DISCUSSION PAPER:

ABORIGINAL YOUTH CAUTIONING

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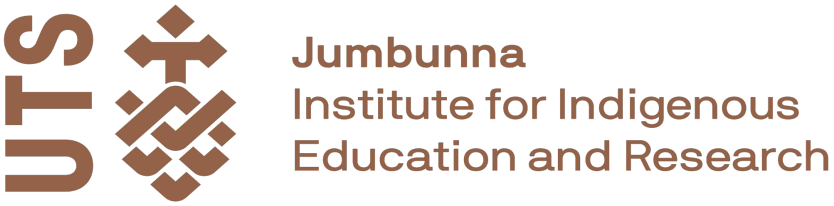

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  - The point at which Indigenous organisations are involved in decision-making
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Failure to receive support from other agencies
Failure to ensure that legislative provisions and policies to enhance Indigenous 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' diversionary practices
Benefits of healing plans, conferencing, mentoring
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Executive Summary

This Discussion Paper provides national and international examples of promising initiatives in diversionary options and police cautioning with respect to Aboriginal young people. The focus is on pre-court diversion, although we also consider some examples of Indigenous court diversionary processes where these are relevant to potential pre-court diversionary models. The Discussion Paper includes a review of the national and international literature on current police diversionary practices for Aboriginal youth, including several case studies of best practice. From these case studies we discern a set of guiding principles and practices. These include:

- **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' diversionary practices:** Many of the examples of best practice share in common the fact that they take place 'on country', 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.

- **Evidence of diversionary mechanisms being more powerful when they are delivered in a culturally appropriate way:** The case studies provide some evidence to suggest that cautions being more powerful when they are delivered in a culturally safe way. This includes not only **how** the cautions are delivered but also the location in which it is delivered (i.e. **where?** police station? community centre? on country?) and by cultural leaders (i.e. **by whom?** police? Aboriginal Liaison Officer? Elders? respected community?). 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 'on country'.
- **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 Indigenous 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.

For the purposes of discussion, we offer a distinction between **structural elements** of Aboriginal youth cautioning and **the processes** which might be utilised in Aboriginal youth cautioning. Common structural features which were evident in the case studies included '**On Country' models** of engagement; the development of **strong partnerships**; and the

recognition of **'shared jurisdiction'** between Indigenous people and non-Indigenous justice agencies.

The Discussion Paper also includes our findings from the literature in relation to 'Barriers' and 'Enablers' for the development of Aboriginal youth cautioning. These are summarised in the Table below.

Potential Barriers and Enablers

Barriers
Limited access to diversionary programs
Referrals to Aboriginal diversionary programs
Eligibility criteria for referral to Aboriginal cautioning
The point at which Indigenous organisations are involved in decision-making
Risk assessment
Failure to receive support from other agencies
Failure to ensure that legislative provisions and policies to enhance Indigenous 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' 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

The Report also includes a series of questions to guide future discussion between Victoria Police, the Police Youth Reference Group and the Aboriginal community of Victoria.

ABBREVIATIONS

ABS	Australian Bureau of Statistics
AIHW	Australian Institute of Health and Welfare
AJA	Aboriginal Justice Agreement
ALS	Aboriginal Legal Service
APLO	Aboriginal Police Liaison Officer
ATSISJC	Aboriginal and Torres Strait Islander Social Justice Commissioner
BIA	Bureau of Indian Affairs (USA)
CDEB	Central Data Entry Bureau
DHS	Department of Human Services
DV	Domestic Violence
FYC	First Year Constable
JR	Justice Reinvestment
MoU	Memorandum of Understanding
NATSILS	National Aboriginal and Torres Strait Islander Legal Services
NGO	Non-governmental Organisation
OiC	Officer in Charge
PCYC	Police-Citizens Youth Club
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
RCMP	Royal Canadian Mounted Police (Canada)
SCRGSP	Steering Committee for the Review of Government Service Provision
SNAICC	Secretariat National Aboriginal and Islander Child Care Agencies
SRA	Shared Responsibility Agreement
SYC	Second Year Constable
VALS	Victorian Aboriginal Legal Service
VCS	Victorian Corrective Services
VPMP	Victoria Police Manual – Policy Rules
VPS	Victoria Police Service
VPSO	Village Public Safety Officer (USA)
YOLR	Young Offenders Legal Referral

DEFINITIONS

Informal Caution: a casual dealing with young people with no formal charges laid. May take young people home or phone parents or guardians, minor intervention, may be recorded administratively on caution sheet at the police station or in the police notebook, and includes warning or telling young people to move on.

