police diversionary options (for example, drug diversion cautions, official warnings)?

Should pre-court diversion be linked to a police cautioning program, for example as part of the conditions attached to a caution? (see discussion on police cautioning below)

How can the specific needs of young Aboriginal women and 10-14 years old children be catered for in pre-court diversion programs?

Are contractual arrangements between government agencies and ACCOs for the delivery of Aboriginal pre-court diversionary program an important consideration?

9. Police Cautioning

We have previously provided a comprehensive report related to police cautioning and Aboriginal self-determination in Victoria (Cunneen et al. 2018). In this section we draw out some of the major issues.

Historically, Victoria had relatively high rates of youth cautioning compared to other jurisdictions. For example, in the mid to late 1990s it was estimated that the cautioning rate in Queensland was about 20 percentage points higher than NSW, while in Victoria it was 20 percentage points higher than Queensland. More recently there appears to have been a steady decline in Victoria in the use of youth cautioning. Ernst and Young (2017: 4) estimated that over the years between 2008 and 2015 the cautioning rate declined from 14% of outcomes to 5.5% outcomes, while the proportion of arrests steadily increased. The decline in the use of cautioning in Victoria was more pronounced for Aboriginal children. According to Ernst and Young (2017: 4) the cautioning rate for Koori children declined from 14.6% of outcomes to 3.9% outcomes during the period 2008 – 2015.

The decline in the use of cautioning in Victoria should be also seen in the context of an increasing number of Children's Court matters; an increase in the remand population; and an increase in the rate of detention. The current Victoria Police Manual – Policy Rules (VPMP Disposition of Offenders) requires, among other things, that the offender must admit the offence. The Victoria Police Manual – Procedures and Guidelines (VPMG Cautions provides guidance on criteria for eligibility including that the offender should have no prior criminal history.

(i) Cautions Administered by Respected Persons

Several states in Australia provide for the administering of a police caution by a person other than a police officer:

- New South Wales: *Young Offenders Act 1997*, s27
- Tasmania: *Youth Justice Act 1997*, s11
- Queensland: *Juvenile Justice Act 1992*, s17

In some states, the legislation specifically refers to an Aboriginal and Torres Strait Islander respected person/ Elder (Queensland and Tasmania), in other cases simply a 'respected person' or 'community representative' (New South Wales).

The Northern Territory operates a pre-court diversionary program. According to Ernst and Young (2017: 125):

> Formal cautions can be administered by commissioned officers of Police, the officer-in-charge of a police station, a respected person in the youth's community or another suitable person (whoever is more likely to have a positive impact upon the young person's behaviour).

However, there is nothing in the legislation specifying these processes.

A significant difficulty in assessing the use of Aboriginal and Torres Strait Islander Elders in existing police cautioning programs in other States and Territories is the absence of any empirical data on the frequency of use or the outcomes. Anecdotal evidence suggests, at least

in NSW and Queensland, that Aboriginal Elders are rarely, if ever, used in administering cautions (see later discussion on the Cautioning Aboriginal Young People Protocol).

(ii) Conditional Cautions

Several states in Australia provide for undertakings which are attached to the caution. In some states these may be a condition of the caution. In Queensland (*Juvenile Justice Act 1992*, s19) and New South Wales (*Young Offenders Act 1997*, s29(4)) the caution may involve an apology.

In Tasmania (*Youth Justice Act 1997*, s10) and South Australia (*Young Offenders Act 1993*, s8(1)) the officer may also require the youth to enter into one or more undertakings. These undertakings can require one of more of the following: compensation, restitution and community service.

In the Northern Territory conditional cautioning is available. According to Ernst and Young (2017: 125):

> Police are also able to apply conditions to cautions, in consultation with the parent/guardian. These may be in addition to the formal caution/family conference or any other diversionary action. Examples of these conditions could be community service style work for the victim, restoration of damage, verbal/written apology, restitution, curfews and imposition of family-agreed consequences.

According to Ernst and Young (2018: 125) 'the application of conditions to cautions [occurs] in approximately 27% of cases'. However, there is no date or source cited for this figure, and generally the evidence Ernst and Young rely on comes from the early 2000s.[5] There is also nothing in the legislation specifying that conditions can be attached or the nature of those conditions.

Similar to the problem of assessing the impact of the use of Aboriginal and Torres Strait Islander Elders in existing police cautioning programs, there is a dearth of basic information, data and evaluation of the frequency of the use of conditional cautions or their outcomes. We know from research that the majority of young people cautioned at the beginning of their contact with juvenile justice agencies do not go on to have further contact with the juvenile justice system, and that young people cautioned for their first offence are less likely to re-offend than those brought before the courts (Dennison, Stewart and Hurren 2006; Shirley 2017:1)[6]. However, we do not know whether attaching conditions to cautions makes any positive (or negative) difference to these results.

(iii) NSW Attempts to Increase Cautioning for Aboriginal Children

Since the early 2000s there have been various significant attempts to increase the rate of cautioning, particularly for Aboriginal young people.

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[5] For general current information on the NT pre-court diversionary program, see https://nt.gov.au/law/young-people/young-people-diversion-programs

[6] The Crime Statistics Agency (Shirley 2017:1) recently found that 'Consistent with findings of previous studies, young people who were cautioned were less likely to reoffend than those charged. The current study also found a longer duration between the index incident and their first reoffending incident for cautioned young people as opposed to those charged'.

(a) Cautioning Aboriginal Young People Protocol (CAYP)

The aim of the CAYP is to promote diversion of Aboriginal youth from the criminal justice system by providing training and opportunities to Aboriginal elders to be involved in the cautioning process. The NSW Police Force Youth Strategy 2013-2017 (2013: 16) aims to 'promote diversion of Aboriginal youth from the criminal justice system through initiatives such as the *Cautioning Aboriginal Young People Protocol'*. The NSW Police Force Handbook (2016: 511) notes that 'If you, as an authorised officer, believe a respected member of the community should give a caution, make the necessary arrangements for this to be done'.

However, there appears to be a complete absence of information about or knowledge by Aboriginal organisations of the CAYP scheme. Senior solicitors at the Aboriginal Legal Service (ALS) noted that they knew 'absolutely nothing' about the scheme, had 'never heard of it being used' and would be 'shocked if it was publicised in the police force'. However, they were also very supportive of the idea of engaging Elders in the cautioning program.

(b) Young Offenders Legal Referral (Tag and Release)

The Young Offenders Legal Referral (YOLR) scheme began in the early 2000s based on a model developed by Brewarrina Police. It was colloquially known as 'Tag and Release'. The rationale for the YOLR was to encourage young people, after legal advice, to admit offences so they could be diverted under the Young Offenders Act.

The YOLR provides for young people to receive legal advice where they would be eligible for a caution or a conference if they agreed to an interview and made an admission. The model provides for information to be faxed to an Aboriginal Legal Service (ALS) prior to a young person being released. Upon release the young person is told that they must get legal advice and return to the police station with an appropriate adult within a specific period (normally no longer that 2-3 weeks) on or before the date indicated on the YOLR.

(c) Protected Admissions Scheme

NSW introduced a 'protected admissions scheme' in 2014 to address the issue of young people failing to receive a caution because of their reluctance to admit the offence. The Protected Admissions Scheme was seen as a guarantee that first time offenders who made an admission of guilt for a minor matter would not face further conviction and would be released with a formal caution. Under the scheme, the young person's legal representative is able to provide advice to admit the offence. A young offender is eligible for the scheme if the offence falls under the *Young Offenders Act*. Police also take into account the type of offence and criminal history.

In some circumstances, the signing of the Protected Admission Form may be sufficient to satisfy police to give a caution. In other cases, police may decide an interview is also necessary. If an interview is conducted, it may be informal or formal and may be recorded electronically.

It was envisaged at the time (at least by Legal Aid and the ALS) that, mostly, there would be no interview, and just signing the Protected Admissions Form would be enough to satisfy the

issuing of a caution. However, sometimes, police would decide they wanted an interview. The general view was that the police would mostly just take the signed Protected Admissions Form.

If, during an interview, the young person admits to additional, more serious crimes, police may suspend the interview and commence a separate interview to ask the young person about those crimes. If this occurs, police will make it clear to the young person that what they say in the new interview is not protected and can be admissible in proceedings. Nothing said during the initial 'protected' interview will be used in any proceedings for any offence.

During the interview, if the young person indicates the involvement of another person in criminal activity, this cannot be used in proceedings against that other person. However, police may (separately and following the protected interview) request the young person provide a statement about that other person's offending. If provided, that statement may be used in proceedings.

From discussions with Legal Aid and ALS solicitors, the general view is that the protected admissions scheme was good in theory but poor in practice. The primary reason for this is that police continue to conduct formal ERISP[7] interviews in addition to the Protected Admissions Form. ERISP can lead to incriminating evidence and is used as an investigative tool.

As a result, a system has developed that is not really used. The take-up has been low and is only used in limited circumstances. The Protected Admissions scheme has not provided a real alternative and will not while police are able to require a record of interview. One solicitor described the scheme as 'a real stinker'. Legal Aid informally suggested they used the Protected Admissions Form about 20 times in a year – in situations where the young person would have admitted the offence anyway.

Similarly, solicitors at ALS indicated that lawyers were reluctant to use the Protected Admissions Scheme because of the requirement to still do an interview in addition to the admission made on the Protected Admissions form. 'Too much could wrong', as one solicitor stated. New offences might be revealed and/or co-offenders identified. If an unprotected record of interview commences, the child will be questioned without fresh legal advice. Lawyers were of the view that the scheme could have been 'brilliant' if the Protected Admission Form had just been used and that was 'the end of it'.

In the context of the Protected Admissions Scheme were also note the specific concerns that the Victorian Aboriginal Legal Service (VALS) has raised somewhat analogous problems in relation to children acknowledging responsibility for an offence, and then being required to undertake a record of interview. VALS has recommended that:

> The accused should not be denied access to diversion by providing a 'no comment' police interview in circumstances where they have previously acknowledged responsibility for the offending. The VPM criterion of the accused having to 'admit the offence' should be brought in line with s59(3) of the *Criminal Procedure Act* by

[7] Electronic Recording of Interviews with Suspected Persons

clarifying that 'admitting the offence' does not mean that the accused must provide admissions during a record of interview/field interview (VALS 2016: 4).

(iv) Failure to Divert Declaration

VALS have also recommended that Victoria Police should adopt a 'Failure to Divert Declaration' which would be submitted to court at the time of filing charges (VALS 2016: 2). The Failure to Divert Declaration has similarities with the 'Failure to Caution Form' used in the Youth Cautioning Pilot program (See Cunneen et al 2018). The purpose of such a form is to ensure transparency and accountability in decision-making. It is worth considering how such a form might be utilised in the Aboriginal Youth Cautioning Scheme.

Questions Relating to Police Cautioning

Who should authorise the caution and at what point do Aboriginal organisations become involved in the decision-making process around cautioning?

Should there be specific offences excluded from cautioning and/or should there be a limit on the number cautions an individual child can receive?

Should the requirement to admit guilt be changed to a requirement of 'not deny' the offence?

Is there a requirement for a legislative base to cautioning and how would this take account of the specific requirements for an Aboriginal Youth Cautioning Scheme?

10. Restorative Justice

(i) Introduction and Use of Restorative Justice/ Youth Justice Conferencing

From the early 1990s ideas around restorative justice gained a substantial foothold in the development of alternative diversionary approaches for young people in Australia. In the field of juvenile justice, restorative justice has been largely equated with youth justice conferencing. Youth justice conferencing in Australia started with a range of pilot projects and developed piecemeal. While unknown prior to the 1990s, the use of youth justice conferencing developed across most of Australia. Polk et al. (2003: 5) was able to conclude that by 2002:

> conferencing at present enjoys high levels of support within the juvenile justice system. This approach has become cemented solidly into the general system of juvenile justice, and is regarded by many as an important device both for providing a better response to juvenile offenders and a way of involving victims in a process of restitution and restoration.

A key criticism of the introduction of youth justice conferencing when it was first introduced was the failure to consider its applicability to Aboriginal young people and to involve Aboriginal communities and organisations in its design and development (Cunneen 1997: 295–296).

Polk et al. (2003: 47-48) refer to three models of conferencing that emerged in Australia: (i) the conference process is developed and run by police; (ii) the conference process is run independently of police (iii) conferencing is only available by way of court referral (a post-court option). Nationally, the third model was adopted only in Victoria.

Youth justice conferencing as it first developed in Australia during the 1990s operated as a police-led diversionary option – for example in NSW and the NT (Richards 2010). In most jurisdictions, legislation has been introduced or amended to formalise youth justice conferencing as a major diversionary option and linked in a hierarchy of diversion with police cautions as an earlier front-end alternative. Since the late 1990s legislation has provided for conferences to be administered by youth justice services. The only jurisdiction is Australia where police may convene youth justice conferences as part of a diversionary option is in the NT. However, in WA police are part of the Juvenile Justice Teams who are responsible for conferences.

In Victoria until the introduction of the *Children, Youth and Families Act 2005* there was no legislative base for the post-court model of conferencing. **Unlike other jurisdictions, in Victoria youth justice conferencing has been aimed at relatively serious matters - under Section 415(1) of the legislation the court can only defer sentencing for the purpose of a group conference if it is considering imposing a sentence of probation or a youth supervision order**.

In 2016 the eligibility criteria for Youth Justice Group Conferencing in Victoria were expanded, allowing the court to refer a young person to participate in Youth Justice Group Conferencing when the court is considering any sentence supervised by Youth Justice. The program is delivered by seven community service organisations across 11 areas dispersed throughout all divisions: Outer Gippsland, Barwon, Western District, Loddon, Mallee,

Central Highlands, Outer East, North East Melbourne Area, Southern Melbourne, Western Melbourne and Goulburn. In Victoria, the group conferencing is positioned post finding of guilt (Armytage and Ogloff 2017a: Part 1, 82).

Armytage and Ogloff (2017b: Part 2, 109) have recommended the following:

- Expand the use of restorative justice programs to address offender and victim needs, including restitution, group conferencing and family group conferencing, across the continuum of youth justice (including, during and after community-based and custodial orders).
- For Koori young people, work with elders and community groups to identify areas where restorative justice could be used to address common issues, such as restoring family relationships, to enable young people to be released from custody back to the family home (Recommendation 6.33).

(ii) Culturally Appropriate?

Some provisions also exist in the legislation establishing conferences that they should be 'culturally appropriate'. According to the New South Wales *Young Offenders Act 1997*, measures for dealing with children are to be culturally appropriate 'wherever possible' and the sanctions imposed should 'take into account the gender, race and sexuality' of the child (s 34(1)(a)(v) and s 34(1)(c)(iv)). The administrator of conferences, when choosing a convenor to run the conference, needs to consider whether it is possible to match the young person with a convenor from the same cultural background. Section 30(2)(c)(v) of the Tasmanian *Youth Justice Act 1997* provides that when conferences are held which involve Aboriginal youth, then an elder or other representative of the young person's community must be invited. These types of requirements pose several problems. What does 'culturally appropriate' mean? Who will decide what it is, when it is possible, and what processes will guarantee its implementation? There is no provision for Aboriginal organisations and communities to make these decisions, nor decisions about the best interests of their children.

Conferencing assumes that Aboriginal young people can operate effectively within an imposed model without suffering significant disadvantage because of cultural difference. On the basis of observations of conferencing in South Australia, it has been suggested that 'the most striking aspect of the model developed *for* Indigenous people are the problems encountered with cultural difference' (Dodson 1996: 46).

Evidence is mixed on compliance with conferencing requirements. In Queensland, it suggests no difference in breach rates for Aboriginal young people compared to non-Aboriginal young people for failing to complete conferencing plans (Cunneen 2005: 64). In South Australia 18.4 per cent of Aboriginal cases were sent back to police for non-compliance, compared to 12.2 per cent of non-Aboriginal cases (Office of Crime Statistics and Research 2008: 32).

There appears to be no less satisfaction with the conferencing process by either Aboriginal offenders or victims (Cunneen 2005: 64; Trimboli 2000). Perhaps most importantly, research demonstrates that conferencing is no less successful in reducing re-offending than the courts for both Aboriginal and non-Aboriginal participants (Luke and Lind 2002; Richards and Lee 2013; Weatherburn et al 2012), although the impact is likely to be greatest among those with lower risks of re-offending (Hayes and Daly 2004). Despite the initial enthusiasm about the potential of youth justice conferencing, it is used in only a small proportion of cases in most

jurisdictions (Richards 2010), and is used to varying degrees across police local command areas (Noetic Solutions 2010a; Ringland and Smith 2013).

(iii) Case Study

Notwithstanding the limitations noted above, youth justice conferencing has been seen as an opportunity to involve Aboriginal and Torres Strait Islander Elders and community members in a cultural response to offending by young people.

Tiwi Islands Youth Development and Diversion Unit, NT

The Tiwi Islands Youth Diversion and Development Unit provides culturally appropriate formal and informal diversionary programs for Tiwi youth, focusing on developing participants' attachment to family, community and school. The case management team work with at risk youth through Tiwi Skin groups. The program is run by TIYDDU staff, with the support of a diversion team within the Northern Territory police. Importantly, community members were involved in the design of the project, and play an important role in its ongoing implementation. Participants are usually first-time offenders who are given the opportunity to participate in a youth justice conference and supported by a range of cultural interventions to address risk factors for offending. NTLAC referred to the program as a 'best practice example' of youth diversion (RCPDCNT 2017: vol 2b, 273). The program has been operating for over 10 years. The program has resulted in low rates of recidivism.

In relation to the use conferencing, it has been noted that:

Community members play an ongoing role in how the program is delivered. They participate in conferences—with young people and their families, program staff and sometimes the victims of a crime—to identify what conditions might be imposed to repair harm. Their involvement both reinforces Tiwi cultural and social authority and helps to ensure conditions benefit offenders, victims and the community as a whole. There is strong community support for this approach…

Conferences are convened to bring together the 'right people' to support youth who are referred to the program. They always occur when a young person is first referred. These conferences enable a collective assessment of the needs and circumstances of the young person. If problems arise during the period of diversion, conference participants may come together again to explore how to resolve any issues (for example, declining school attendance). Typical attendees include the young person and their family, TIYDDU staff and Skin Group Leaders and Elders with kinship obligations to the young person. (Stewart et al 2014: 47-49).

A 2014 evaluation by the Australian Institute of Criminology (Stewart et al 2014) found that only 20 per cent of young people participating in the diversion program had contact with police for alleged offences in the 12 months following commencement of the program, which compares very favourably with reoffending rates calculated in other jurisdictions (Stewart et al 2014: vii). Additionally, the 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: vii).

Sources: van Gent et al (2018:19-20); RCPDCNT (2017: vol 2b, 272-3); Stewart et al (2014: vii)

The Tiwi Islands Youth Diversion and Development Unit provides an example of 'best practice' in youth diversion. The focus in usually on first-time juvenile offenders. The program utilizes a **youth justice conference** in addition to other cultural interventions. It is a locally designed diversion program built around the needs of Tiwi young people at risk of further criminal justice intervention and has been externally evaluated.

(iv) Restorative Justice, Conferencing and Child Welfare

Restorative justice in the form of family group conferencing has been used in the context of child welfare. The process encourages partnerships between families and child protection agencies to respond to child welfare concerns in a forum where families can participate in the decision-making process. Conferences can be used to address welfare concerns once a child has been deemed to be in need of care and protection, in the case planning process, and to facilitate court orders around placement. The NT Royal Commission noted both positive outcomes from the process, as well as limitations.

> FGC is an important means of introducing community and family-based approaches to respond to child welfare concerns and to develop a plan of action with authorities. Positive outcomes of FGC include increased uptake of support services, greater satisfaction by families involved in the decision-making process and an increase in the number of alternative family placements identified. However, in Australia these approaches have too often been inconsistently applied, under-funded, under-utilised, not implemented as agreed or used too late in the decision-making process, limiting potential impact on demands on the child protection system (RCPDCNT 2017a: vol 3a, 277).

Burra Lotjpa Dunguludja (Victorian Aboriginal Justice Agreement Phase 4) also includes use of restorative justice as both a principle and a strategy. The Aboriginal Justice Caucus has supported the development of restorative justice initiatives. In addition, the East Metropolitan RAJAC and the Hume RAJAC are developing a restorative justice initiative with potential for expansion into other regions if successful.

In Victoria, family group conferencing has been incorporated into the Aboriginal Family-Led Decision-Making (AFLDM) model.

The Aboriginal Family-Led Decision-Making (AFLDM) model

An evaluation of the pilot undertaken by the Rumbalara Aboriginal Co-operative in 2001 demonstrated positive outcomes for those Aboriginal children and families who participated. It found that of the 12 families who participated in 2003, no one had '*progressed further into the child protection system*'. On the basis of the success of this pilot, funding was secured to extend it across the state and it was later expanded into the Family-Led Decision-Making Model (FLDM) which is offered to both Aboriginal and non-Aboriginal families.

The Secretariat for National Aboriginal and Islander Child Care (SNAICC) advised the Commission that Victoria is the only state in the country to *'implement a statewide, culturally specific model of AFLDM in partnership with Aboriginal agencies.'* The AFLDM is

identified as the preferred method of decision-making for Aboriginal children and there are now a number of AFLDM initiatives run by Aboriginal community-controlled organisations in Victoria where concerns about a child have been substantiated or a child is the subject of a court protection order.

The Wathaurong Aboriginal Co-operative in Victoria describes AFLDM as offering a new way of working with child protection services and families based on traditional values and decision-making models. In these processes, the responsibility for children is shared by parents and the general community and underpinned by the cultural guidance and expertise of community Elders, who also participate in the program. Aboriginal communities participate in a forum to address concerns identified by child protection agencies and are guided by convenors who facilitate and support attendance at the forums.

Source: RCPDCNT (2017a: vol 3a, 277-8).

Care circles and circle sentencing in NSW

Care circles are used in New South Wales to offer an alternative pathway to enhanced community input, control and ownership in determining the best interests of Aboriginal children. The circles are a means by which '*Aboriginal culture and identity may be taken into account*' in the child protection system.

Unlike formal adversarial processes of the courtroom, care circles are conducted in the community and attended by the parties and their legal representatives, respected Aboriginal community members and the magistrate. Care circles have synergies with circle sentencing processes used in criminal justice matters that bring together a number of parties from the legal and Aboriginal community as a result of a person's offending behaviour. These processes also occur in an informal setting but, like care circles, only take place if the matters are deemed appropriate and in instances where a defendant pleads guilty or a finding that a child is in need of care and protection has been made.

Care circles and circle sentencing offer avenues of enhancing the participation of Aboriginal families in decision-making processes. These methods assist to inform decisions around placement, restoration, support options and visitation.

Source: RCPDCNT (2017a: vol 3a, 279).

Questions: Restorative Justice

Where are the most appropriate spaces in the youth justice system for developing restorative justice: pre-court diversion, court diversion, sentencing, release from custody?

Which ACCOs are most appropriately placed to be involved in convening restorative justice conferences?

What lessons can be learned from the use of restorative justice and family group conferencing in the child protection sector?

11. Bail and Remand

The aim of this section is to discuss how we might address the issue of bail and escalating remand rates, and to consider what alternatives there are to remand in custody. The factors behind both bail refusal and the breach of bail conditions have been relatively well identified.

(i) Major Factors in Bail Refusal for Aboriginal children and young people:

- Prior convictions
- Prior failures to appear
- Lack of safe, stable, secure accommodation
- Substance dependencies
- Mental health, cognitive impairment
- 'Show cause' provisions[8]
- Some of these factors may particularly impact on Aboriginal young women and girls (eg lack of safe, stable, secure accommodation) (See generally ALRC 2017: 154-157; VEOHRC 2013: 50).

(ii) Some of the factors in Breach of Bail Conditions

Curfews, exclusion zones, non-association orders and other restrictions can lead to a breach of bail conditions. In particular it is noted that:

- Restrictions which are unrealistic and impractical for children and young people to comply with (eg prohibitions on the young person consuming drugs or alcohol where the young person has a substance abuse problem with no effective supports to change their behaviour)
- Restrictions which limit or prohibit contact with family networks
- Restrictions which prevent the young person from complying with cultural responsibilities (eg taking care of relatives, attending funerals)
- Conditions or restrictions which are exacerbated by punitive policing of minor breaches
- Conditions which lead to failure because of the lack of programs to support young people while on bail (See, generally, Victorian LRC 2007; NSW LRC 2012; ALRC 2017: 157-161; RCPDCNT 2017a: vol 2b, 278, 287-90).

Although not specifically dealing with Aboriginal juveniles, data provided to the ALRC for 2015 found in NSW that the majority of breaches of bail conditions by Aboriginal and Torres Strait Islander people were for 'technical' breaches (ie breaches of conditions rather than substantive new offences). Of the 2,945 Aboriginal people who had a breach of bail proven in the Local Court, '32% involved a new offence; 25% breached curfew; 17% breached

[8] It is difficult to know the impact yet of the *Bail Amendment (Stage one) Act 2017 (Vic)* introducing 'show exceptional circumstances' for Schedule One offences and 'show compelling reason' in Schedule Two offences for not refusing bail. However, submissions to the ALRC Inquiry argued that 'when there is a presumption against bail or when an accused must 'show cause', the obstacles to a grant of bail for an Aboriginal and Torres Strait Islander person is magnified' (ALRC 2017: 155-156).

reporting requirements; and 14% failed to reside in the designated location. Some breached more than one condition' (ALRC 2017:159).

(iii) Section 3A of the *Bail Act 1977* Victoria

The ALRC recommendations seek to enable Aboriginal and Torres Strait Islander people accused of low-level offending to be granted bail (ALRC 2017: 149-183). ALRC recommends Victorian provision (s.3A of the *Bail Act 1977* (Vic)) be adopted in other state and territory bail statutes. Section 3B of the *Bail Act 1977* (Vic) determine certain factors which must be taken into account in determinations concerning all children and young people, including the importance of stability in the lives of children and young people, and the desirability of granting bail where possible.

In the Second Reading speech when s.3A was introduced into Parliament it was noted that:

> Section 3A requires a decision-maker to take into account (in addition to any other requirements in the Bail Act) any issues that arise due to the Aboriginality of an accused when making a determination under the Bail Act… While the provision requires the decision-maker to take the evidence into account it does not require the decision-maker to reach a particular decision. The test for granting bail remains unchanged, requiring a decision as to unacceptable risk (Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2010, 3502 (John Lenders)).

It is noted that s.3A interacts with s.19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides for cultural rights, and specifically recognises that Aboriginal people hold distinct cultural rights.[9]

Submissions to the ALRC Inquiry noted that s.3A has been underutilised, and as a result s.3A had little impact on remand numbers in Victoria. The ALRC has acknowledged that 'the effect of this provision may be diminished through limited application and use by legal advocates, and deficiencies in culturally appropriate bail support services and diversion programs' (2017:150). Therefore, ALRC recommended (**Recommendation 5–2)** that state and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

- develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies; and
- identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options (ALRC 2017: 169).

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[9] Section 19(2) Aboriginal person hold distinct cultural rights and must not be denied the right, with other members of their community: (a) to enjoy their identity and culture; (b) to maintain and use their language; (c) to maintain their kinship ties; and (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Therefore two questions arise: how do we make s.3A work better in a legal sense, and how do we make it work better in a practical sense through improved bail support programs?

(iv) How do we make s.3A work better in a legal sense?

It has been noted by Victoria Legal Aid that 'the consideration of an individual's Aboriginality does not exist in a vacuum, and requires understanding and skill across all involved in the determination of bail' (cited in ALRC 2017: 174). There has been widespread support for improved guidance and training in relation s.3A for Victoria Police, court registrars, magistrates, bail justices, legal advocates and prosecutors. The ALRC recommended that in addition to training there was 'a concurrent need for well-constructed written guidelines for criminal justice participants, including the judiciary' (ALRC 2017: 175).

Are amendments required to s.3A? Section 3A is prescriptive in that it *requires* the court to consider issues related to Aboriginality. However, it has been argued that the section could be amended to further strengthen the provision. The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted to the ALRC that amendments should 'include reference to a person's age; provide "culture" and "background" as separate considerations (rather than the requirement to consider a person's cultural background); and explicitly state that the courts are to consider the relevant matters when determining whether the person will reach bail *and* when attaching conditions to that bail' (ALRC 2017: 173).

It has also been suggested that 'bail authorities be directed to limit their discretion so that, other than in exceptional circumstances, bail authorities preclude:

- the possible repetition of minor offences from their considerations of community safety;
- refusal of bail due to the unavailability of adequate accommodation; and
- the imposition of certain bail conditions such as curfews and non-association orders (ALRC 2017: 176).

There is also a need to consider whether the recent 2017 Victorian bail amendments which require a person to show 'exceptional circumstances' or 'show compelling reason' for various offences for bail not to be refused disadvantage Aboriginal people.

(v) How do we provide better bail support programs for Aboriginal young people?

Bail support programs for Aboriginal and Torres Strait Islander people generally take three forms:

- services that can support Aboriginal people to be granted bail and to meet the conditions of their release;
- culturally appropriate programs; and
- mainstream bail diversion programs.

Support services for Aboriginal people to be granted bail and to meet their conditions tend to be delivered by non-government organisations. Most are for adults. Some are specifically for women (in general), including the Miranda Project in NSW and Sisters Inside in Queensland,

while the Koori Women's Diversion Program in Victoria is specifically for Aboriginal women.

The **Koori Women's Diversion Program in Victoria** has two key components:

1. Intensive case management services in Mildura and Morwell Koori caseworkers have been placed at Aboriginal community-controlled organisations in Mildura and Morwell. Both were areas identified as having high numbers of Koori women in contact with the justice system and significant gaps in service provision for Koori women. The caseworkers provide a single point of assistance to address the many issues faced by Koori women that contribute to offending, including family violence. The program aims to break down barriers to Koori women accessing assistance by providing women with holistic and streamlined caseworker support throughout the criminal justice process. The services were developed in partnership with Koori communities in Mildura and Morwell, and are tailored to respond to the needs of Koori women offenders and complement existing services. The program is showing considerable promise, with high levels of engagement by Koori women. In addition, magistrates have been supportive and have referred women to the service as a diversion option.

2. Odyssey House Victoria Koori Women's Diversion Program. This program provides six drug and alcohol treatment and rehabilitation family places in a culturally appropriate setting in Melbourne for Koori women with substance abuse issues who are in contact with the justice system.

A Koori Support worker has been employed and more than 45 women have commenced treatment through the program. The program aims to:

* provide culturally-appropriate and holistic treatment in a residential setting for Koori women referred from the justice system
* enable women to remain with their children while accessing treatment
* divert women out of the criminal justice system at any stage of the process, including as a bail option, an alternative to prison or as a post-release program.

Source: Human Rights Law Centre & Change the Record 2017: 37).

The VEOHRC (2013: 52) identified that residential facilities for Aboriginal and Torres Strait Islander women with appropriate supervision, wraparound services, mentoring programs and access to their children are critical to the successful completion of bail conditions.

(vi) Bail Diversion for Drug and Alcohol Issues (Aboriginal Adults)

There are also specific bail diversion programs for Aboriginal and Torres Strait Islander people (adults) with alcohol dependencies, such as the Queensland Indigenous Alcohol Diversion Program (QIADP). QIADP is a pre-sentence bail-based court diversion program. It is a voluntary treatment program available Indigenous people appearing in the Magistrates Court, and for whom alcohol misuse contributes to their offending. Once an individual has been bailed on to QIADP, they are progressed through an assessment to treatment. During this time the individual may receive support from multiple agencies to address their alcohol misuse problems. The successful completion of QIADP must be taken into account by a Magistrate when subsequently sentencing the individual. There have been several evaluations

of QIADP which have found that participation in QIADP reduced the frequency of individuals' contact with police. When offending behaviour did re-occur following participation in QIADP, it was found to be less serious than previously. Other findings included improved health and social outcomes for participants, reduced levels of alcohol consumption, reduced levels of offending and improved parenting capacity.
The Western Australian Indigenous Diversion Program is available on referral for people with substance use who have entered a plea of guilty in some regional areas in WA. If referred to the program, the participant's case will be remanded for approximately eight weeks to allow the offender time to access treatment for their drug use. The Indigenous Diversion Officer coordinates the treatment process. Following treatment, the offender returns to court for sentencing. This program is available to people who would have been granted bail, and would otherwise be expecting a fine or community-based order on sentencing (ALRC 2017: 178).

(vii) Mainstream Bail Diversion Programs (Adults)

Aboriginal and Torres Strait Islander people can also be diverted into mainstream bail diversion programs from the Local or Magistrates Court. In Victoria, for instance, the Court Integrated Service Program (CISP) is available on referral from the Magistrates' Court regardless of the entry of a guilty plea, and includes the Koori Liaison Officer program. CISP provides case management and entry into services and accommodation for all jurisdictions of the Magistrates' Court. This program received support in the submission from VALS to the ALRC. VALS reported good outcomes from using this service for their clients, advising that Aboriginal people feel safer accessing services from Aboriginal organisations. VALS recommended expanding Koori Case Managers (ALRC 2017: 178-9).

(viii) Aboriginal Young People and Bail Support

The Aboriginal Legal Service Western Australia (ALSWA) has suggested that the best way to provide culturally appropriate bail support and diversion was to 'develop and establish Aboriginal-run programs that provide holistic, flexible and individualised support and assistance'. ALSWA put forward their **Youth Engagement Program** as a model. This program has three Aboriginal diversion officers who work with young people appearing at court. Support provided by the Aboriginal diversion officers includes: accommodation assistance; referrals to programs; transport assistance; reminders for court and other appointments; mentoring; and liaison with agencies. The diversion officers work onsite at the Perth Children's Court and conduct outreach services (ALRC 179-80). The **Clean Slate without Prejudice** program in Redfern, which was noted earlier in this Report (pp), also takes Aboriginal young people who may be referred to the program as a bail condition.

(ix) Case Studies

Aboriginal legal services in the Northern Territory recommended to the NT Royal Commission that bail support programs models which include 'wrap-around' services such as those provided by the Conditional Bail Program in Queensland and ASYASS in Central Australia were the most appropriate.

Conditional Bail Programs in Queensland

Conditional Bail Program

The Conditional Bail Program is 'aimed at a young person whom the court believes is highly unlikely to comply with bail conditions unless supervised under a structured program' (Queensland Government 2012b: 2). The program is delivered by Queensland Government youth justice service centres as a form of supervised bail. A young person can only participate in the program if a court makes participation a condition of their bail order. The program is not intended to specifically address alleged offending behaviour or monitor bail conditions that do not involve the Department (Queensland Government 2012b); the majority of young people involved in the program have not entered a guilty plea.