Formal Caution: a caution administered at a police station and authorised by senior police officer a parent or guardian must attend or be notified to contact the police station within a set period. A formal caution can be administered whether or not the young person is arrested for the offence. In some jurisdictions (such as South Australia) police can issue a formal caution accompanied by a range of specified requirements, such as undertaking community work; in other jurisdictions (such as the NT), the formal caution may take the form of a youth conference.

Justice Reinvestment: A strategy for reducing the number of people in prison by investing funds from the corrections budget into communities that are over-represented in prison.

Restorative Justice: An approach to criminal justice which focuses on the rehabilitation of offenders and reconciliation with victims and the broader community.

Youth Conference: An approach to youth criminal justice which brings together offenders, their families and supporters with victims, their supports and the police to discuss the crime and how people have been affected. Also referred to as Family Group Conferencing and Youth Justice Conferencing.

1. The Context of Aboriginal Self-Determination

This section of the Discussion Paper discusses self-determination in the context of criminal justice reform and potential implications for the development of an Aboriginal Youth Cautioning Program for the Victorian Police.

The Victorian Government has made a commitment to self-determination as the primary driver of Aboriginal affairs policy and noted that it is 'the guiding principle in Aboriginal Affairs and [the Government] is working closely with the Aboriginal community to tackle some of the most important issues for Aboriginal Victorians' (Victorian Government no date (a)). The Government has also agreed to enter into treaty negotiations with the Aboriginal peoples of Victoria, to recognise Indigenous self-government and to develop options for a permanent Aboriginal representative body (Maddison et al 2017).

As Behrendt et al (2018: 3) have noted self-determination was a foundational principle for the Victorian Aboriginal Justice Agreement (AJA), established in 2000 in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. It is a crucial component of the next (fourth) phase of the Victorian AJA (AJA4), to be launched in 2018, and future AJAs. Generally, the Victorian AJAs have been founded on the understanding of 'the need for the Aboriginal community to be centrally involved in the attempts to address these issues and that partnership with government is an effective strategy for achieving systemic change' (Behrendt et al 2018: 8).

The evaluation of Aboriginal Justice Agreements nationally concluded that the Victorian AJA was the best example of the agreements and that the agreements have contributed to 'a more coherent government focus upon Indigenous justice issues and, in those jurisdictions where they exist, they have been associated with criminal justice agencies developing Indigenous-specific frameworks' and 'have led to development of a number of effective initiatives and programs in the justice area.' They can also 'advance principles of government accountability with independent monitoring and evaluation, with maximum Indigenous input into those processes' and 'have effectively progressed Indigenous community engagement, self-management, and ownership where they have set up effective and well- coordinated

community-based justice structures and/or led to the development of localised strategic planning, as well as through encouraging initiatives that embody such ideals' (Allison and Cunneen 2013).

The Victorian Government has begun engagement with Koori communities to identify and deliver outcomes that empower them to exercise their right to self-determination, and autonomy for self-government in matters relating to their internal and local affairs. The Government is committed to making self-determination core business for government agencies, and has noted a number of initiatives including:

- The Government works in close partnership with Aboriginal Victorians in justice, family violence and children in out-of-home care through the Aboriginal Justice Forum, the Indigenous Family Violence Partnership Forum and the Aboriginal Children's Forum (established through the Aboriginal Children's Summit in August 2015).
- Last year the Government passed legislation that empowers an Aboriginal Community Controlled Organisation to assume responsibility for, and make decisions about the care of, Aboriginal children living in out-home care, decisions normally made by the Secretary of the Department of Health and Human Services.
- From a single Magistrates' Court site in 2002, there are now 25 Koori Courts across Victoria that provide for Aboriginal communities to have real input into the court processes. The Department of Health and Human Services is currently consulting with the Aboriginal community on a new Aboriginal Health and Wellbeing Strategic Plan that integrates self-determination into its core principles.
- The Victorian Government has also been working in partnership with the Aboriginal community to develop a new Aboriginal education plan.
- The Victorian Local Aboriginal Networks (LANs) Five Year Plan was released on 17 March 2016 with a plan strengthen the LANs and ensure future success and sustainability of the networks. LANs empower Aboriginal people to lead decision making by providing an inclusive, culturally affirming space in which to participate (Victorian Government no date (b)).

It is also worth noting that while the Victorian Charter of Human Rights does not specifically include the right to self-determination, as Behrendt et al (2018: 34-5) note it does contain protections of some rights that are inherent to self-determination. The Charter protects cultural rights at section 19, which is the only recognition in the Charter of distinct rights of Aboriginal people:

> People can have different family, religious or cultural backgrounds. They can enjoy their culture, declare and practice their religion and use their languages. Aboriginal persons hold distinct cultural rights.