The program is tailored to meet the needs of young people via assessment and a case planning framework. These program and activities may include:

*pro-social or leisure activities;

*initiatives to address immediate personal or developmental needs and strengthen family ties or cultural attachment;

*delivery of the CHART or Aggression Replacement Training programs, to address behaviours that have been assessed as causing problems in the young person's life or that place them at risk of breaching their bail undertaking;

*re-entry into school, vocational education and training, employment programs, a traineeship or apprenticeship;

*community-based sporting or recreational activities with a developmental focus; and

*activities to support the young person to access other community resources and services.

A 2012 snapshot review of 20 young people on a Conditional Bail Program found that in terms of the outcomes of the program, 11 successfully completed the program and had not subsequently been charged with new or different offences according to the latest available records.

<u>Youth Bail Accommodation Support Service</u>

This program, delivered by the Youth Advocacy Centre, aims to implement support services and developmental interventions (eg independent living skills, family support, access to education, employment and training etc) to increase a young person's capacity to comply with their bail conditions, maintain stable accommodation and to engage positively with family, pro-social peers and broader community on a sustainable basis.

This program, delivered by the Youth Advocacy Centre, aims to implement support services and developmental interventions (eg independent living skills, family support, access to education, employment and training etc) to increase a young person's capacity to comply with their bail conditions, maintain stable accommodation and to engage positively with family, pro-social peers and broader community on a sustainable basis.

Source: Richards and Renshaw (2013: 88).

Alice Springs Youth Accommodation and Support Services (ASYASS)

The ASYASS is funded by the Northern Territory Department of Health through funding for the homeless and operates a crisis refuge service for youth aged between 14 and 17. ASYASS provides early intervention, intensive case management and life skills development for those who reside at their homes. Children and young people are assisted with education and employment, parenting skills, life skills and can be linked with outreach services as required. The service cannot always meet demand.

The Chief Executive Officer of ASYASS recommended bail homes being located in ordinary houses rather than at an identifiable facility. ASYASS's current facilities are houses located across Alice Springs. They are designed to be normal and non-stigmatising home environments, with bedrooms, lounge rooms, kitchens and gardens. The Chief Executive Officer of ASYASS recommended that each house should have approximately four beds, and if the numbers of young people needing accommodation increase then more small facilities should be opened rather than increasing their capacity. In her view the bail accommodation design proposed by Territory Families for a large facility with secure windows, unbreakable beds and a concrete fit-out would resemble a detention facility.

Source: RCPDCNT (2017a: vol 2b, 300-1).

The Victorian Youth Justice Intensive Bail Supervision Program (including Koori Intensive Bail Supervision Program)

The objectives of this program are to provide an intensive bail supervision service for young people aged 10–18 years who are at risk of being remanded or re-remanded and to divert young people from future involvement in the criminal justice system. This service is provided by the Victoria Department of Human Services.

A young person can only gain access to this program when it has been set as a bail condition by the courts. However, potential clients can be identified by the Youth Justice Court Advice Service, the police, the program's case managers, the Children's Court, Youth Justice Custodial Services, CAHABPS and legal representatives. These actors can then refer the young person to be assessed for suitability by the program's case manager or a Youth Justice Court Advice Service worker. The case manager or the young person's legal representative can then make the recommendation for the young person to participate in the program as part of their bail to the presiding judicial officer. The program is voluntary and young people must consent to participating in the program.

The young person is provided with case management to reduce the risk of them reoffending while on bail and to assist them to comply with their bail conditions. The program also assists in addressing the young person's needs related to accommodation, education and training, employment, health and development, family and other matters.

This program is only available to young people in the North, West and South metropolitan regions. In the North and West regions, the Department collaborates with the community organisation Concern Australia, which provides outreach work with young people in addition to the support provided by the program's case manager.

In addition to the metropolitan regions stated above, the Koori Intensive Bail Supervision Program is also available in the Gippsland, Hume and Barwon South West regions. This program aims to provide culturally specific support to Indigenous young people.

Source: Richards and Renshaw (2013: 87-88).

(x) Meeting the Need for Accommodation

The Armytage and Ogloff (2017b: Part 2, 92) review recommended that consideration should be given to the development of a youth-specific bail diversion program for Koori young people, equivalent to Wulgunggo Ngalu Learning Place which is currently available for adult Aboriginal males (see: http://assets.justice.vic.gov.au/corrections/resources/61a8b7f8-d793-4432-a445-600d83384537/wulgunggodl2015_acc.pdf). Also relevant as a potential model is Baroona Youth Healing Place.

The need for appropriate accommodation options for Aboriginal and Torres Strait Islander peoples seeking release on bail was reiterated by many stakeholders to this ALRC (2017: 183). Issues that arose were whether bail hostels were suitable and the hesitancy to house together people who may have challenging behaviours and needs.

ALS NSW/ACT submitted that bail houses can

> provide a safe, supportive, and supervised short-term housing arrangement for an individual who is eligible for bail, but may not be granted bail due to a lack of suitable and stable accommodation. Bail houses can provide a bail address for the full-duration of bail, or can act as an initial form of accommodation until other suitable and stable accommodation can be found.
>
> Bail houses can also prevent or reduce breaches of bail conditions. Bail conditions frequently impose a 'reside as directed' condition on an individual… This can be a difficult condition for Aboriginal people where an individual is required to reside in unsuitable accommodation. (ALRC 2017: 181-2).

ALS NSW/ACT recommended the 'Bail Supportive Housing Program' from Ontario Canada, noting the need for specific housing for Aboriginal and Torres Strait Islander people. The key features of the Canadian model include: 24-hour support and supervision; programs such as life-skilling and referral to counsellors and housing agencies; dedicated Indigenous staff including an Aboriginal Bail-Program Supervisor, who also provides outreach services to community (ALRC 2017: 182).

(xi) Best Practice Principles for Youth Bail Support Programs

Best practice principles for bail support programs have been previously identified by the Australian Institute of Criminology (Willis 2017). The review was not specific to bail support programs for Aboriginal and Torres Strait Islander peoples. However, the review did focus on programs for young people. The review found that each state and territory ran at least one 'program or service to support people on bail—either directly, to allow the courts to grant bail, or to provide treatment and other services to defendants on bail'. Best-practice programs were:

- voluntary: participants are therefore motivated to engage in treatments;
- individualised and holistic: responsive to the criminogenic needs of the participant;
- timely: available immediately upon bail being granted;
- collaborative: using interagency approaches;
- supportive: prioritised support over supervision;
- familiar: locally based; and
- evidence based: based on sound guidelines and processes (Willis 2017: iv).

In addition, the NT Royal Commission found that an effective bail support program, including bail accommodation should:

- be available to support young people from the moment they are granted bail
- operate as a 24-hour service
- be available to young people irrespective of whether they have entered a plea of guilty and are awaiting sentence or not
- have the capacity to deal with young people who may have complex needs
- be designed to include wrap around services, such as education, housing, employment and health
- operate with clear and effective lines of communication to the courts, police, families and other interested parties
- operate in a culturally competent manner
- collect high-quality data about its operations and make that data available for formal evaluation of its effectiveness
- have a specialist youth worker who works with the young people and their families, among other things, to support them in arranging services and provide practical life skills support such as attendance at Centrelink, obtaining a driver's licence and purchasing clothing, and
- develop bail support plans for the young people, through a specialist youth worker engaging with the young person and their family (RCPDCNT 2017a: vol 2b, 300).

Questions: Remand and Bail Support

How can the underutilisation of s.31 of the Bail Act be remedied?

Can the Wulgunggo Ngalu Learning Place and/or Baroona Youth Healing Place provide appropriate models for Aboriginal young people, and is the same model suitable for Aboriginal young women and girls?

Can the Koori Women's Diversion Program be adapted for Aboriginal young women?

What are the limitations of the current Koori Intensive Bail Supervision Program?

12. Diversion from Court

This section of the report focusses on court diversion *prior to sentencing*. In many Australian jurisdictions diversion at this stage of the proceedings is tied to a referral from court to a youth justice (or family group) conference. The ability of courts to refer matters to a youth justice conference has been particularly important for Aboriginal children. Courts appear more willing than police to refer Aboriginal children to a conference and this is reflected in the higher proportion of Aboriginal children among court referrals to conferences (Cunneen et al 2015: 158).

As noted previously in the section on restorative justice, in Victoria the eligibility criteria for Youth Justice Group Conferencing were expanded in 2016 to allow the court to refer a young person to participate in Youth Justice Group Conferencing when the court is considering any sentence supervised by Youth Justice.

In Victoria the other major court-based diversion program is the Children's Court Pre-Plea Diversion Program. There does not appear to be any data at present on the specific use of the program for Aboriginal young people, although as noted below it is available in all Koori courts.

Victoria: The Children's Court Pre-Plea Diversion Program

This is a statewide response designed for young people who address harm by taking responsibility for their offences, address the causes of their offending, participate in diversion activities and, where appropriate, engage with support services.

Eligibility criteria include young people with limited or no criminal history who would otherwise be sentenced to an outcome not requiring supervision from youth justice. The young person's history and circumstances of their offending are considered in determining whether diversion is appropriate. There are no automatic exclusions regarding the nature or type of offence eligible for diversion, apart from offences that carry a mandatory penalty. Eligibility is informed by consultation with the young person, their family or carer, legal representative and Victoria Police prosecutors.

Upon successful completion of the diversion program, the young person **is eligible to have their charges dismissed with a non-disclosable criminal record** for the offences related to the diversion order.

As of January 2017, the program is delivered by 18 DHHS staff, including two coordinators, who are responsible for statewide oversight of the program. The program is available at all Koori courts.

Around 350 adjournments for diversion were made in the first three months of statewide service delivery.

Sources: Armytage and Ogoloff (2017a: 73-74); Children's Court Youth Diversion Service: https://www.justice.vic.gov.au/justice-system/childrens-court-youth-diversion-service

In Canada there are a number of Aboriginal-run diversionary programs which operate on the basis of a pre-sentencing court referral. These are funded under the federal Aboriginal Justice Strategy which is discussed further later in this report. The example below is the Aboriginal Community Justice Program operating in Ontario.

Aboriginal Community Justice Program: Diversion to Aboriginal Healing, Ontario

The Aboriginal Community Justice Program (Ontario) provides an alternative to court for Aboriginal adults and youth that have acquired criminal charges. In communities where these programs exist, Aboriginal accused have the option to apply to have their charges diverted (deferred) out of the courts and placed into the Aboriginal Community Justice Program. Each program has an operational protocol agreement with their local Crown Attorney's office that outlines the process, the charge types, and eligibility requirements to participate in the program.

Applications for diversion are typically submitted by the Aboriginal Courtworker(s), or the program staff to the Crown Attorney. If the application is denied, the matter will proceed through the court process. If approved, the matter is adjourned (paused) for approximately six months to participate in the Aboriginal Community Justice Program.

Once in the Aboriginal Community Justice Program, a Healing Plan will be jointly created between the participant and trained Community Council Members. The Healing Plan sets out to address the underlying causes that lead to the offence by establishing conditions the participant will be required to complete during the adjournment period.

At the time of the next court date the Aboriginal Community Justice Program will provide the Crown Attorney with a report on the participant's progress identifying whether the participant:

(1) Successfully completed the program - If the participant is successful, **the charges are withdrawn (no conviction)** and the matter is released from the courts.

(2) Needs more time - If the participant needs more time, a request for another adjournment period (usually three months) to complete the remaining conditions of the Healing Plan is made.

(3) Unsuccessful - If the participant is unsuccessful the participant and the charges will be directed back into the courts to be resolved.

There are several examples of the Healing Plans as part of the Aboriginal Community Justice program including in Ontario the Odawa Aboriginal Community Justice Program and the Ontario Federation of Aboriginal Friendship Societies.

Sources and Further Reading:

http://www.odawa.on.ca/programs/justice/contacts.html

http://www.ofifc.org/about-friendship-centres/programs-services/justice/aboriginal-community-justice-program

http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplace/ont.html

The Aboriginal Community Justice Program in Ontario has a number of relevant points to consider in the Victorian context. Firstly, if the program is successfully completed the charges are withdrawn and no conviction is recorded. This contrasts with the Victorian Pre-Plea Diversion Program where a successful outcome results in a non-disclosable criminal record for the offences related to the diversion order. The eligibility criteria in Ontario are potentially more flexible because they do not limit application to a young person who would not be likely to receive a supervisory order (as in Victoria). There is also flexibility in requesting a further adjournment if needed for the successful completion of a Healing Plan.

Further relevance to the Victorian context lies in the idea of developing a Healing Plan between the offender and (trained) members of an Aboriginal Community Council. The Healing Plan addresses the underlying causes that lead to the offence by establishing conditions the participant will be required to complete. Typically, the Healing Plan may include: therapy and counselling; addictions programs; cultural programs to help empower the individual's sense of identity; and other programs suitable for the individual offender.

Questions: Court Diversion

Is the Ontario model sufficient (ie the adjournment of the proceedings to undertake an Aboriginal-run healing program)?

Are the existing models in Victoria (Children's Court Pre-Plea Diversion Program) that can be utilised and improved, and are there existing ACCOs that can fulfil the required roles?

13. Courts and Sentencing

This section of the report considers a number of issues relevant to the sentencing of Aboriginal young people in Victoria. These include the current discussions as to whether special legislative requirements should be introduced to consider Aboriginality when sentencing; the role of specialist pre-sentence reports; and the role of the Koori court.

(i) Legislative Requirement to Consider Aboriginality in Sentencing

The ALRC (2017: 204) has recommended that:

> Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples (Recommendation 6-1).

The Law Reform Commission of Western Australia (2006: 374) previously recommended a similar, although more limited provision be introduced into legislation in Western Australia:

> When considering whether a term of imprisonment (or a term of detention) is appropriate the court is to have regard to the particular circumstances of Aboriginal people (Recommendation 37).

The Western Australian recommendation is more limited than the ALRC recommendation because it does not specify both the unique systemic factors and the background factors of Aboriginal and Torres Strait Islander peoples, and only comes into play at the point when a term of imprisonment or detention is being considered.

The ALRC (2017: 186) found that 'the majority of stakeholders to this Inquiry supported the introduction of provisions requiring sentencing courts to take a two-stepped approach. First, to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples, then to proceed to review evidence as to the effect on that particular individual offender'.

The Victorian Aboriginal Legal Service (VALS 2017: 3) has also proposed that the *Sentencing Act 1991* (Vic*)* be amended to support the 'consideration of the courts to the persons' Aboriginal background, as per the *Canadian Criminal Code* s718.2(e)'. In general, the Australian recommendations have been influenced by Canadian legislation and case law. Section 718.2(*e*) of the *Canadian Criminal Code* requires that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. The Canadian Supreme Court in *R v Gladue* (1999) 1 SCR 688 at 689 confirmed that the unique circumstances of Aboriginal people needed to be considered in sentencing:

> The provision [s 718.2(*e*)] is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.

> The effect of s 718.2(*e*), however, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders … In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

In *R v Ipeelee* [2012] 1 SCR 433 the Canadian Supreme Court revisited *Gladue* and upheld its application to Aboriginal people in all cases, including serious matters.[10]

The Victorian Aboriginal Justice Agreement Phase 4 (*Burra Lotjpa Dunguludja* nd: 39) has committed to *considering* amending the Sentencing Act 1991 to take account of Aboriginality.

(ii) Pre-Sentence 'Indigenous Experience Reports' or 'Community Justice Reports'[11]

The *Gladue* decision in Canada led to the development of specialist reports for the courts, referred to as Gladue Reports. These reports differ from conventional pre-sentence reports and are intended to provide a more comprehensive understanding of the historical and cultural context of an Aboriginal offender, including the underlying causes of offending. These Canadian developments have also influenced Australian considerations of the need for some similar form of report. The ALRC noted that the majority of stakeholders to its Inquiry supported the introduction of specialist reports for Indigenous offenders, and recommended the use of 'Indigenous Experience Reports' to enable superior courts (District/County and Supreme) to take account of the unique systemic and background factors of Aboriginal offenders when sentencing. These should 'ideally prepared by independent Aboriginal and Torres Strait Islander organisations' (ALRC 2017: 186). For Local or Magistrates Courts, the ALRC recommended that:

> State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means (Recommendations 6-3).

The NT Royal Commission also supported 'the development of a model akin to the Canadian Gladue reports' specifically for children and young people. The NT Royal Commission recommended that:

[10] When sentencing an Aboriginal offender, courts *must* take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters provide the necessary context for understanding and evaluating the case-specific information presented by counsel. However, these matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders (*R v Ipeelee* [2012] 1 SCR 433).

[11] Also referred to as Gladue Reports (after the Canadian case), Bugmy Reports in NSW (after the High Court case), and Aboriginal Community Justice Reports in Victoria (VALS 2017, also *Burra Lotjpa Dunguludja*).

1) Communities be resourced to establish a process to provide:

    - information for pre-sentencing reports for Aboriginal children and young people, and
    - information about local non-custodial sentencing options for Aboriginal children and young people.

2) The *Youth Justice Act* (NT) be amended to require this information be taken into account by the Youth Justice Court. (Recommendation 25.42) (RCPDCNT 2017a: vol 2b, 323).

(iii) Further Developments in Australia

There have been moves underway to develop specialist Indigenous Experience Reports in various states and territories. In the ACT, Legal Aid ACT is designing 'a framework for the creation of specialised reports similar to the Gladue Reports in Canada', and in NSW the Aboriginal Legal Service is developing a 'Bugmy Evidence Library' of material on disadvantage in particular Aboriginal communities which can be used as evidence in sentencing matters (ALRC 2017: 220-1). It is also worth noting that the Murri Court is Queensland also enables the use of cultural reports.