The Victorian Government has noted that the Review of the Charter 'recommended that a right to self-determination for Aboriginal people be included in the preamble to the Charter, something that Aboriginal people have been calling for' (Victorian Government no date (b)). The Victorian Aboriginal Affairs Framework 2013-2018 is also relevant to discussions on self-determination in the Victorian context. Although the Framework does not specifically mention self-determination it does refer to Aboriginal Affairs engagement structures including at the statewide, regional and local levels (Victorian Government 2013: 23). More importantly in the context of developing an Aboriginal Youth Cautioning Program, there are nine principles which underpin engagement with Koori people (Victorian Government 2013: 24). We return to these principles later in this section of the Discussion Paper.

Background

The broader context for self-determination can be found in the reports of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). Many of the Commission's recommendations either implicitly or explicitly refer to the need for negotiation with Indigenous people and organisations. The most explicit expression of the principle of self-determination is recommendation 188 of the RCIADIC:

> That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.

The Commission saw self-determination as fundamental to improving the outcomes of Aboriginal people in contact with the criminal justice system.

The principle of Indigenous self-determination can also be found in the *Declaration on the Rights of Indigenous Peoples*. As we have discussed more fully elsewhere (Behrendt et al 2018: 10), self-determination is notoriously difficult to define and the concept defies any concrete definition. Its meaning varies according to context. Ted Moses observes that Indigenous self-determination:

> is a concept of sweeping scope that encompasses all aspects of human development and interaction, cultural, social, political and economic. It is not simply a political right as it is often characterized. And it is not exclusively an economic right. It is a complex of closely woven and inextricably related rights which are interdependent, where no one aspect is paramount over any other. It is a right that forms the basis of all other rights (cited in Muehlebach 2003: 253).

In a similar vein, Michael Dodson, the first Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) noted that 'self-determination is the river in which all other rights swim'. He went on to state that:

> The crucial importance of self-determination to Aboriginal and Torres Strait Islander people is little appreciated by non-Indigenous Australians. Correctly understood, every issue concerning the historical and present status, entitlements, treatment and aspirations of Aboriginal and Torres Strait Islander peoples is implicated in the concept of self-determination. The reason for this is that self-determination is a process. The right to self-determination is the right to make decisions (cited in Cunneen 2001: 241).

As we noted previously (Behrendt et al 2018: 14-15), in the context of settler colonial states, Indigenous peoples seek internal autonomy and the right to enter into negotiations and agreements with local, state and federal governments as distinct, self-governing peoples. This can be conceived as *relational self-determination* whereby the Indigenous-state relationship

is sees as one of non-domination, where Indigenous peoples are not unilaterally controlled by the state.

The Principles Underpinning Self-Determination

There are common features to all definitions of self- determination. These are **control** and **consent**. For Indigenous communities and people, it will vary in form according to particular customs, needs and aspirations (Behrendt et al 2018: 10).

The former ATSISJC, Mick Gooda, has noted more broadly that there are four key principles that underpin the *Declaration on the Rights of Indigenous Peoples*. These are **self-determination; participation in decision-making and free, prior and informed consent; non-discrimination and equality; and respect for and protection of culture** (ATSISJC 2011:18). Each of these principles provides a guide for both reflecting on and reforming criminal justice systems.

The four principles can provide a framework for considering the development of an Aboriginal Youth Cautioning Program for the Victorian Police. As noted above, every issue concerning Indigenous people is implicated in the concept of self-determination. At a community level, it is the right, *inter alia*, to exercise control over decision-making, community priorities, how communities operate and processes for resolving disputes (ATSISJC 2011: 109-10). Importantly, a sense of control is transformative and improves wellbeing. 'It can transform an individual or a community from the passivity of victimhood into pride, action and responsibility' (ATSISJC 2011:110).

> A self-determining community not only exerts control but it also self-regulates. It decides how disputes are resolved, how decisions are made, what protocols for behaviour are acceptable, and it takes responsibility to ensure the well-being of the entire community. [Conversely,] government interventions that impose solutions to fix our internal relationships are inconsistent with self-determination (ATSISJC 2011: 111).

Participation in decision-making requires participation in both internal Indigenous community decision-making, as well as external decision-making processes with government, industry and non-government organisations. The ATSISJC notes that:

> External consultation and engagement processes need to be adequately established so that our internal decision-making, and if necessary dispute resolution processes, can operate effectively without pressure. This might take time and require space for the resolution of difficult issues. Making decisions and resolving disputes should occur on our timetable, not that of an interested third party. It is also essential to identify who within the community has decision-making authority whilst also ensuring there is a mechanism for all community members to participate (ATSISJC 2011: 114-5).