In Victoria the Aboriginal Legal Service (VALS 2017) has recommended a trial of Aboriginal Community Justice Reports written by Aboriginal communities, and also recommended that the *Sentencing Act 1991* (Vic*)* be amended to support the use of Aboriginal Community Justice Reports. The VALS (2017: 2) has noted the importance of an expanded role for the use of Community Justice Reports which could include 'a variety of justice scenarios, including bail, sentencing, child protection and for young people'.

VALS proposes that ultimately, such reports could be utilised across a range of justice responses. In particular:

- Offences which will attract a gaol sentence
- Youth justice matters
- For use in both Koori Court and mainstream court
- Child welfare and Family Law responses
- Family Violence matters (VALS 2017: 13).

According to VALS, the purpose of preparing such reports is to:

- Identify possible underlying drivers of the individual's offending, in particular, those that may relate to the impacts of trauma and colonisation uniquely experienced as an Aboriginal person.
- The reports also provide the opportunity for the offender and the community, to spend time to consider and speak about such impacts in a therapeutic and restorative justice manner.
- This also provides a further voice to the offender, their family and community, and thus greater involvement in, and engagement with the justice system, akin to the aims of the Koori Courts (VALS 2017: 4).

The ALRC (2017: 226-7) also noted the importance of training and the development of guidelines for judicial officers and legal practitioners to support the use of Indigenous Experience Reports.

There is a commitment in *Burra Lotjpa Dunguludja* (nd: 39) to trial over the next five years the use of Aboriginal Community Justice Reports to provide information to judicial officers about an Aboriginal person's life experience and history that impacts their offending; and to identify more suitable sentencing arrangements to address these underlying factors.

(iv) Expanding and Developing the Role of the Koori Court

Aboriginal sentencing courts (Koori Courts, Murri Courts, Nunga Courts, community courts and circle sentencing courts) have been established for Aboriginal offenders throughout most of Australia, beginning with South Australia in 1999. There are currently 56 Aboriginal sentencing courts operating, comprising 41 adult courts and 15 youth courts (Daly and Marchetti, forthcoming).

In Victoria, the Koori Court was legislated by the *Magistrates Court (Koori Court) Act 2002* and the *Children and Young Persons (Koori Court) Act 2004.* The **Children's Koori Court** is currently sitting at: Melbourne; Heidelberg; Dandenong; Mildura; Latrobe Valley (Morwell); Bairnsdale; Warrnambool; Portland; Hamilton; Geelong; Swan Hill; and Shepparton. The **(adult) Koori Court** is currently located at Bairnsdale, Broadmeadows, Latrobe Valley, Mildura, Shepparton, Swan Hill and Warrnambool Magistrates' Courts. The **County Koori Court** sits at Melbourne, Mildura and Morwell. Expansion of the Children's Koori Court occurred under the Aboriginal Justice Agreement Phase 3. There is a commitment in *Burra Lotjpa Dunguludja* (nd: 47) to expand Koori Courts to additional locations across three jurisdictions: County Court, Magistrate's Court and the Children's Court. A major recommendation of *Ngaga-dji* Report is the expansion of the Children's Koori Court access to state-wide availability (Cerreto 2018: 53).

There have been 16 evaluations and impact studies of Australian Aboriginal sentencing courts (Marchetti 2017). Although it is difficult to draw comparisons across these studies, most have found improved rates of court appearances and strengthening of community participation, but not a consistent effect on recidivism. Daly and Marchetti (2012) have noted that:

> Indigenous groups say that they have more trust in and better understand the court's decisions because they are involved and have a say.[12] Our research finds that the strengths of the courts lie in improved communication, reliance upon Indigenous knowledge and mechanisms of social control, and fashioning more appropriate penalties[13]. There is greater attention paid to the reasons for and contexts of offending behaviour, coupled with "Indigenous friendly" procedures and Aboriginal justice workers.

[12] Briggs, D & Auty, K 2003, "Koori Court Victoria – Magistrates' Court (Koori Court) Act 2002", paper presented to the Australian and New Zealand Society of Criminology Conference, Sydney, October
[13] Marchetti, E & Daly, K 2004, "Indigenous courts and justice practices in Australia", Trends & Issues in Crime and Criminal Justice, no 277, Australian Institute of Criminology, Canberra.

One study that found the courts were achieving positive criminal justice outcomes used a desistence analysis (Daly & Proietti-Scifoni 2009). The research found that the processes that most helped an offender to desist from crime included access to effective alcohol and drug rehabilitation programs, and elder support for the offender.

In Victoria, Borowski and Sheehan found that the Children's Koori Court was perceived as an effective response to Aboriginal young people's offending, because the Elders provided an opportunity for better engagement with young people and their families, and it was seen as a culturally appropriate way of dealing with Aboriginal young offenders and strengthening their cultural identity (Borowski and Sheehan 2013a). Regional magistrates in particular supported the expansion of the Children's Koori Court. Another issue that was identified, however, was the need for appropriate and accessible support services post-court, with one magistrate suggesting that the Children's Koori Court process is otherwise 'a complete waste of time' (Borowski and Sheehan 2013b).

Similarly, the NT Royal Commission reiterated the importance of Children's Courts providing a '**one-stop shop**'. The Commission found that

> Young people are more willing to engage with services when they are at court as they are in a time of high need and often are in a vulnerable state. Accordingly, sustained and coordinated efforts should be made to ensure the opportunity to link young people with support services is maximised. Co-locating youth services, or having youth services available on youth court days, would facilitate a comprehensive multi-agency response to the complex issue of youth offending. The Commission heard from the President of the Children's Court in Western Australia that having a '*one-stop shop*' of youth justice services, mental health services, the Director of Public Prosecutions, legal aid, child protection and victim assistance services in the court building makes a real difference to rehabilitative outcomes. In New Zealand, the Commission saw the value of the Children's Court coordinating and controlling those services with well-established relationships being developed between the court and regular appearances by representatives of those agencies (RCPDCNT 2017: vol 2b, 316).

The Victorian Aboriginal Legal Service has also noted that the Koori Courts can play a greater role in diversion.

Intersection of Diversion and Koori Court

Diversion technically does not require going before a Magistrate to be dealt with. There is scope, however, with Koori Court being the diversionary forum that it already is, that, once a person has pleaded guilty, after appearing before the Koori Court, that person may still get the sentencing outcome of diversion, and not get a criminal record. This would allow greater use of culturally appropriate responses to address underlying issues of identity and cultural connection.

Source: VALS (2015: 4).

The *Ngaga-dji* report has recommended that Children's Koori Court structure be expanded to enable children to plead not guilty thereby increasing their access to the existing justice system and that the court be expanded to enable state-wide accessibility (Cerreto 2018: 53). The Aboriginal Justice Caucus has focused on the role for Elders and Respected persons in

the court and the need to move from an advisory role to greater shared decision-making, and, similar to VALS recommendations, the hearing of contested matters, and diversion to community-based processes. It has also been agreed as part of *Burra Lotjpa Dunguludja* (nd: 47) that Koori Courts will pilot hearings of family violence intervention orders.

(v) Aboriginal Cultural Rights and the *Cemino* Decision

The Victorian Supreme Court decision in the *Cemino* case (*Cemino v Cannan* [2018] VSC 535) has important implications for the recognition of Aboriginal cultural rights. Zayden Cemino is a Yorta Yorta man who was charged with 25 criminal offences allegedly committed in the Echuca area where he lives. Echuca does not have a Koori court. Mr Cemino applied to the magistrate's court at Echuca to have the matter moved to the Koori Court in Shepparton. The magistrate refused, relying on the case law that serious indictable offences should generally be dealt with in the locality in which they occurred, especially if the defendant's address was in that locality. Mr Cemino sought judicial review in the Supreme Court. The Supreme Court found that 'a Magistrate must consider the purposes of the Koori Court and the rights under ss 8(3) and 19(2)(a) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ('the Charter') and must not treat the traditional principles for determining proper venue as decisive' (Judicial College of Victoria 2018: 1).

The Supreme Court has:

> Confirmed that courts must consider the distinct cultural rights of Aboriginal people under… the Charter when making decisions in relation to an Aboriginal person's request to be heard in the Koori Court. This decision has significant implications for Aboriginal people across Victoria and for decisions in the Courts about whether an Aboriginal person has access to the Koori Court (Shmerling and Warner 2018).

It has been noted that the 'accused's task of persuading the Court to transfer their case to a Koori Court is likely to be significantly easier post-*Cemino*' (Judicial College of Victoria 2018: 3).

Questions: Courts and Sentencing

Much of the current discussion on legislative requirements to consider Aboriginality in sentencing have not been explicitly focussed on the potential application to children and young people. Are there any particular issues which arise which are specific to Aboriginal children and young people?

Should there be a legislative requirement to consider Aboriginality in sentencing along the lines recommended by the ALRC? Should it only apply when considering a sentence of detention or should it apply to sentencing more generally?

Both the NT Royal Commission and the Victorian Aboriginal Legal Service (VALS) have recommended the use of specialist Aboriginal pre-sentence reports specifically for youth justice. Will the *Burra Lotjpa Dunguludja* commitment to trial Aboriginal community justice reports include the reports for youth justice? VALS have also identified the need for legislative reform to the *Sentencing Act 1991* (Vic*)* to support the use of specialist Aboriginal pre-sentence reports. What legislative requirements are required?

The ALRC recommended that such reports should be prepared by independent Aboriginal and Torres Strait Islander organisations. Who should have responsibility for preparing the reports? What resources are required for implementation?

What are the implications of the recognition of cultural rights for the Koori Court, and more generally?

Is further expansion of the Children's Koori Courts a priority? Are there any other changes that need to be made to improve the operation of the Children's Koori Court?

Are the proposed changes noted above, in conjunction with current policies and programs such as the Children's Koori Court, adequate to ensure shared jurisdiction between Aboriginal Community Controlled Organisations and the non-Aboriginal system of courts and sentencing?

14. Alternative Sentencing Options to Detention

This section of the report looks at alternative sentencing options for Aboriginal children and young people and considers the role for community-based supervision and support through Aboriginal Community-Controlled Organisations (ACCOs). In particular it reflects on a greater potential role in the provision of supervision and support services for young Aboriginal people on community supervision orders. It is also important to note that a support program run by an Aboriginal organisation may accept young people from a variety of sources at any one time including:

- Early intervention 'at risk' of offending or more serious offending
- Police referrals at the point of pre-court diversion
- Court diversion prior to sentencing
- As part of a community supervision court order

Aboriginal-run programs which are relevant in this regard and have been referred to previously in this report include the Murri School, Clean Slate Without Prejudice, the Yiriman Project, the Warlpiri Youth Development Aboriginal Corporation, and BushMob.

In addition, it is important to consider the potential role of ACCOs in providing for community-based options such as residential healing and cultural programs, particularly for Aboriginal young people who may be without family support and/or are homeless.

(i) ACCO Supervision of Adult Aboriginal Offenders

There is well-established ACCO supervision of Aboriginal offenders in Victoria related to adults. In particular we note the Wulgunggo Ngalu Learning Place for Aboriginal men and the earlier programs associated with the Rumbalara Women's Mentoring Program, and its development and expansion in 2006 (under the Aboriginal Justice Agreement Phase 2) into the Koori Offender Support and Mentoring Program (KOSMP) across five locations in Victoria. However, following a review by Koori Justice Unit, the KOSMP program has been merged with the Aboriginal Justice Worker program and operates from ACCOs to assist with payment of fines and/or completion of CCOs, rather than the original focus on mentoring.

Rumbalara Women's Mentoring Program: Benefits of mentoring programs

The Rumbalara Women's Mentoring Program was established in 2002 as a pilot initiative to intervene in the cycle of reoffending by Aboriginal women. The program provides women undertaking community-based orders (CBOs), including parole, with mentoring and support by Aboriginal Elders and Respected Persons. The aims of the program include assisting Aboriginal women on CBOs to complete their orders successfully and ensuring the mentoring program provides a planned response to Aboriginal women on CBOs.

A preliminary evaluation found that strengths of the program included the positive approach and feedback of the project officer and mentors, as well as program participants. In addition, the Koori Court magistrate and the Aboriginal Justice Officer said they found the program valuable as a support mechanism. Limitations of the program included staff training and administrative issues and problems with its location, as well as a perceived lack of organisation.
Source: Bartels (2010: 8)

The Koori Offender Support and Mentoring Program (KOSMP).

The KOSMP aims to assist Aboriginal adults on Community Corrections Orders to successfully complete their orders by providing a planned community response and ensuring Elders and respected persons are involved in the program to provide community-based local support, advice and cultural connection to offenders. The program model was first delivered in Shepparton in 2006 and funding was allocated under the AJA2 for delivery of the program in five locations across Victoria: Bairnsdale, Latrobe, Mildura, Shepparton and North-west Metropolitan. Program site locations were chosen based on the daily average number of Aboriginal offenders reporting to CCS offices in each region.
Source: CIRCA (2013: 81).

The Wulgunggo Ngalu Learning Place

Wulgunggo Ngalu Learning Place has been described as ‘a culturally safe residential rehabilitation service available for Aboriginal men completing community-based corrections orders. Youth Justice would benefit from an equivalent service for Koori young people to participate in rehabilitation activities as well as programs and daily activities… Program evaluation in 2013 identified favourable outcomes due to the holistic and culturally safe program’.

Source: Armytage and Ogloff (2017: Part 2, 207).

The Wulgunggo Ngalu Learning Place is a joint initiative of the Victorian Government and the Aboriginal community. Opened in September 2008 at the former Won Wron Prison site in Gippsland, it is a culturally appropriate 'learning place' for Aboriginal men undertaking Community Correction Orders (CCOs).

A live-in program, which can accommodate up to 18 men at any one time, the Learning Place is an initiative of the Victorian Aboriginal Justice Agreement. It is part of the Victorian Government's response to the findings of the Royal Commission into Aboriginal Deaths in Custody (1991). Residents can volunteer to attend or may be directed there by the courts.

The program aims to help reduce the significant over-representation of Aboriginal people in Victoria's criminal justice system. The focus is on developing life skills to improve overall health and reduce substance abuse if needed, improve job prospects and reduce the likelihood of reoffending in the future. Programs include local land care and community art, cooking and parenting workshops.

Elders provide leadership and communicate traditional cultural values. This is in keeping with the name 'Wulgunggo Ngalu'. Taken from the local Aboriginal language (Gunai/Kurnai), Wulgunggo means 'which way' and Ngalu means 'together'.

The program was awarded a prestigious International Corrections and Prisons Association (ICPA) award in October 2010.

Source:
http://www.corrections.vic.gov.au/home/community+corrections/community+programs/

(ii) ACCO Supervision of Aboriginal Young Offenders

In the Victorian context, the Koori Youth Justice Program is an important part of community-based supervision for Aboriginal young offenders. Also of relevance is the government commitment to provide additional funding to extend the community-based Koori Youth Justice Program (*Burra Lotjpa Dunguludja*, nd: 6). Additional funding to expand and consolidate the program was provided as part of the 2018/19 budget process.

Koori Youth Justice Program

The Koori Youth Justice Program was developed in 1992 in response to the findings of the Royal Commission into Aboriginal Deaths in Custody (April 1991) and now operates throughout the department's metropolitan and rural regions. Koori youth justice workers are located across the state and within the Parkville and Malmsbury youth justice custodial centres.

The program employs Koori youth justice workers to support young Aboriginal people who are at risk of offending as well as those on community-based and custodial orders. The workers assist in providing access to appropriate role models, culturally sensitive support, advocacy and casework.

The Koori Youth Justice Program is operated in the community mainly by Aboriginal Community Controlled Organisations. The program is delivered by 24 staff employed through 13 Aboriginal community-controlled organisations and one community service organisation.

Aboriginal custodial workers are employed by youth justice custodial services to work with and support young Aboriginal people while they are in custody. The program aims to prevent offending or re-offending behaviour by ensuring that young Aboriginal people are connected to their families and communities and provided with access to the supports and services they require.

Sources: https://www.justice.vic.gov.au/justice-system/youth-justice/koori-youth-justice-programs; Armytage and Ogloff (2017a: Part 1, 72-73).

Armytage and Ogloff (2017b: Part 2, 99) have recommended that to further assist in reducing Aboriginal over-representation in youth justice there is a need to:

- Increase funding levels for Aboriginal community-controlled organisations to expand the Community-based Koori Youth Justice Program for early intervention and the Koori Intensive Support Program to support the supervision of Koori young people on community orders. As noted above, increased funding was provided as part of the 2018/19 budget process.
- Establish a Youth Justice Community Support Service, similar to that run by Jesuit Social Services and other providers, but to be delivered by Aboriginal community-controlled organisations for intensive case management for those assessed as high risk

by the VONIY (or equivalent) and support services for Koori young people on community supervision orders (Recommendation 6.28).

A somewhat different approach is evident in Western Australia where there is a legislative base to local Aboriginal communities providing court-ordered supervision. Legislation provides for the use of contractual arrangements between WA Corrective Services and Aboriginal communities for the local provision of community supervision for sentenced offenders (see the *Young Offenders Act 1994*, s17b).[14] An Aboriginal Community Supervision Agreement provides for the Aboriginal Community Council to supervise the completion of the requirements of a court order. The Council is paid for this service. These agreements were developed in order to discourage courts from imprisoning young offenders from remote communities on the basis that any other penalty would not be enforced. In 2006 the Department of Corrective Services had agreements with 59 communities.[15] The services provided to young offenders in their own communities include:

- providing monitoring, support and guidance for young people on community-based orders coming back to the community after detention or from the court;
- providing placement options for young offenders in communities that are not their usual place of residence;
- providing placement options for young offenders who may be considered suitable for supervised bail;
- having community members approved and trained to provide community conferencing for minor offending;
- having community members assist in developing and/or facilitating programs.