Decision-making must be free, prior to any activity occurring, informed of all the options and consequences, and based on consent. These requirements underpinning decision-making are particularly apt when assessing how governments 'consult' with Indigenous peoples. The ATSISJC usefully summarises the requirements for 'free, prior and informed consent' in the Text Box below.

Text Box: Free prior and informed consent

Free means no force, bullying or pressure.

Prior means that we have been consulted before the activity begins.

Informed means we are given all of the available information and informed when that information changes or when there is new information. If our peoples don't understand this information then we have not been informed. This information should include possible consequences, good and bad, of any decision or non-decision. An interpreter or other person might need to be provided to assist.

Consent requires that the people seeking consent allow Aboriginal and Torres Strait Islander communities to say yes or no to decisions affecting them according to the decision-making process of their choice. To do this means we must be consulted and participate in an honest and open process of negotiation that ensures:

- all parties are equal, neither having more power or strength
- our group decision-making processes are allowed to operate
- our right to choose how we want to live is respected.

Importantly, the onus is on the organisation (government, corporate or our own representativ bodies) who is seeking consent or a decision to be made to ensure that the decision that is mad is free and informed.

Source: (ATSISJC 2011: 115)

The principle of non-discrimination and equality is particularly important given the histories of racial discrimination against Indigenous people. Further it is:

> important to remember that equality requires an acknowledgement of cultural difference and recognition that historical discrimination has continuing negative impacts… For me this means that when governments develop systems, be they education, health or any in other area, they have a duty to design such systems so that they accommodate difference, whether the people affected are Aboriginal or Torres Strait Islander, refugees, have a disability or are gender different. It should not be up to people who are different to navigate their way through systems that does not take into account their particular needs and circumstances (ATSISJC 2011: 117).

Respect for and protection of culture is fundamental for the survival of Indigenous peoples. A fundamental understanding is that Indigenous culture is a source of strength and resilience, and cultural safety and cultural security are foundational to restoring and maintaining social order in Indigenous communities (ATSISJC 2011: 123-134). The ATSISJC draws a distinction between cultural awareness, cultural safety and cultural security – each of these form a pyramid with cultural awareness at the bottom and cultural security at the top. Addressing cultural awareness and then cultural safety are prerequisites for ensuring cultural security.

> **Cultural safety** can be defined as… An environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It

> is about shared respect, shared meaning, shared knowledge and experience of learning, living and working together with dignity and truly listening (ATSISJC 2011: 124).
>
> **Cultural security** is subtly different from cultural safety and imposes a stronger obligation on those that work with Aboriginal and Torres Strait Islander peoples to move beyond 'cultural awareness' to actively ensuring that cultural needs are met for individuals. This means cultural needs are included in policies and practices so that all Aboriginal and Torres Strait Islanders have access to this level of service, not just in pockets where there are particularly culturally competent workers (ATSISJC 2011: 127).

Overall, the principles underpinning self-determination have significant implications for the development of an Aboriginal Youth Cautioning Program, particularly in ensuring that self-determination; participation in decision-making and free, prior and informed consent; non-discrimination and equality; and respect for and protection of culture are met. In addition, **the development and implementation of an Aboriginal Youth Cautioning Program should aim to ensure that the requirements of cultural security underpin such a program and are met through policies and processes which are introduced.**

The Importance of Self-determination 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 Indigenous 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/ Indigenous-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 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).

Lack of Self-Determination and Higher Crime Rates

An important research finding from Behrendt et al (2018) is the potential correlation between self-determination and crime rates in Aboriginal communities. While the evidence is clear

that self-determination has a positive impact on community well-being and on the capacity of communities to achieve their aspirations, Behrendt et al (2018: 23) suggest that the reverse is also potentially true: there may be a connection between the lack of autonomy or self-determination and community distress and crime.

The research by Behrendt et al (2018) found that participants, in reflecting on why their communities had relatively low or high crime rates, stressed local decision-making, self-determination and autonomy as positively or negatively shaping the nature of 'crime'. 'They may not have explicitly used the terminology of self-determination, but people describing whether their community had the capacity to respond to their local problems was a striking and common story' (Behrendt et al 2018: 25). The authors go on to note that:

> Research participants in towns with low crime rates frequently spoke of 'community control' or community self-reliance as a positive contributor to 'success' or relative harmony, both as preventing crime and as enabling the community to respond to crime and other community issues as they arise. By contrast, the prevalence of external control, undermining of community decision- making and indifference to community-based solutions were frequently highlighted as destructive and contributing to malaise and distress in the towns with high crime rates. Research participants vividly described a sense of paternalism and helplessness that was palpable (Behrendt et al 2018: 25).