The Department of Corrective Services (2010) notes that it 'provides training and ongoing support to community councils so they can undertake services to an acceptable standard'.

(iii) Mentoring

We have already noted in various sections of this report the importance of mentoring. The *Ngaga-dji* report emphasises the importance of mentoring for children and young people when discussing solutions that work to prevent youth offending (Cerreto 2018: 49). Two case studies are provided on the Panyappi Aboriginal mentoring program in South Australia and the Wayapa mentoring program in Victoria.

Case study: Panyappi Indigenous Youth Mentoring Project, South Australia

The Panyappi Indigenous Youth Mentoring Project is an intensive mentoring program for Indigenous young people and their families which was set up in Adelaide in 2001. The project aims to intervene in pathway of offending behavior, decrease youth contact with the criminal justice system and work with agencies to help young people (Van Gent *et al* 2018). The Panyappi Indigenous Youth Mentoring Project targeted young people of a specific age group (aged 10–15) who had a history of poor school attendance and educational

[14] See further information on WA community supervision agreements see http://www.atns.net.au/agreement.asp?EntityID=4632 and https://www.correctiveservices.wa.gov.au/_files/youth-justice/csa-fact-sheet.pdf

[15] See Agreements, Treaties, Negotiated Settlements database at http://www.atns.net.au/agreement.asp?EntityID=4632

achievement, substance abuse, unstable living environments and experiences of abuse (Stacey 2004).

The project consisted of a mentoring model, which sees an Indigenous mentor be matched with a young person, who work closely together and over time. The mentors were provided with formal training and informal supervision. The program employed mentors in a full-time capacity and sought to a low caseload, with initially some mentors having responsibility for only one young person. The rationale of this was to allow mentors to engage with the young person intensively, building trust within a relationship that was formalised but voluntary. An evaluation conducted by Stacey (2004) suggests that mentors played a key role in linking to a range of services to help address the results of historical abuses and ensure support was available to address the complex needs of the young person and the family.

The Panyappi Indigenous Youth Mentoring Project was evaluated in 2004, adopting a mix of quantitative and qualitative methods—program statistics, client demographics, program documentation, interviews and focus groups with young people, family members, staff and program collaborators (Stacey 2004). Quantitative data reflected substantial decreased in formal cautions, orders and convictions (Stacey 2004). The greater majority (12 young people) decreased their rate of offending by 25 per cent or more, often much more (70-100 per cent)—though in interpreting this finding it is important to bear in mind the small sample size (n=15) and the lack of sample group.

Sources: Stacey (2004); Van Gent et al. (2018); Ware (2013).

The Panyappi Indigenous Youth Mentoring project shows the advantages of partnering with community organisations in reducing (re) offending and demonstrates the advantages of more intensive, medium to long-term one-on-one work between mentors and young people.

In Victoria the **Wayapa mentoring program** has been recommended by Koorie Youth Council as a highly successful mentoring program for young people. It has male and female streams and also includes components for adults (See https://wayapa.com/mentoring-programs/).

(iv) Canadian community-based justice programs

The *Aboriginal Justice Strategy* supports Aboriginal community-based justice programs that offer alternatives to mainstream justice processes.

Aboriginal Justice Strategy Program

The AJS is a federally led, cost-shared program that has been supporting Aboriginal community-based justice programs that use processes, grounded in the principles of restorative justice and Indigenous Legal Traditions for 25 years. The programs supported by the AJS are unique in that the services offered by each program are based on justice-related priorities and designed to reflect the culture and values of the communities in which they are situated. Although the primary focus for most community-based justice programs is diversion of offenders from the mainstream justice system (MJS), AJS programs also provide a range of other justice-related services from prevention to reintegration (Department of Justice Canada 2016: i-ii).

The 2016 evaluation of the *Aboriginal Justice Strategy* considered six case studies which are detailed in the report. Two programs (the Saskatoon Tribal Council and the United Chiefs and Councils of Mnidoo Mnising Community Justice Program, Ontario) have been chosen as illustrative of programs developed at the community level under the strategy. Other case studies in the evaluation include the Elsipogtog Restorative Justice Program, New Brunswick; Punky Lake Wilderness Camp Society Tsilhqot'in Community Justice Program, British Columbia; Kwanlin Dun First Nation Social Justice Program, Yukon; Manitoba Métis Federation and Métis Justice Institute, Métis Community Justice Program. All case studies are described in detail at Department of Justice Canada (2016: 105-155).

Saskatoon Tribal Council (STC) Community Justice, Extrajudicial Measures and Opikinawasowin Reintegration Programs.

The STC operates an *Aboriginal Justice Strategy* Program. The objective of the community-based justice programs is to provide support and assistance to youth, adults and their families for the duration of their involvement in the justice system, with a particular focus on youth. The programs offered include:
Extrajudicial Measures Program which provides mediation services to youth (12-17 years) who are referred for first-time and less serious offenses
Extrajudicial Sanctions Program which provides mediation services to youth (12-17 years) as well as intensive support services, and is aimed at those who have been charged with break and enter/related offenses.
Enhanced Extrajudicial Sanctions Program which provides mediation services to youth (12-17 years) to deal with first-time and less serious offenses by providing intensive support using a case management model based on a community safety plan.
Youth and Community Reintegration which provides mentoring and support to youth and young adults (12-24 years) currently serving time in a secure or open facility and getting ready to make a transition into community living.

The program focused on integrated services in a family centered case management model and is based on the belief that a **holistic, community-based approach** is required to restore balance and harmony in the lives of the offender and the victim so that the healing process can begin. The **active participation and guidance of Elders** is key to all phases of the diversion process. The STC program works 'to ensure that the community-based justice programs were developed to ensure that they responded to the needs of Indigenous people in the communities. This was done through programs being run by and for Indigenous people, and ensuring that some of the programming focused on **culture and heritage**. The support and services were offered within an Indigenous empowerment framework to ensure they were culturally appropriate' (Department of Justice Canada 2016: 111)

For a full discussion of the STC Aboriginal Justice Programs see Department of Justice Canada (2016: 109-112).

The United Chiefs and Councils of Mnidoo Mnising Community Justice Program, Ontario

The Community Justice Program provides pre-charge and post-charge diversion through justice circles for youth and adult band members, both on- and off-reserve, located in the Manitoulin District. With the support of Elders, the Program has administered over 500 justice circles since 1994.

The objective of the Program is to employ traditional law principles of accountability, healing, and making amends in order to develop a Plan of Action for offenders who have accepted responsibility for their offences. When developing a client's Plan, social history and availability of rehabilitative services are examined. For example, in some instances, a Plan may focus on life skills that are transferable to employment skills upon completion of the Program, while others may target education, the need for social work, mental health, and addictions services.

In addition to a Plan of Action, the Program also delivers a twelve-session mandatory victim empathy program that incorporates Anishnabe justice principles and approaches. Indigenous traditional knowledge is incorporated as a form of positive healing. The cultural principles and approaches employed by the United Chiefs and Council of Mnidoo Mnising have proven to be very successful, as clients often return as participants or leaders. The Plan, in combination with the victim empathy program, are designed to promote and support healing for the victim, offender and community. The Program's Justice Panel is comprised of Elders with a strong foundation in the Annishnabe culture and language, as well as representatives from the six communities (Department of Justice Canada 2016: 112-113).

The importance of the *Aboriginal Justice Strategy* is that it is a national strategy (in Canada) and could be considered at the state-wide level in Victoria. Although covering the whole federal jurisdiction it allows for the development of local level, placed-based, strategies where communities can decide the appropriate forms and focus for Indigenous diversion.

For example, the STC program focusses on youth and employs Elders in a **holistic, community-based approach.** There is the use of various levels of intervention outlined above. The *United Chiefs and Councils of Mnidoo Mnising Community Justice Program* focusses on **diversion through justice circles** and employs traditional law principles of accountability, healing, and making amends in order to develop a Plan of Action. The process utilises Elders and is designed to promote and support healing for the victim, offender and community. Both the examples show the importance of local-level elements of self-determination.

(v) Aboriginal Operated Residential Alternatives to Mainstream Detention Centres

As noted above, Wulgunggo Ngalu Learning Place provides a culturally safe residential program for Aboriginal men completing community-based correctional orders, and the Baroona Youth Healing Place provides a therapeutic and culturally based residential program for young people with drug and alcohol issues (discussed in section 8). Both have been suggested as potentially appropriate for Aboriginal young people on bail and sentenced supervision. However, **there is also a need to think about the potential ACCO-run residential alternatives for Aboriginal young people sentenced to detention.**

The Canadian experience with healing lodges is worth considering in this context. It particular the healing lodges can provide a direct alternative to the use of imprisonment in mainstream facilities and involve Aboriginal communities in the correctional process. Section 81 of the Federal *Corrections and Conditional Release Act 1992* (CCRA) provide communities with the opportunity to be active partners in the care and custody of offenders. The legislation allows for Correctional Services Canada (CSC) to enter into an agreement with an Aboriginal community for the provision of correctional services to Aboriginal offenders and for payment by the CSC for the provision of those services. The CSC may

transfer an Aboriginal offender to the care and custody of an Aboriginal community, with the consent of the Aboriginal offender and of the Aboriginal community. An offender can be transferred at any time in his or her sentence to either **a community-based custodial facility or non-custodial supervision**.

Questions: Alternative Sentencing Options

What is the potential role for ACCOs in the provision of case management, supervision and support services for young Aboriginal people on community supervision orders?

Is legislative change necessary to:

- enable community supervision (eg WA community corrections agreements, or would MOUs, protocols be sufficient?)
- enable other alternative sentencing options and residential options instead of detention? (eg Healing Plans and residential alternatives)

Which approaches provide the best model for the ACCO supervision of Aboriginal young women (for example, mentoring programs, the Koori Women's Diversion Program)?

15. Detention and Alternative Approaches

This section of the Report considers issues relating to the use of youth detention. It begins with a discussion on strategies to restrict the age at which a young person can be sentenced to detention. It then discusses international best practice in the use of detention, and the implications for Aboriginal young people and Aboriginal community-controlled organisations in Victoria.

(i) Raising the Minimising Age of Criminal Responsibility and Establishing Age Restrictions on the Use of Detention

International best practice shows the need to raise the minimum age of criminal responsibility above the current Victorian age of 10 years of age. The low minimum age is inconsistent with prevailing practice. The average minimum age of criminal responsibility in Europe is 14 years old (Cunneen 2017). Similarly, in some 86 countries surveyed worldwide the median age was 14 years and, despite variation, 'there has been a trend for countries around the world to raise their ages of criminal responsibility' (Hazel 2008: 31-32). There are strong arguments for raising the minimum age of criminal responsibility and for also raising the age at which children can be sentenced to detention.

The minimum age of criminal responsibility is the primary legal barrier to criminalisation and thus entry into the criminal justice system. Nationally, the minimum age of criminal responsibility in Australia is 10 years old. There is an absolute presumption that children under the age of 10 are incapable of committing a criminal offence. A rebuttable presumption against responsibility exists until the age of 14 through the principle of *doli incapax*. *Doli incapax* presumes that a child aged under 14 years does not know that his or her criminal conduct is wrong unless the contrary is proved.

Article 40(3)(i) of the Convention on the Rights of the Child (CRC) requires the implementation of a 'minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. The CRC does not identify a specific appropriate age; however, 12 years has been recommended as the absolute minimum age for states to implement by the UN Committee on the Rights of the Child (2007). The UN Committee has argued that a higher minimum age of criminal responsibility of 14 or 16 years will contribute to a youth justice system which responds more appropriately with children in conflict with the law without resorting to judicial proceedings (UN Committee on the Rights of the Child, 2007: 33).

The NT Royal Commission has recommended (Recommendation 27.1) increasing the minimum age of criminal responsibility to 12 years, retaining the protection of *doli incapax* for 12-14 year olds, and limiting the circumstances that youth under the age of 14 years can be sentenced to detention (RCPDCNT 2017a: vol 2b, 418). The exceptions which would allow a child aged 12-14 to be sentenced to detention include a serious and violent crime against the person, where there is a serious risk to the community and the sentence is approved by the President of Children's Court (RCPDCNT 2017a: vol 2b, 419-420).

There has been widespread civil society support for raising the minimum age of criminal responsibility including the Child Rights Taskforce (2018: 68), Jesuit Social Services (2015), Amnesty International (2015), the Royal Australian College of Physicians and the Australian Medical Association (AMA 2019), criminal lawyers' associations, State, Territory and

Federal Children's Commissioners, and other organisations (Mitchell 2016; Zillman 2017; RCPDCNT 2017a: vol 2b, 418). Recently, the President of the NSW Children's Court, Judge Peter Johnstone, recommended to an NSW Legislative Assembly Inquiry into the Adequacy of Youth Diversionary Programs in NSW that the minimum age of criminal responsibility be raised to 12 years, and the minimum age for the use of control orders (juvenile detention) be raised to 14 years.[16] **The Victorian Koorie Youth Council in the *Ngaga-dji* report has recommended that the age of criminal responsibility be raised to at least 14** (Cerreto 2018: 51).

The various reasons for raising the minimum age of criminal responsibility have been examined in detail elsewhere (Cunneen 2017). However, in summary, these can be identified as follows:

- Compliance with the United Nations Convention on the Rights of the Child and international human rights standards.
- The common law doctrine of *doli incapax* has proven to be incapable of protecting young children (Bartholomew 1998; Fitz-Gibbon 2016; O'Brien and Fitz-Gibbon 2017; Cunneen 2017: 5-7).
- There are compelling child developmental arguments for raising the age (Crofts 2015, 2016; Cunneen 2017: 7-8; Sentencing Advisory Council 2012).
- The low minimum age has detrimental effects on children with mental illnesses and cognitive impairments (for a summary of the literature see Cunneen 2017: 9-12).
- The low minimum age compounds the over-representation of children from the child protection/care system among young children in the juvenile justice system (McFarlane 2017).
- Sound criminological arguments that youth justice systems are themselves criminogenic, with early contact being one of the key predictors of future juvenile offending (for a summary of the literature see Cunneen 2017: 12-13).
- The low minimum age of criminal responsibility adversely affects Indigenous children who comprise more than two thirds of children under the age of 14 years who are sentenced to either youth detention or a community-based order (AIHW 2019).[17]

Many jurisdictions internationally not only have higher minimum ages of criminal responsibility, they also have age restrictions on the use of detention, generally reflecting a greater emphasis on providing for pre-court and other diversionary options. For example, in **Switzerland** the minimum age of criminal responsibility is 10, but the youth court can only impose 'educational measures' on 10-14 year olds. Juvenile prison sentences are restricted to those aged 15 and above (Zimring et al 2017: 21-24). In **Belgium** a sentence of detention is only allowed for children above the age of 14. In **Finland** children under 15 years of age charged with a criminal offence can be subjected only to the child welfare measures. In

[16] Evidence 30 April 2018. <https://www.parliament.nsw.gov.au/ladocs/transcripts/2056/Corrected%20Transcript%20-%2030%20April%202018.pdf>.

[17] During 2017-2018, 601 children under the age of 14 years were placed in detention, 69 per cent of these children were Indigenous. During the same period, 782 children under the age of 14 years were placed on a community-supervision order, of whom 68 per cent were Indigenous children (AIHW 2019: Table S40b, Table S78b).

Scotland there is no prison service for children under the age of 16 years (RCPDCNT 2017a: vol 2b, 418-19).

Thus, there is a need to raise the minimum age of criminal responsibility, and to consider placing restrictions on the use of detention. This is of significant relevance to Aboriginal children because they are most over-represented among the younger cohort sentenced to detention (Cunneen 2017). The evidence is also clear that the earlier age at which a child is incarcerated, then the more likely they will have a life course of repeated contact with the justice system (for example, see McAra and McVie 2007, 2010; Weatherburn, McGrath and Bartels 2012).

(ii) International Best Practice in Detention

The Northern Territory Royal Commission assessed evidence of best practice approaches to secure residential accommodation for young people from around the world. They identified four common principles.

Best Practice Approaches to Secure Residential Accommodation

- The best results, in terms of ensuring community safety and rehabilitating young people are achieved in small facilities designed to be normalised and residential that focus on delivering therapeutic and educational services. Punitive institutional environments damage young people, endanger staff and do little, if anything, to make the community safer.
- The philosophy and operating principles of the facilities are extremely important. Staff at all levels must take seriously the purpose of secure accommodation facilities as being to turn around the lives of troubled young people and make them productive members of a safe society. This means a focus on the delivery of high quality therapeutic services, education, interpersonal and life skill development training for the young people who are detained.
- The detail of the design, philosophy and operating principles for the facilities in a particular jurisdiction must be developed in consultation with the community and in light of the characteristics of the expected population. In particular, while an overrepresentation of Aboriginal young people should not be planned for, regard must be had to the significant Aboriginal population in the Northern Territory when planning reform. There is no silver bullet: while it is valuable to borrow ideas from other places, it is a mistake to import models uncritically or programs from elsewhere.
- The development of a new secure residential model should occur alongside reforms to minimise the number of young people who need to be detained at all... There is a risk that building new facilities distracts decision makers from the real goal of keeping young people out of detention. It is not enough to just 'build a better mouse trap'.

Source: RCPDCNT (2017a: vol 2b, 428-9).