Behrendt et al's research findings are an important justification for negotiating with Aboriginal communities around the best approach to responding to young people who commit offences and the nature and role of diversionary options. Further, the findings support the need for self-determination, participation in decision-making and free, prior and informed consent in the development of programs and policies, and *real decision-making authority* by Indigenous communities/organisations.

Self-Determination and Negotiation

Self-determination through more localised Aboriginal nation-building can provide a mechanism to achieve 'bottom up' solutions which are devised with and by Aboriginal communities which are necessary for achieving community safety and well-being. 'The

evidence suggests that, in order to fully participate in developing locally relevant policy and programs, Indigenous peoples need to be able to organise so as to determine collective policy positions and strategy on various issues' (Behrendt et al 2018: 28).

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 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 government policy makers is that the relevant issues are complicated and conceptually challenging, and do not lend themselves to straightforward or immediate solutions. **This problem will be no less so with the development of an Aboriginal Youth Cautioning Program where there may be time constraints on developing and implementing a particular model.** 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 'one size fits all' policy approach has particular resonance for an Aboriginal Youth Cautioning Program where there may be a counter policy imperative to ensure consistency in approach and outcomes.**

Principles of Engagement with Aboriginal People

The Victorian Aboriginal Affairs Framework 2013-2018 has set out nine principles for engagement with Aboriginal people. These principles are as follows:

Strength-based approach. Engagement to build upon community strengths and self-reliance, capability, foster positive change and promote and celebrate achievement.

Partnership between community and government. Trusting relationships are central to successful partnerships between Aboriginal people and Government and shared responsibility for identifying solutions and improve outcomes.

Recognition of diversity in Aboriginal communities. Engagement to include diverse groups of Aboriginal people and communities in Victoria and recognise, embrace and respect difference.

Respect. Respect the skills and ability of Aboriginal people, communities and organisations to provide information to enable good decision making. Ensure adequate time for genuine engagement has been provided.

Cultural understanding. Engage in a way that demonstrates cultural awareness, respect and recognition and utilises culturally appropriate methodologies and accessible forms of communication.

Recognised Aboriginal leaders. Engage in a way that respects recognised leaders and Elders as acknowledged by the Aboriginal community.

Focus on youth. In recognition that Aboriginal young people represent more than half of the Victorian Aboriginal population, actively seek to engage youth in consultation, seeking input and developing their leadership and other capacities, while appreciating their relationships with the Aboriginal community.

Clear and consistent flow of information. Provide information in a range of accessible and appropriate communication styles to strengthen understanding between Aboriginal people and government.

Accountability. Value engagement with Aboriginal people and communities. Be clear on the intended outcomes of engagement arrangements and ensure feedback is provided on how input has been utilised or informed policy in a spirit of mutual respect. All parts of government and organisations funded by governments to deliver services for Aboriginal Victorians need to be accountable to the Aboriginal community (Victorian Government 2013: 24).

Broadly speaking, these nine principles from the Aboriginal Affairs Framework are not inconsistent with the earlier discussion in this section on the importance of self-determination and other principles underpinning the *Declaration on the Rights of Indigenous Peoples*. However, it worth noting that principles such as *free, prior and informed consent* and the need for *cultural safety* and *cultural security* set a higher standard than those noted immediately above.

Self-determination and the importance of the interface between Indigenous decision-making and non-Indigenous justice organisations

Aboriginal self-determination and its associated principles provides a specific context in Victoria for the development of an Aboriginal Youth Cautioning Program. Ultimately it provides for the Aboriginal community to be centrally involved in the decision-making process for the development, implementation and operation of a revised cautioning program. The principles set out in this section of the Discussion Paper recognise the importance of understanding and respecting community decision-making, community priorities and community processes for resolving problems. Respect for and protection of Aboriginal culture requires that programs meet standards of cultural safety and cultural security. Time constraints in developing and implementing policies and programs, and the tendency to prioritise a 'one size fits all' approach, may also work against the need for full consideration of the issue by Aboriginal communities and organisations.

Questions Arising from a Consideration of Aboriginal Self-Determination and the Development of Aboriginal Youth Cautioning Program:

How is a negotiation framework developed with localised Koori communities in relation to the development of an Aboriginal Youth Cautioning Program?

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

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

Should there be specific consultation and engagement with Aboriginal young people about prospective models for Aboriginal Youth Cautioning?

How do we ensure that an Aboriginal Youth Cautioning Program meets the requirements of Cultural Safety?

2. The Current Victorian Youth Cautioning Program

Background

In Victoria police cautioning of young people was first established in 1959 and the scheme was expanded in 1977. Youth cautioning is the major pre-court diversionary option available to young offenders. Two pilot youth cautioning schemes, the Koori Youth Cautioning Pilot and the Youth Cautioning Pilot, were introduced in 2007 and 2010 respectively. Originally, the cautioning model required a sergeant or above to authorise and administer the caution. However, the Youth Cautioning Pilot allowed an 'all ranks' model of cautioning. The Koori Youth Cautioning Pilot also introduced 'an enhanced referral and follow-up model to better support young people, facilitated by the local Youth Resource Officer (YRO) and/or the Aboriginal Community Liaison Officer (ACLO). This aimed to address underlying drivers of offending behaviour. A Failure to Caution Form was developed to provide greater accountability for officers when young people were not cautioned' (Ernst and Young 2017: 5).

Over the decade to 2002 most states had introduced provisions for police cautioning within their youth justice legislation (Polk et al 2003: 15, 18). Victoria was by the early 2000s, and remains today, one of the few states in Australia that does not provide a legislative base for police cautioning, although it is part of police instructions.

The Declining Use of Cautions and Limited Access for Aboriginal Children

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 (Cunneen and White 1995: 248; Polk et al 2003:15).

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 Ernst and Young report (2017: 21) also shows clearly that Aboriginal children are less like to receive a caution than non-Aboriginal children in every age group between 10 and 17 years. The disparity becomes greater for older children. For example, Aboriginal children in the 10-year-old age category are only slightly less likely than non-Aboriginal children to receive a caution, by age 13 years the proportion of non-Aboriginal children cautioned is double that of Aboriginal children, and by 16 years of age non-Aboriginal children are more than three times more likely to be cautioned than Aboriginal children. A recent report by the Crime Statistics Agency (Shirley 2017:12) found that 'Indigenous status continues to be a significant predictor for cautioning'. Aboriginal children were twice as likely to be charged (rather than cautioned) compared to non-Indigenous children.

The most common offences for which youth cautions are used are (in order): theft (shop steal); drugs (possess/use); 'other'; and public order offences (Ernst and Young 2017: 20).

The Broader Context for Youth Cautioning in Victoria

In considering the development an Aboriginal Youth Cautioning Program it is important to acknowledge and contextualise cautioning within some of the broader parameters within which youth justice operates within Victoria. This contextualisation allows for an understanding of some of the distinct features of the contemporary youth justice landscape in the Victoria and has implications for how an Aboriginal Youth Cautioning Program is designed and developed.

(i) Youth Justice Conferencing

Youth justice conferencing in Australia started with a range of pilot projects and developed piecemeal – each jurisdiction with its own history and processes. From the early 1990s ideas around restorative justice and use of conferencing models gained a substantial foothold in the development of alternative diversionary approaches for young people. While unknown prior

to the 1990s, the use of youth justice conferencing developed across most of Australia. Polk (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.

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.

In most jurisdictions legislation had been introduced or amended to formalise youth justice conferencing as a major diversionary option and linked in a hierarchy of diversion with police cautions – the latter being preferred as an earlier front-end alternative (see Appendix 1). 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 is 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.

(ii) Police Run Youth Justice Conferences in Australia

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 (see Richards 2010). However, during 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 NSW a small number of police officers have been trained by the Department of Juvenile Justice and may convene a youth justice conference on behalf of the Department. In Tasmania there was a dual system of police-run and Department of Health and Human Services operated

conferences – however it appears that responsibility now rests solely with the Department to convene conferences (Youth Justice Act 1997, Division 3).

(iii) Bail and Remand

As a result of changes to bail, we have seen a long-term trend nationally in the increasing proportion of young people remanded in detention prior to their court appearance. In the early 1980s only 20 per cent of the youth detention population were remandees. By the late 1990s the proportion had grown to around 40 per cent. Then consistently over the next decade more than 50 per cent of the youth detention population nationally was on remand (Cunneen and White 2011: 297-298).

However, the picture has not been uniform: for example in 2010 in Victoria 29 per cent of young people were on remand (New South Wales Law Reform Commission 2012b: 56). While there has been some increase in Victoria in the number of remandees since 2010, amendments to the Victorian *Bail Act* in 2016 acknowledge that children should be treated differently to adults when considering bail, and provides certain protections for children including that bail conditions should be no more onerous than necessary and not 'constitute unfair management of the child'.