The Royal Commission noted that the focus should be on rehabilitative, therapeutic and educational approaches rather than simply containment. 'The rehabilitative and therapeutic services will include cultural healing, reconnection with family, mental health and trauma counselling, drug, alcohol and other substance abuse services and medical and dental services' (RCPDCNT 2017a: vol 2b, 430). Education and skills development should 'include formal education to ensure young people have an opportunity to meet their full potential, vocational training to assist older children to enter the workforce when they finish their

education and basic living skills for those young people who have not been taught them at home' (ibid).

Convergences in international best practice showed that there is:

- An emphasis on **minimising the number of children who need to be detained** at all. Detention is damaging for the young person, distressing for their family and expensive for the taxpayer (RCPDCNT 2017a: vol 2b, 432).
- An emphasis on **residential, normalised facilities**. 'For the children who are securely detained, the jurisdictions that achieved the best results are those that moved away from the institutional prison model and towards more normalised, home like facilities. This has occurred, for example, in Missouri, Washington DC, New York City, and Diagrama's centres in Spain' (RCPDCNT 2017a: vol 2b, 433).
- An emphasis on **small residential facilities** that are locally based and close to home to allow for successful reintegration (with some reviews of best practice suggesting units with no more than 12 young people) (RCPDCNT 2017a: vol 2b, 440-1).
- An emphasis on delivering **therapeutic services**. 'These services aimed at treating the factors that led to the young person breaking the law. The intensive delivering of counselling and therapy sessions is a feature of the Missouri model, which was replicated in Washington DC and New York. Diagrama in Spain operates on the basis of a multidisciplinary technical team of social workers, psychologists, teachers, lawyers and doctors who are responsible for the case management of the child'(RCPDCNT 2017a: vol 2b, 434).
- An emphasis on delivering **high quality education**.
- An emphasis on '**keeping young people busy**' with 'structured and full days… to help to develop in young people useful skills, a sense of self-worth and to support therapeutic treatments' (RCPDCNT 2017a: vol 2b, 436).
- An emphasis on **security through relationships**. The best performing systems achieved security 'primarily through relationships, rather than through the use of fences, locks, isolation and restraints. The Diagrama and Missouri approaches both emphasise relational security. Staff are trained and supported to engage with the young people as individuals, and to deal with outbursts through counselling and group therapy' (RCPDCNT 2017a: vol 2b, 437).
- An emphasis on **highly skilled staff**. 'Young people who come into detention disproportionately come from disadvantaged backgrounds, have a high level of need for support and, at least, initially have behaviours that make them difficult to work with. To manage this population effectively, successful jurisdictions have highly skilled staff. The staff have to be able to manage difficult behaviours, while showing positive behaviour, and actively engaging with the children' (RCPDCNT 2017a: vol 2b, 438).
- An emphasis on **community involvement and family engagement**. 'A common feature of successful youth detention systems is that they welcome the community into the secure facilities. Community involvement in the life of the secure facility provides transparency and informal oversight of the operations. It normalises the experience for young people, helps them develop social skills for their return to the community and allows them to develop positive relationships with the community. It allows the community to develop a sense of ownership and understanding of the operation of the facility' (RCPDCNT 2017a: vol 2b, 439, 441).

International best practice shows significant opportunities for greater involvement of ACCOs in the way youth detention should operate. The need for community involvement and family engagement in detention facilities signals the need for substantial engagement with ACCOs. International best practice supports more in-reach by ACCOs in Victoria to provide programs and services to young people, and to build therapeutic trusting relationships so they will continue to engage with services once released.

A greater emphasis on therapeutic services and high quality education needs to involve appropriate Aboriginal organisations. A movement away from larger prison-like facilities to small 'normalised' residential facilities which are locally based offers opportunities for involvement of local ACCOs which are more likely to have pre-existing relationships young people and their families and close knowledge of the environments from which the young people have come. **The possibility of Aboriginal operated residential facilities focussed on healing, therapeutic and cultural programs was discussed in Section 14 and is also relevant here.**

Questions: Detention of Aboriginal Young People

What should be the minimum age of criminal responsibility? Should there also be an age limit on when children can be sentenced to detention?

What interventions and strategies need to be put in place for 10-14 years if detention is not an option?

How do current Victorian government plans in terms of youth detention fit with international best practice?

What strategies can be put in place to ensure ACCOs' active involvement with Aboriginal young people in detention?

16. Parole, Throughcare and Post-Release Support/ Reintegration

(i) Parole

The limitations for Aboriginal people in accessing parole are well documented both in Australia and Canada. The literature tends to focus on Aboriginal adults. However, many of the problems identified are also relevant to Aboriginal children. In Victoria it was found that 67% of Aboriginal adult prisoners did not apply for parole and thus served their full sentence (ALRC 2017: 303). The Australian Law Reform Commission noted two key reasons for Aboriginal people not applying for parole:

> First, eligible Aboriginal and Torres Strait Islander prisoners may believe that they are unlikely to be granted parole by the parole authority; this may be due to living arrangements, previous offending, or lack of attendance in prison programs. It may also be related to a complex history in dealing with government representatives. Second, in jurisdictions that do not count time served on parole in the case of revocation, being granted parole creates too great a risk of increased prison time (ALRC 2017: 303).

In Canada it has been noted that Aboriginal prisoners are less likely than non-Aboriginal prisoners to have their parole approved, and for those who do have parole approved are more likely than non-Aboriginal prisoners to have their parole revoked (Hamilton and Sinclair 1991: Chapter 12).

Of further significance in the Victorian context is that the current system of Parole Boards, including the Youth Parole Board, are not 'public authorities' for the purposes of the Charter of Human Rights and Responsibilities. As a result, these Boards operate outside the human rights protections provided by the Charter. The Boards are also not bound by rules of procedural fairness and natural justice, nor are they subject to freedom of information legislation, and are not subject to review by the Ombudsman (VALS 2011).

The question arises whether establishing an Aboriginal Youth Parole Board to determine parole for Aboriginal young people will increase access to parole and better outcomes in compliance?

(ii) Post-Release Support and Desistance from Crime

Preventing Aboriginal children and young people re-offending after release from detention requires effective transitional support with through-care case management while in detention and post-release services after exiting from detention. It is widely recognised that transitional support and continuity of care for Aboriginal children and young people leaving custodial settings needs to be improved. As shown below, the literature demonstrates that ACCOs can play a vital role in this area. Elders and the Aboriginal community more generally can play an important role supporting effective reintegration back into families and community.

The NT Royal Commission has noted the fundamental importance of throughcare and post-release support.

> Children and young people are vulnerable upon release from detention, as they are commonly re-exposed to the environments, people, places and other influences that led them into detention. Recidivism risks associated with release from detention can be offset by helping children and young people to strengthen existing positive connections or build new connections outside detention prior to release.
>
> A well-planned and supported transition from detention can be the circuit-breaker in a cycle of reoffending. Without adequate planning for release, the system is *'absolutely setting up a young person to fail'*. Without post-release support, the likelihood of failure inevitably increases (RCPDCNT 2017a: vol 2b, 194).

Case management[18] is essential for the exit planning of young people leaving detention. It is important that ACCOs are involved in case management and through-care plans, and not simply 'added on' at the time of release. There is a demonstrated need to involve community-based Aboriginal organisations in pre-release case management planning and post-release programs. As the NT Royal Commission noted,

> Often, they have existing relationships with young people and have a longer-term familiarity with their needs and their family and community background. They are also more likely to maintain those relationships with young people when they leave detention. If they are involved in case management planning, they can support effective delivery of post-release services (RCPDCNT 2017a: vol 2b, 16).

For young people some of the key outcome areas for post-release services include income, accommodation, education and training, employment, legal needs, health, family networks, living and survival skills, social and personal skills, leisure and recreation (Cunneen and Luke 2007). There are particular issues for Aboriginal children and young people. Previous studies have shown Aboriginal young people who are referred to post-release services are likely to have more extensive prior criminal offending histories than their non-Aboriginal counterparts (Cunneen and Luke 2007). Their post-release requirements are likely to be greater because of more entrenched histories within youth justice.

While not specific to Aboriginal post-release, Ross (2005) has summarised understandings of good practice in re-entry programs. He points to the following five principles:

- programs should begin before the prisoner is released and continue into the post-release period, that is, through-care
- the causes of offending, such as drug dependence, need to be addressed simultaneously with practical welfare needs, such as housing and income support
- programs specific to ex-prisoners may be needed immediately after release but the goal should be to move offenders to mainstream support services
- where offenders have experienced 'a long pathway of social deprivation, stunted life options and emotional and physical abuse', it should be expected that reintegration will take a long time

[18] Case management is a practical and effective way to coordinate services for rehabilitating children and young people. The goal is to help young people *'promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society'.* This is achieved by providing access to activities and programs, including education and vocational training, based on each young person's individual circumstances and needs (RCPDCNT 2017a: vol 2b, 6).

- offenders must be active participants in their own rehabilitation, and not be treated as the passive recipients of services.' (Ross 2005: 7).

Willis and Moore (2008: 101-2) noted some of the specific factors important to Aboriginal post-release re-integration, including

- addressing the grief and loss that consumes many Aboriginal people
- adequately responding to mental health problems
- achieving reintegration for those serving short sentences or on remand who rarely receive correctional programs and services, and
- the limited resources in remote communities.

Further, Willis and Moore (2008: 104) noted that their research '**highlighted a strongly perceived need for greater involvement of family and community in the reintegration process and in achieving throughcare'**.

A study by Dawes (2011: 693-707) on the challenges of re-integrating Aboriginal young people after release from detention in Queensland found that a number of common risk factors contributed to the high rates of re-offending among his research cohort. These included the negative effects of being labelled as a criminal due to the possession of a 'risk reputation', the risk to the individual's physical and emotional health after returning to unsafe environments, associating with other offenders and a failure to engage with further education or training opportunities.

> Twenty-four of the interviewees reported that the greatest challenge to their successful re-entry was that they were singled out and stigmatised by the community due to their criminal histories. For example, there were many accounts where the young people spoke about negative interactions with police due to their 'risk reputations' as criminals (Dawes 2011: 703).

The reputations of young people as 'high risk' also militated against their attempts to re-engage with education and training options. Another identified risk that threatened to derail a successful transition was the short-term nature of some courses and traineeships which were usually completed over six weeks leaving the young person with the predicament of finding another option. A common factor for desisting from crime for these youth was their re-engagement with either full time education, training or employment. Another major factor for these positive forms of transition was the high level of support these youth obtained from family members or significant others who impacted positively on their lives. The North Australian Aboriginal Justice Agency (NAAJA) Throughcare Program described below is one of the few Aboriginal-specific through care programs.

NAAJA Throughcare Program

Since 2010, the North Australian Aboriginal Justice Agency (NAAJA) has operated the Throughcare Program in Darwin that provides pre- and post-release support for Aboriginal people, including children and young people. It is the only comprehensive program of its kind in the Northern Territory and is not provided for, or designed or funded by the Northern Territory Government. Support starts as close as possible to six months before release and continues after release for a period, depending on the client's needs.

Our approach aims to assist our clients in the early, and often stressful, period immediately following release from custody whilst also working to empower our clients by reducing the intensity of support as they become more able to independently navigate 'life on the outside' for themselves.

Since the program began its intensive case management service in 2010, the agency has attempted to compile data to assess whether the program reduces recidivism.

The agency said that while it was not a reliable statistical analysis, the data indicated that during the collection period only 14% of clients returned to prison while in the Throughcare Program. In terms of youth-specific data, the program had opened 95 case management files for children and young people since 2010, with only 24 of those returning to detention. The data suggests that the Throughcare Program has reduced recidivism rates for children and young people, compared with other jurisdictions. However, the Northern Territory Government's failure to collect the necessary data, whatever be the difficulties in doing so contended for by the Northern Territory Government, makes conclusive analysis impossible (RCPDCNT 2017a: vol 2b, 14-5).

Questions: Parole, Throughcare and Post-Release Support

Existing literature shows the limitations for Aboriginal people in accessing parole.

Would establishing an Aboriginal Youth Parole Board to determine parole for Aboriginal young people increase access to parole and better outcomes in compliance?

Existing literature on throughcare and post-release for Aboriginal children and young people leaving detention shows the essential and important roles which ACCOs can fulfil.

What current roles do ACCOs play in throughcare and post-release support in Victoria?

How do we expand the roles of ACCOs in throughcare and post-release support? Should they be the primary provider of throughcare and post-release support for Aboriginal children and young people leaving detention?

17. Broader Models of Aboriginal Community Governance on Law and Justice Issues

Much of the discussion in this report has dealt with the consideration of Aboriginal diversionary programs at various points of the youth justice system, and the need for reform of various legislative and policy barriers (including, for example, bail and sentencing).

In this section of the report a broader perspective is considered where the development of Aboriginal youth justice strategies might be considered within wider whole of community Aboriginal approaches to law and order. It is acknowledged that the Victorian Aboriginal Youth Justice Strategy is being developed as part of the Aboriginal Justice Agreement Phase 4 (*Burra Lodjpa Dunguludja).* The Agreement includes broader initiatives that relate to place-based projects developed by local communities (*Burra Lodjpa Dunguludja* nd: 47, 52, 55), and as part of the implementation process has established a Place-Based Collaborative Working Group.

The case studies below provide examples of Aboriginal whole of community responses to law and order.

Case Study: Northern Territory Law and Justice Groups

The Northern Territory Government launched its *Aboriginal Law and Justice Strategy* in 1995. Part of this strategy involved facilitating the creation of community-based Law and Justice Groups, initially in Ali Curung, Lajamanu, Yuendumu and Willowra. External facilitators used community planning methods to work with these groups and government and non-government organisations to negotiate Community Law and Justice Plans. The model promoted the devolution of responsibility for law and justice issues from agencies to community organisations, where relevant and appropriate, and incorporated traditional dispute resolution and customary decision-making mechanisms. The participatory planning approach enabled the combination of a whole-of-community and whole-of-government response to addressing law and justice issues. The approach was responsive to community priorities, incorporated community capabilities and ensured clarity of process and appropriate accountability of all actors in the system. Formalised Law and Justice Plans signed off by senior representatives from the different stakeholders created a mandate for agreed measures, which ranged across education, prevention, diversion, intervention, prosecution and crisis response.

Funding for the Law and Justice Groups ceased in 2004, but some initiatives have survived and been reinvigorated at various points in the past decade. The Lajamanu Kurdiji Law and Justice Committee… discusses community safety issues; meeting before court sittings to provide crime prevention advice and pre-sentence reports to the court; informal dispute resolution to stop small conflicts escalating; and advocating community views to the licensing commission and police.

A preliminary analysis regarding trends in Lajamanu's court list revealed promising improvements when the Law and Justice Group took a leading role. Against a backdrop of escalating rates of Aboriginal incarceration across the Northern Territory, from 1996 to 2014, the Lajamanu court list recorded a 50% decline in the overall number of criminal cases, including a 90% decline in dishonesty offences and a 55% decline in assault cases.

The concept of a Law and Justice Plan… was revived in 2012 by Elders from… Maningrida, known as the 'Burnawarra'. The *Maningrida Justice Collaboration Agreement*, proposing a new approach where community Elders would take responsibility for justice, law and safety issues in the community, working in concert with the Northern Territory Police, Department of Attorney-General and Justice and other relevant agencies. The Burnawarra Law and Justice Group submitted the Agreement to the [NT Royal] Commission with a statement calling for Elders to be empowered and recognised to take the lead in the child protection and youth justice systems.

The *Maningrida Justice Collaboration Agreement* illustrates what an alternative, community-led approach to law and justice might look like. It identifies the Maningrida community as being primarily responsible for resolving justice issues in the community, with involvement of the police and magistrates seen as an option of last resort… The Agreement is guided by a set of community protocols established to promote community safety and harmony through measures such as baggage checks for those entering the community, curfews for young people, restrictions on card games in communities and rules regarding male and female relations. This emphasises the importance of the safety of women, children and family, indicating that where *'the sacred women's law has been broken, the sacred law of the men has also been breached'*.

(**Source:** RCPDCNT 2017a: vol 1, pp.281-3).

While not specifically related to Aboriginal young people and diversion, the NT example of the development of community-based Law and Justice Plans or Agreements shows the importance of Aboriginal self-determination and the potential for the devolution of responsibility for law and justice issues to Aboriginal community organisations with the potential incorporation of traditional dispute resolution and decision-making mechanisms.

Case study: Maranguka Justice Reinvestment, Bourke NSW

Maranguka is a whole of community strategy currently being trialed in Bourke, New South Wales. Established in 2013, the Maranguka (which means 'caring for others and offering help' in the local Ngemba language) is a community-led initiative that involves a collective impact framework bringing together a range of government and non-state entities to work on a common agenda.

The Maranguka initiative responded to community concerns over the level of youth offending, the lack of detailed outcome-driven evaluations of the numerous programs delivering services into Bourke and the short-term nature of the funding allocated by government for these programs. In order to provide effective programs and services, the Bourke community identified a critical need for a framework that will provide long-term, sustainable funding.

It is a community-led collective impact approach to justice reinvestment—which involves taking money out of corrections and incarceration strategies and reinvesting it in community development strategies. It is a coordinated strategy to support vulnerable families and young people through community-led teams working in partnership with existing service providers, in order to 'together ... build a new accountability framework which wouldn't let our kids slip through'. The overarching goal of the project is to decrease the rate of contact of Aboriginal young people with the criminal justice system, adult incarceration and youth detention in

Bourke.

The first stage of the project focused on building trust between the Aboriginal community and service providers, identifying community priorities, and identifying circuit breakers. Regular meetings have been held with Bourke community members, local service providers and government representatives. The community has identified and are currently in the process of implementing—in partnership with local service providers—a number of cross-sector initiatives or 'circuit breakers' to achieve the goal or reducing offending and making the community safer. The community has currently identified three 'circuit breakers'—strategies or focus areas identified by community members as priority areas which will in turn enable positive cycles of change in behaviour patterns and opportunities—around the issues of breaches of bail, outstanding warrants and the need for a learner driver program.

The second stage involved data collection on local crime, including: offending, diversion, bail, sentencing, punishment and re-offending rates. Data will also be collected on broader socioeconomic factors on local community outcomes, including: early life, education, employment, housing, healthcare, child safety and health outcomes including mental health and drugs and alcohol. The data has been handed over to the community members via the Bourke Tribal Council for the third and final stage of the strategy. The final implementation stage involves using economic modeling to demonstrate the savings associated with the strategies to be identified by the community and local service providers to reduce offending among children and young people.

KPMG (2016, 2018) have undertaken two reports on the Maranguka Justice Reinvestment initiative – a Preliminary Assessment and a recent Impact Assessment. The impact assessment results for the 2017 calendar year (compared to 2016) showed improvement in the following areas:
*Family strength, with a 23 per cent reduction in police recorded incidence of domestic violence and comparable drops in rates of re-offending.
*Youth development, with a 31 per cent increase in year 12 student retention rates and a 38 per cent reduction in charges across the top five juvenile offence categories.
*Adult empowerment, with a 14 per cent reduction in bail breaches and a 42 per cent reduction in days spent in custody.

KPMG estimates the changes in Bourke during 2017, corresponding to the operation of the Maranguka JR Project, resulted in a gross impact of $3.1 million (with operational costs of $0.6 million). Of this, approximately two thirds relate to impact to the justice system and one third is broader economic impact to the region. These findings indicate impacts approximately five times greater than the operational costs for 2017, excluding in-kind contributions. Should Bourke sustain just half of the results achieved in 2017, an additional gross impact of $7 million over the next five years could be delivered.

Sources: Just Reinvest: http://www.justreinvest.org.au/justice-reinvestment-in-bourke/**;** KPMG (2016, 2018); Van Gent et al (2018).

The NT Royal Commission has noted that:

> The project [Maranguka Justice Reinvestment] was initiated and continues to be driven by Aboriginal community stakeholders… The approach was developed over a

> period of years, to allow local political contests to play out and legitimacy of the new governance structures to form. Bourke leaders prioritised these local governance processes over any external program demands, which led to a deliberate place-based approach. With time, Bourke leaders turned their attention to how the external service delivery system should align to their priorities, thus establishing their agenda proactively, rather than reactively (RCPDCNT 2017a: vol 1: 285-6).

The Maranguka project provides several lessons for the Victorian context in terms of the benefits of local agency and, in particular, the benefits of a whole-of-community approach. Within the Maranguka project, justice agencies work alongside Aboriginal organisations, Bourke Council, the local TAFE, Aboriginal Legal Service, school and social workers in an interagency manner to set and achieve community justice (including youth justice) goals. Feedback provides strong indication of the benefits of whole-of-community approaches to justice which include relationship building, networking, sharing information, reducing silos in service delivery, improving processes and improving community safety.

Questions: Broader Models of Aboriginal Community Governance on Law and Justice Issues

The two case studies provide consideration of how an Aboriginal Youth Justice Strategy can be considered within broader Aboriginal concerns about whole-of-community approaches to law and order.

18. Aboriginal Community Controlled Organisations (ACCOs)

The case studies, research evidence and discussion in this report demonstrate the fundamental importance of ACCOs to developing an Aboriginal Youth Justice Strategy. Their potential involvement and roles can impact at all levels of youth justice: from early intervention, to diversion, to sentencing, detention and post-release support. In relation to this point it is worth noting the conclusion drawn in the review by Armytage and Ogloff (2017).

> Engagement with Koori elders, family and community has not been prioritised by the statutory youth justice system. The system has neglected to embed culturally effective practices or working with Koori families. Significant consideration of how to shift and refresh this approach is required (Armytage and Ogloff 2017: Part 2, 208).

The case studies identified in this report also reflect the diversity of Aboriginal youth justice initiatives taking place and show the breadth and diversity of themes and issues: 'shared jurisdiction', 'partnerships', 'mentoring', 'conferencing, restorative justice and peacemaking', 'cultural education' and 'on country' or place-based models are all important. Some of the most innovative and impactful practices manage to combine several elements. For example, Tribal Warrior's Clean Slate Without Prejudice, the Yiriman Project, Tiwi Islands Youth Diversion and Development, Warlpiri Youth Development Aboriginal Corporation, Barreng Moorop and many of the Canadian examples involve partnerships, case management with wrap around services, and mentoring as well as reflecting elements of peace-making/restorative justice and on country (or place-based) models.

Many of these initiatives can improve relations with criminal justice agencies, including the police, as well as reductions in youth offending. For example, Clean Slate Without Prejudice has been attributed with improving police relations with Aboriginal young people, as well as some evidence of the partnership contributing to lower crime rates generally including robberies and assaults against police. In Western Australia, the partnership between Fitzroy Police Station and the Yiriman project was described by its organisers as being as much about improving the relations between young people, Elders and the state police, as it was about diversion. A related benefit relates to networking more broadly - bringing together Aboriginal young people, Elders and respected community leaders and the benefits of supporting Aboriginal community leadership more broadly.

The importance of programs taking place in a culturally safe setting is also noted. This may be a local Aboriginal community centre or on country. Much of the diversionary elements of the Yiriman project occurred on country, in the presence of Elders and in a cultural setting. The cultural setting and cultural education are important to many of the other projects including Warlpiri Youth Development Aboriginal Corporation, Tiwi Islands Youth Diversion and Development Program, and the programs existing under the Canadian Aboriginal Justice Program. There is a clear emphasis on reconnecting young people with cultural identity and sense of belonging to country.

(i) Guiding or Practice Principles

From the above discussion of various case studies we are able to discern a number of guiding principles which underpin the work of ACCOs:

- **Benefits of operating within framework which respects Aboriginal sovereignty and shared jurisdiction:** A review of the national and international literature of practices in Aboriginal youth diversionary practices indicates the importance Aboriginal sovereignty and shared jurisdiction. Many of the examples of best practice took for granted and worked within the philosophy of Aboriginal sovereignty, of 'shared jurisdiction' and legal pluralism. Aboriginal sovereignty and authority was a fact—recognised formally or informally—and was built into the design and everyday working of the initiative or program. Working within a framework which respects Aboriginal sovereignty is an essential element of processes of self-determination.
- **Benefits of partnering with local organisations, collectives and co-operatives:** Partnerships and collaborations between the police and Aboriginal and community youth organisations are a key building block for the development of successful practices in youth diversion. Many of the examples of best practice involve collaborating with pre-existing community—based and community-controlled organisations. A review of best practice in national and international literature reveals that partnering with existing organisations can be a way of activating local agency
- **Benefits of 'On Country' or Place-Based diversionary practices:** Many of the examples of best practice share in common the fact that they take place 'on country' or were place-based, reflecting highly localised, holistic and whole-of-community approaches. These initiatives shared in common the fact they took place in the presence of Elders and in a cultural setting. The emphasis was on reconnecting young people with cultural identity and sense of belonging to country. 'On Country' models in particular have the advantage of sharing 'cultural match', that is, cultural connections between specific Aboriginal nations, language, culture and country. The structure and format are capable of being adapted to local needs and the particular young people involved and are responsive to local needs and priorities.
- **Evidence of diversionary mechanisms being more powerful when they are delivered in a culturally appropriate way:** The case studies provide evidence to 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 the location in which it is delivered (i.e. where? community centre? on country?) and by cultural leaders (i.e. by whom? Aboriginal staff? Elders? respected community members?). Anecdotal evidence from the case studies suggests that 'diversion' is more powerful and has a more meaningful impact when delivered by and involves Elders and respected community leaders and occurs in a culturally safe environment.
- **Benefits of strengths-based approaches:** Nearly all of the above case studies involve strengths-based approaches. The case studies share several points in common: the young person is typically an active (and rarely a passive) participant in his or her diversion from the criminal justice system.
- **Benefits of whole-of community approaches:** The case studies provide some evidence to indicate the benefits of whole-of-community approaches, which include relationship building, networking, sharing information, reducing silos in service delivery, improving processes, promoting community cohesion and improving community safety and resilience.
- **Benefits of mentoring, conferencing, healing plans:** Successful processes in Aboriginal youth diversionary practices involve mentoring, conferencing, healing and peacemaking. These may be offered singularly or in combination, depending on the program. Research suggests there are benefits to all of these approaches.

(ii) The Context of Self-Determination: Structure

The first component can be thought of in terms of the structural elements of Aboriginal youth cautioning in a self-determining context. What are the structural components that would need to be in place? What are the baseline features or foundations would successful youth cautioning practices have? A central research finding of the Behrendt *et al* (2018) report on self-determination and the Victorian criminal justice system related to the importance of partnerships 'with teeth'—that is, input into policy design and implementation in a way that is meaningful and over which there is accountability and oversight.

The case studies share many common structural features. For example, many examples of best practice took place 'on country' or were place-based in that they reflect highly localised, holistic and whole-of-community approaches. Most examples also involved decentralised decision-making—with Elders, respected cultural leaders and other key organisations in the local Aboriginal community taking an active part in the diversion process. Nearly all of the best practice case studies involved partnerships and working in collaboration with Aboriginal organisations, Elder groups and other community justice initiatives.

Figure 1 provides an illustration of the interaction between these different components in Aboriginal youth cautioning practices.

On Country or Place-Based

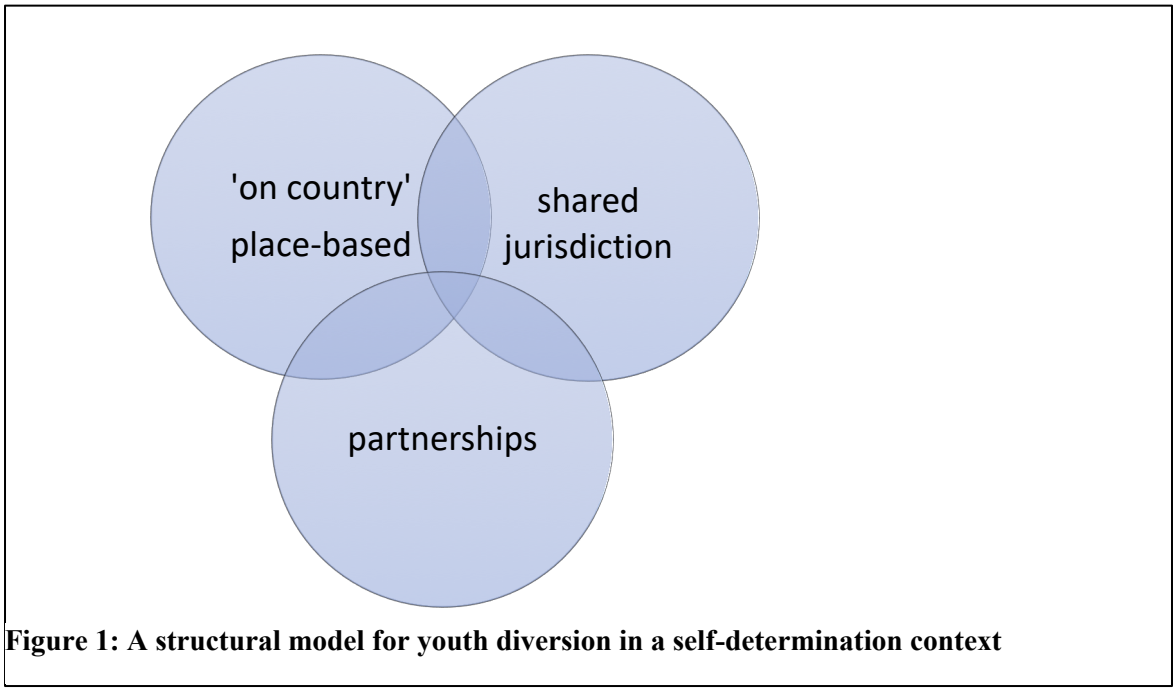

Figure 1: A structural model for youth diversion in a self-determination context

Many of the examples of best practice took place 'on country', reflecting highly localised, holistic and whole-of-community approaches. 'On Country' models are similar to what in the mainstream literature on community development are referred to an 'place-based' approaches. However, by using the concept of 'On Country' we emphasise the cultural connections between specific Aboriginal nations and their country. The BushMob case study,

for example, involves taking young people for intensive camping trips with Elders and cultural leaders. The duration of the camps, the structure and timing are capable of being adapted to local needs and the particular young people involved and hence **responsive** to local needs and priorities.

Several of the examples of 'On Country' or place-based diversionary models have taken place in partnership with local police. There is evidence that the local police at Fitzroy Crossing, for example, worked very successfully in partnership with the Yiriman project in the planning, organisation and delivery of an intensive 60-day trek involving a number of local Aboriginal young people. Similarly, there is a strong connection between local police and Maranguka in Bourke which is fundamental to developing justice reinvestment at a local level.

Partnerships

Partnerships and collaborations between the police, the courts and other youth justice agencies and Aboriginal and community youth organisations are a key building block for the development of successful practices in youth diversion. Many of the examples of best practice involve collaborating with pre-existing community—based and community-controlled organisations. For example, the youth programs organised by the Ballarat and District Aboriginal Cooperative involves a number of formal and informal partnerships with the Victoria Police and local Aboriginal youth, such as entering the annual Murray Marathon teams. While the police partnership between the Redfern Local Area Command and Aboriginal Corporation Tribal Warrior demonstrated the benefits of casual socialising, team work and 'community building' in a setting far removed from mundane policing activities. Aboriginal Justice Programs in Canada involve partnerships between police, prosecutors and the courts and Aboriginal community organisations. There are many examples of community justice initiatives which offer a range of programs and services. Community organisations and co-operatives provide unique opportunities that could be utilised for the delivery of cautions in culturally appropriate and impactful ways.

Shared Jurisdiction

Another building block of successful youth diversionary practices is acknowledgment and willingness to work within a framework of shared jurisdiction. Many of the examples of best practice took for granted and worked within the philosophy of Aboriginal sovereignty, of 'shared jurisdiction' and legal pluralism. For these examples, Aboriginal sovereignty and authority was simply a 'fact' which was built into the design and an integral part of the everyday working of the initiative or program. In some cases, the shared jurisdiction was acknowledged in formal agreements, contracts and memoranda of understandings. Examples of these formal agreements include in Canada, agreements under the Aboriginal Justice Strategy and in Australia, contracts between WA Corrective Services and local Aboriginal communities to provide court-ordered supervision. In other cases, shared jurisdiction was acknowledged in more informal and even mundane ways. For example, there are many examples of Aboriginal corporations, co-operatives and organisations who run Aboriginal youth diversionary services (see, for example the Warlpiri Youth Development Aboriginal Corporation or Tribal Warrior examples). For these initiatives, Aboriginal sovereignty and authority is inscribed into the structure of the organisation, its control, management and accountability mechanisms. Importantly, examples of best practice and of successful partnerships with state entities such as the police work within this framework or structure of decision-making and accountability.

Taken together, these three features of shared jurisdiction, partnerships and 'On Country' or place-based mechanisms appear to be common structural elements or building blocks of successful Aboriginal youth diversionary practices.

(iii) The Context of Self-Determination: Process and Structure

In addition to issues of structure discussed above, what are the elements of successful **processes** in terms of program design, implementation and engagement? What design principles do successful youth diversionary practices share? Several lessons can be gleaned from the examples of best practice in the national and international literature.

Aboriginal Program Design and Implementation

The examples of best practice share certain common features in terms of Aboriginal control over input into Aboriginal program design and delivery. For example, many of the examples discussed (such as the Yiriman project, Clean Slate Without Prejudice, Warlpiri Youth Development, etc.) are programs that have been designed and are implemented at the local community level. Local community 'vision' in terms of the input, design and delivery of youth diversionary programs initiatives seems to be a common feature of these initiatives, and an enabler for successful police/community partnerships.

At present, the majority examples of national and international diversionary initiatives involve programs developed by government agencies, such as the department of justice and attorney general, or the police. These tend to be general in application, rather than focussed specifically on Aboriginal children, although Aboriginal children may be recognised as a particular target group within the program.

Mentoring

Another theme from the above summary of the literature involves examples of what can loosely be described as 'mentoring'. Mentoring involves building relationships between young people and older generations through guidance, taking an interest and showing care and respect. Mentoring programs can involve adult or peer mentors and can be implemented in a range of ways, such as one-on-one or in groups. Mentoring is typically viewed as a primary prevention strategy through reducing risk factors and building a protective relationship (Barron-McKeagney *et al* 2000).

A growing body of research demonstrates that mentoring can have positive effects in improving behavioural, academic and vocational outcomes for at-risk youth and, to some extent, in reducing contact with juvenile justice systems (Ware 2013). Mentoring also has specific application with Aboriginal children in being able to provide for the transmission of cultural knowledge. Many of the programs described in this report involve a mentoring component including night patrols, Clean Slate Without Prejudice, Warlpiri Youth Development Aboriginal Corporation, bail support programs, Rumbalara Women's Mentoring Program, and Panyappi. Mentoring is also referred to by both the NT Royal Commission and by Richards et al (2011) as an element in successful Aboriginal diversionary programs. As previously discussed, mentoring is often used in an Aboriginal context in combination with other approaches (such as conferencing or other programs).

Conferencing, Healing and Peacemaking

Another example of successful processes in Aboriginal youth diversionary practices involve conferencing, healing and peacemaking. Broadly conceived, Aboriginal youth conferencing involves the participation of Aboriginal community members in the cautioning, trial and sentencing of Aboriginal young people and other efforts aimed at improving the cultural appropriateness of criminal justice processes.