While many states have various bail programs, historically Victoria has had significantly lower proportions of its detention centre population on remand. For most of the period 2007-2010 in Victoria less than one-third were remandees. Laws and policies impact on the use of remand and in Victoria various strategies introduced since the 1990s had either reduced the remand population, or kept it at comparatively low levels. Having said that, the juvenile remand population had risen significantly since 2010 and by 2016 some 46% of the detention population were remandees, although it is still less than comparable states like NSW and QLD, and slightly below the national average (AIHW 2017: Supplementary Table S109a).

(iv) Courts, Sentencing and Detention

Since 2006 there have been a considerable increase in the number of young people appearing before the Children's Court. In 2006 there were 2,000 matters heard in the Children's Courts and this had increased to 30,000 matters by 2015 (Ernst and Young 2017: 18).

Victoria has maintained a comparatively low rate of detention compared to other states. In 2016 the rate of juvenile incarceration in Victoria was approximately half that of NSW and Queensland, and almost a quarter of Western Australia's rate (AIHW 2017: Supplementary Table S77a). However, despite the comparatively low rate, there have been significant recent increases with the rate of juvenile incarceration nearly doubling between 2007 and 2016 (AIHW 2017: Supplementary Table S85a).

Victoria also has developed community-based policies some of which are specifically aimed at Koori youth such the *Koori Justice Worker Program* – which led to a reduction in the number of Indigenous young people in detention at the time (Cunneen and White 1995: 250). More recently, the *Youth Support Services Program* began operating statewide in 2011 with the aim to provide early intervention and diversion services for young people who were at risk of entering the youth justice system, and a *Youth Diversion Pilot Program* began operating in 2015 and allows the court to refer a young person to a diversion activity, receive assistance from support services, and if successfully completing the activity, have the criminal charge dismissed. The development of specific court services for Indigenous young people was also evident with the first youth Koori court in 2004 and its later expansion to other locations. The courts aim to ensure greater participation of the Indigenous community in the sentencing process and to assist in achieving more culturally appropriate sentences for young Indigenous people.

Recent Contextual Changes and Implications for an Aboriginal Youth Cautioning Program

In 2016 Victoria had the lowest rates of both detention and community supervision (that is, all children under supervision) in Australia (AIHW 2017: Supplementary Table S5a). Although there is no formal legislative base for diversion in Victoria, police cautioning has been an important part of the diversionary landscape. The absence of legislation covering diversion is an exception to the trend in Australia, and perhaps contrary to what most child advocates have called for: clear legislative guidelines for the use of diversionary options.

In summary, the changing youth justice context has a number of points of relevance for how an Aboriginal Youth Cautioning Program is designed and developed. Some key changes have been:

- The declining use of cautions;
- An increasing number of Children's Court matters;
- An increase in the remand population; and
- An increase in the rate of detention.

Why are these points relevant to developing an Aboriginal Youth Cautioning Program? We believe that they raise some important questions for the objectives of the Program which impact on what type or model of intervention is likely to be most effective. On the one hand, the self-determination objectives of the Program are clear. However, the criminal justice objectives are less well-defined:

- Is the model only targeting low level offending and first or second or younger aged offenders and therefore primarily aimed at increasing the rate of cautioning?
- Is it aimed at particular types of offences – for example those offences which are likely to lead to bail refusal?
- Is the model aimed at repeat older offenders?

These questions are important for thinking about how a self-determination model interacts with particular criminal justice objectives. At the very least, communities and community organisations should be aware of the likely justice outcomes of the model which is developed.

Description of the Current Victorian Child Cautioning Process

The current Victoria Police Manual – Policy Rules (VPMP Disposition of Offenders) requires the following in relation to Child Cautions:

- The offender must admit the offence;
- The caution can be only given to children of or above 10;
- The parent/ guardian must consent to the caution;
- The parent/ guardian must be present at the time of giving the caution.

There are no other Ineligibility/Limitations criteria listed in the Policy Rules (eg in relation to the type of offence or prior cautions).

Further direction in relation to cautions is provided in the Victoria Police Manual – Procedures and Guidelines (VPMG Cautions). The Guidelines provide guidance on criteria for eligibility including that :

- Generally the offender should have no prior criminal history;
- Cautions should be considered for sexual or related offences only in exceptional circumstances;
- Any co-offenders where possible should be interviewed.

In relation to interviews, the Guidelines state that interviews should be recorded for indictable offences where either:

- The child offender's parent/ guardian is unavailable, in which case the interview must be conducted in the presence of an independent person;
- There is a probability the matter will proceed to court.