There are many different models of conferencing, healing and restorative justice—youth conferencing, family conferencing, healing plans, sentencing courts, and so on—at various stages of the criminal justice process (diversion, trial, and sentencing). While there are many examples of Aboriginal conferencing and healing approaches around the globe, a range of examples related to the Aboriginal Justice Strategy in Canada and diversionary approaches in Australia (the Warlpiri Youth Development Aboriginal Corporation, the Tiwi Islands Youth Diversion and Development Unit have been provided.

(iv) Potential Enablers and Barriers for Aboriginal Diversion in the Context of Aboriginal Self-Determination

The following discussion of potential 'barriers' and 'enablers' draws on the work presented in previous sections of this report. Table 1 presents barriers and enablers in summary form.

Table 1 Potential Barriers and Enablers

Barriers
Limited access to diversionary programs
Referrals and Eligibility criteria to Aboriginal diversionary programs
The point at which Aboriginal organisations are involved in decision-making
Failure to receive support from other agencies
Failure to ensure that legislative provisions and policies to enhance Aboriginal diversion are implemented in practice
The failure to adequately support Aboriginal diversionary options
Problems in provision of information and program data collection
Enablers
Operating within framework which respects Aboriginal sovereignty and shared jurisdiction
Partnering with local organisations, collectives and co-operatives
Whole-of community approaches
Appropriate program design
Diversity and flexibility in approaches
Diversionary mechanisms being more powerful when they are delivered in a culturally appropriate way
'On Country' and Place-based diversionary practices
Benefits of healing plans, conferencing, mentoring
Strengths-based approaches
Contractual arrangements for the delivery of Aboriginal cautioning and diversionary programs
Managing conflicting views of justice

(v) Potential Barriers

Factors which act as barriers to the development of successful Aboriginal diversionary programs can be considered broadly as external political factors (such as funding), the legislative and policy framework, factors internal to criminal justice agencies (including specific practices such as referral or the failure to implement policy), and factors related to community capacity (such as staffing and training).

Limited access to diversionary programs

The Canadian experience of the Aboriginal Justice Strategy (AJS) suggests that even when a national (or state-wide) strategy is in place to support Aboriginal diversionary programs, not all communities will be able to develop programs. The AJS supports 200 community-based programs, most since the start of the scheme in the early 1990s. However, the AJS has been unable to consider new programs due to funding limitations. In 2015, for example, over 25% of all applications could not be funded (Department of Justice Canada 2016: 25-26). In Canada a majority of Aboriginal communities do not receive funding from the AJS, which means that a large number of Aboriginal people in conflict with the law do not receive the benefits of Aboriginal-run diversionary support. Thus, developing state-wide policy may not in practice ensure widespread availability of diversionary options.

Referrals to Aboriginal diversionary programs

Community-based programs rely heavily on police and, in some cases, prosecutors and court referrals. Domestic and international experience suggests that these vary greatly from community to community and are contingent on buy-in, often at the local level, from referring agencies.

In Canada an Aboriginal person eligible for AJS programs has three main ways to access programs: 'community referrals' where community members make self-referrals or are referred by a community agency including schools; 'pre- and post-charge referrals' which can come from police, prosecutors or judges; and 'reintegration referrals' which can come from corrections officials. The 2016 evaluation of the AJS noted that problems with referrals from the mainstream justice system were 'a primary barrier to the success of the AJS' (Department of Justice Canada 2016: 33). The report also noted that common reasons given for not referring were police and prosecutors not believing that community-based justice programs were an appropriate alternative, that cases were not eligible, and that there was a lack of services or supports of particular types in the community to refer people to. Significantly, it was found that some criminal justice personnel applied their own eligibility criteria (such as prior offending) which was not criteria established in legislation or policy.[19]

Eligibility criteria for referral to Aboriginal diversionary programs

A potential barrier to effective Aboriginal diversionary schemes is limited eligibility criteria. Various limitations may be imposed including seriousness of offence, the number of previous diversionary referrals and/or history of prior offending. As noted above in the Canadian example, criminal justice personnel may apply their own 'informal' criteria. To overcome this barrier, there needs to be wide agreement with Aboriginal organisations as to what constitutes legitimate eligibility criteria. VALS have recommended that Victoria Police should adopt a 'Failure to Divert Declaration' in relation specifically to police cautioning. The purpose of such a form is to ensure transparency and accountability in decision-making. The use of such a form might be utilised more broadly for all Aboriginal diversionary programs.

[19] In the Victorian context, for example, we know there is considerable variation in the use of cautioning among different police divisions and local government areas, ranging from 32% to 80% of outcomes depending on LGA (Shirley 2017: 7-8).

The point at which Aboriginal organisations are involved in decision-making

Perhaps one of the most significant potential barriers to effective diversionary processes in the context of Aboriginal self-determination is the point at which Aboriginal organisations are involved in the decision-making process. As noted previously in this report, twenty years ago the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC 1997) set out the requirement for consultation with accredited Aboriginal organisations thoroughly and in good faith when decisions are being made about an Aboriginal young person. In juvenile justice matters that organisation must be involved in all decisions at every stage including decisions about pre-trial diversion, admission to bail and conditions of bail. Thus, all pre-court discretionary decisions relating to Aboriginal young people need to be made in consultation with Aboriginal organisations. Recommendation 53 sets out fifteen rules relating to juvenile justice decision-making. These Rules embed the principle that accredited Aboriginal organisations must play a fundamental role in making decisions affecting Aboriginal children and young people in the criminal process.

With the potential exception of the Koori Youth Court, currently there are no examples in Australia where Aboriginal organisations or Elders are involved in the decision as to whether or not an Aboriginal young person should receive a diversionary outcome.

Failure to receive support from other agencies

Depending on the nature of the diversionary program there may be a need for effective support from agencies other than criminal justice, including child protection, education, counselling services, drug and alcohol services, and other youth services. The lack of support may arise because of insufficient time and resources on the part of the diversionary program to develop partnerships; or it may be that those agencies (for whatever reason) may not provide the necessary support.

Failure to ensure that legislative provisions and policies to enhance Aboriginal diversion are implemented in practice

There are several possible barriers here: legislative provisions or policy may be introduced but have no policy implementation plan and the provisions are ignored; or policy may be introduced but ongoing practices undermine the intent of the policy. An example of the former has been attempts to involve Aboriginal Elders in the cautioning process in Queensland through legislative provisions and in NSW through the CAYP policy – neither has resulted in participation by Aboriginal people in the cautioning process because of the failure to meaningfully implement the policy. An example of the latter is shown with evaluation of the Aboriginal Justice Strategy in Canada, where it was found that some criminal justice personnel applied their own eligibility criteria which was not established in legislation or policy and had the outcome of undermining the potential effectiveness of the policy.

The failure to adequately support Aboriginal diversionary options

The literature from Australia, New Zealand and North America shows that the failure to adequately fund and support Aboriginal diversionary options leads to significant problems in staffing, training and program capacity.

Where funding is on an annual or short-term basis there is constant uncertainty about the program's continuation which impacts on staff turnover and potential for program development. Staff turnover may be frequent because of the short-term program mandate and uncertain renewals, along with relatively low-pay scales. A common finding for many Aboriginal diversionary programs was that workloads were heavy (high caseloads, too many responsibilities, complex work) and there was little time left for program development.

Limited funding also limits the resource capacity to train staff. The Canadian review of the Aboriginal Justice Strategy found that because of limited training resources:

- the level of training and experience of program managers and staff varied considerably
- the lack of recognized core competencies for the various types of programs and services resulted in a wide variance in the experience, training and abilities of diversionary program workers
- there was a lack of resources for systematic, ongoing training of workers and other service providers (Department of Justice Canada 2016: 31).

Evidence from Australia and Canada shows that programs may have a heavy reliance on Elders and community volunteers, and with often little time to engage them as effectively as they would like (Department of Justice Canada 2016: 41), similarly in Australia the evaluation of the Tiwi Islands diversionary program found a reliance on volunteers and the use of alternative means of support including work-for the-dole (CDEP) (Stewart et al 2014: 41).

Problems in provision of information and program data collection

A common problem which emerged for many Aboriginal diversionary programs, particularly in relation to assessing effectiveness, was that many of the programs did not have adequate mechanisms in place to collect data to allow thorough evaluation of program outcomes (see for example Stewart et al 2014: viii). There can also be insufficient longitudinal data which prevents conclusive findings on the extent to which the program produces positive outcomes that are sustained over time (Stewart et al 2014: 42).

(vi) Potential Enablers

Guiding Principles emerging from the discussion on the case studies were noted above. These Guiding Principles also can be considered, among other factors, as 'enablers' for successful Aboriginal diversionary programs.

Operating within framework which respects Aboriginal sovereignty and shared jurisdiction

A review of the national and international literature of practices in Aboriginal youth diversion demonstrates the benefits of operating within framework which respects Aboriginal sovereignty and shared jurisdiction. Many of the examples of best practice took for granted and worked within the philosophy of Aboriginal sovereignty, of 'shared jurisdiction' and legal pluralism. Aboriginal sovereignty and authority was a fact—recognised formally or informally—and was built into the design and everyday working of the initiative or program.

Working within a framework which respects Aboriginal sovereignty is an essential element of processes of self-determination.

This finding is consistent with Australian and North American evidence on the importance of real decision-making authority by Aboriginal people, that is, where Aboriginal people making the decisions have the capacity to set the direction and priorities and to determine the goals about the issues that affect the community (Behrendt et al 2018: 22).

Partnering with Aboriginal organisations, collectives and co-operatives

Partnerships and collaborations between the police and Aboriginal and community youth organisations are a key building block for the development of successful practices in youth diversion. Many of the examples of best practice involve collaborating with pre-existing community—based and community-controlled organisations. A review of best practice in national and international literature reveals that partnering with existing organisations can be a way of activating local agency.

Whole-of community approaches

The case studies provide some evidence to indicate the benefits of whole-of-community approaches, which include relationship building, networking, sharing information, reducing silos in service delivery, improving processes, promoting community cohesion and improving community safety and resilience. For example, in the Australian context, Stewart et al (2014) have shown the importance community members having input into the design of programs and continuing to play a role in its implementation (p.41) and further that 'excellent practice would demand that communities be fully involved in the [diversionary] program through its inception and ongoing operation' (p.99). In Canada the review of the Aboriginal Justice Strategy found that 'a key message is the importance of broad community engagement in designing and maintaining community-based justice programs (Department of Justice Canada 2016: 43).

A significant benefit of a program that engages community members in the diversion process is that it enhances the community's capacity to minimise and address youth offending (see for example, Stewart et al 2014: 42). In addition, successful Aboriginal programs reinforce Aboriginal social and cultural authority and the inclusion of members of the community in policy development, service delivery and programs builds community capacity and social capital.

Appropriate program design

Appropriate program design can include addressing a community-defined need; having clear objectives; serving the target group of young people (program reach); is culturally competent for the particular community; and having clear processes for developing partnerships and collaboration.

Diversity and flexibility in approaches

The review of Aboriginal diversionary programs shows considerable variation in approaches. This variation is consistent with localised understandings of Aboriginal self-determination in program development, and the limitations of 'one size fits all' policy approach.

In the Canadian context, the Aboriginal Justice Strategy 'is designed to be very flexible, allowing and enabling communities to develop justice-related programs and services in keeping with local needs and tailored to local cultures and traditions' (Department of Justice Canada 2016: 30). It is further noted that the Aboriginal Justice Strategy's flexibility 'encourages both cultural relevance and a wide variation in types of programming, including prevention, pre-charge diversion options, alternative sentencing approaches, and reintegration programs, such as wilderness camps with a spiritual component' (Department of Justice Canada 2016: 31).

Diversionary mechanisms being more powerful when they are delivered in a culturally appropriate way

The case studies provide evidence to suggest that Aboriginal diversionary programs are more powerful when they are delivered in a culturally safe way. This includes not only *how* the programs are delivered but also the location in which they are delivered and by whom they are delivered. Evidence from the case studies suggests that diversion is more powerful and has a more meaningful impact when delivered by and involves Elders and respected community leaders and occurs 'on country' or is place-based. Self-determination is essential to ensure cultural relevancy. In Canada it has been argued that 'cultural relevancy is inherent in the Aboriginal Justice Strategy design because the programs are determined and delivered by the communities' (Department of Justice Canada 2016: 30).

This finding is consistent with Australian and North American evidence on *cultural match,* that is when the approaches taken and the decisions that are made align with the culture, norms and values of the community (Behrendt et al 2018: 22).

'On Country' or place-based diversionary practices

Many of the examples of best practice share in common the fact that they take place 'on country' or are place-based, reflecting highly localised, holistic and whole-of-community approaches. These initiatives shared in common the fact they took place on country, in the presence of Elders and in a cultural setting. The emphasis in this place was on reconnecting young people with cultural identity and sense of belonging to country. 'On Country' models have the advantage of sharing 'cultural match', that is, cultural connections between specific Aboriginal nations, language, culture and country. The structure and format are capable of being adapted to local needs and the particular young people involved and are responsive to local needs and priorities.

Benefits of healing plans, conferencing, mentoring

The research shows that many Aboriginal diversionary programs utilize mentoring, healing plans and conferencing, either in combination or singularly. Research suggests there are benefits of mid to longer term mentoring models. There is dearth of information on the effectiveness of healing plans and conferencing where they are used by Aboriginal organisations as part of community-based diversion. However, evaluations of the Tiwi Islands Youth Diversion and Development Unit and the Warlpiri Youth Development Aboriginal Corporation suggest that they can be effective interventions. More generally the Canadian review of the Aboriginal Justice Strategy (which employs these types of interventions in many of the programs) found in an analysis of recidivism rates that program

participants are about 40% less likely to reoffend than those eligible but not participating, and that this effect carries over well past the time of the offences in question (at least eight years, which is the limit of the analysis) (Department of Justice Canada 2016: 40).

Strengths-based approaches

Nearly all case studies involve strengths-based approaches. The case studies share several points in common: the young person is typically an active (and rarely a passive) participant in his or her diversion from the criminal justice system. A strengths-based approach is also consistent with cultural security where those who work with Aboriginal peoples move beyond 'cultural awareness' to actively ensuring that cultural needs are met for individuals. Further, individual assessment processes need to move beyond non-Aboriginal defined risk assessment. Stewart et al (2014: 42) note the importance of detailed assessment processes which involve the extended family and kin, and provide the means by which 'the program identifies both presenting issues and appropriate interventions to address these concerns'.

Contractual arrangements for the delivery of Aboriginal cautioning and diversionary programs

A contractual relationship between justice agencies and Aboriginal organisations for the delivery of diversionary programs would have the benefit of clearly defined program objectives, responsibilities and accountability for the parties involved. A precedent for the use of contracts in the juvenile justice system can be found in Western Australia with contracts between corrections and Aboriginal communities for the local provision of community supervision for sentenced offenders (the *Young Offenders Act 1994*, s17b).

Managing conflicting views of justice

An issue that emerged in the literature is the potential difference between non-Aboriginal and Aboriginal views of 'justice'. On the one hand there is a 'prevailing perspective in [Aboriginal] communities that when a community member commits a crime, it is the whole community that suffers, and the whole community needs to be part of the solution' (Department of Justice Canada 2016: 40). Further, there is widespread recognition of the current failure of non-Aboriginal criminal justice systems to respond effectively to Aboriginal communities and that Aboriginal community-based diversionary programs reflect local cultural values and offer alternative approaches to the non-Aboriginal criminal justice system.

The review of the Canadian Aboriginal Justice Strategy found that 'there is a perceived divide between the mainstream criminal justice system and the kind of justice delivered by community-based justice programs. The focus for most communities is to provide a way to reconnect with their culture and traditions, as a key component of the path to greater individual and community well-being (Department of Justice Canada 2016: 45). How this 'divide' is managed between Aboriginal justice concerns and the ideas of justice that permeate non-Aboriginal criminal justice agencies can have significant effects on, for example, the extent to which referrals are made to Aboriginal community-based diversionary programs.

19. Accountability, Monitoring and Evaluation

Greater accountability for justice outcomes is an important part of the Victorian Aboriginal Justice Agreement Phase 4 (VAJA4) and is directly tied to achieving self-determination in the justice sector. VAJA4 notes that underpinning accountability is the need for access to data to inform the design and development of new initiatives and to ensure outcomes are being met. VAJA4 also notes the importance of evaluating program outcomes 'based on criteria that reflect Aboriginal values and measures of success' (p.51).

It has been noted previously in this report that one of the barriers to developing Aboriginal diversionary approaches in the context of Aboriginal self-determination has been that many community-based diversionary programs do not have adequate mechanisms in place to collect data to allow thorough evaluation of program outcomes. This problem is likely exacerbated by short-term and limited funding which does not include capacity for evaluation. VAJA4 notes the importance of 'building evaluation capacity among community stakeholders as well as the capacity of government to commission and manage culturally responsive evaluations' (p.57). At a time when governments increasingly value 'evidence-based' practice, the improved capacity for evaluation of Aboriginal community-controlled and delivered diversionary programs has special significance. The ability of Aboriginal organisations to not only design and deliver programs, but also to evaluate programs enhances Aboriginal self-determination.

At a broader level, VAJA4 envisages independent oversight and reporting of justice outcomes as a way of ensuring accountability. The Agreement notes as a longer-term outcome 'the possible creation of an independent Aboriginal Justice Commissioner, including its role and scope in informing and overseeing justice outcomes for Aboriginal people' (p.51).

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