The Guidelines are silent on who should give the caution. Among other matters relating to the issuing of the caution, it is noted that the 'member' should:

- Have an informal discussion with the child and parent/guardian to seek the underlying reasons for the offence and to discuss inappropriate behaviour and its consequences;
- Advise that further cautions are unlikely for any future offences;
- Consider referral to appropriate agencies.

(i) Drug Diversion Cautioning

Also relevant to the cautioning of young people is the availability of cautioning for drug offences. For cannabis cautioning, VPMP Disposition of Offenders requires the use of a child caution. However, drug diversion cautions (other than cannabis and illicitly held pharmaceuticals) are available for persons of or over the age of 10. The VPMP Disposition of Offenders requires that the drug diversion caution:

- Applies to use and/or possession of a small quantity of an illicit drug (other than cannabis and illicitly held pharmaceuticals);
- Must be for personal use only
- Offender must consent to the diversion and participating in the drug diversion program (ie receive the drug diversion caution, and attend for assessment and appropriate treatment with an approved service provider).

Other eligibility criteria are:

- No other offence involved unless they are to be immediately dealt with via police cautioning program or issue of an infringement notice
- Offender must not have received more than one previous cannabis caution or drug diversion (prior convictions for any offence do not affect eligibility).

Further direction in relation to drug diversion cautions is provided in the Victoria Police Manual – Procedures and Guidelines (VPMG Cautions). The aim of the program is to 'divert appropriate adult and child offenders detected for the use and/or possession of a small quantity of illicit drugs into early assessment and appropriate treatment managed by DHS'. Unlike the guidelines covering general cautions for children, there is an explicit acknowledgment that 'there is no need to conduct a recorded interview'.

The treatment agency notifies the CDEB of either the successful or unsuccessful completion of a treatment program. If the offender has failed the treatment program (eg failed to attend), then the caution in withdrawn and the finalised through court proceedings.

(ii) Official Warnings

Whilst not part of the current cautioning process, we also note that police can issue official warnings to children 14 years and over for the following offences:

- Contravention of a direction to move on
- Drunk in a public place
- Drunk and disorderly in a public place
- Disorderly conduct in a public place
- Breach of a conduct condition of bail (VPMP Disposition of Offenders).

(iii) Court Diversion

Whilst outside of the cautioning program, we also note that after proceedings for an offence have commenced, the police have the option to recommend to the court (magistrate's and children's courts) that a diversion program is appropriate in the circumstances. With some exceptions, the diversionary option is available for summary and summary/indictable offences (s59, *Criminal Procedure Act 2009*).

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

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.[1] 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-

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

offend than those brought before the courts (Dennison, Stewart and Hurren 2006; Shirley 2017:1)[2]. However, we do not know whether attaching conditions to cautions makes any positive (or negative) difference to these results.

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.

(i) 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 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.

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

[2] 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'.

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. Copies of the Young Offenders Legal Referral and Young Offenders Legal Referral Contacts forms are in Appendix 2).

(iii) 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 (see Appendix 3).

In some circumstances, the signing of the Protected Admission Form (see Appendix 4) 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 (see Appendix 5 NSW Police Code of Practice for Crime).

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[3] 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

[3] Electronic Recording of Interviews with Suspected Persons

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

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 noted at the beginning of this chapter. 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.

Risk Assessment

Currently there appears to be no formal risk assessment tool used in Australia when police decisions are made as to whether to caution a young person. A risk assessment is made in NSW in relation to children who may be referred (by police or education) to support services through the Youth on Track (YoT) early intervention program. States and territories employ extensive risk assessment tools routinely for young offenders who are under community-based or custodial supervision. Internationally, New Zealand and England and Wales have risk assessment tools at the diversionary stage of juvenile justice.

NSW Youth on Track

The Youth on Track has a 'screening tool' to identify juveniles at high risk of re-offending. The YoT tool includes gender, age, prior cautions (none, one, two, three or more) and prior charges (none, one, two, three, four or more). The tool is administered by the police at the time of caution, conference referral or charge and is used for automatic referrals to the program. Indigenous status not included due to reliability concerns – however it is not clear whether 'reliability' related to its predictive capacity for repeat offending or to the identification of the individual child. It is also worth noting that YoT on their website[4], when referring to risk factors and participation in crime, specifically refer to Indigenous status as a 'static' risk factor. Static risk factors are 'things that can't be changed - that increase the likelihood of a person's involvement in crime'. Thus Indigenous status is in itself seen as 'predictor' of offending.

New Zealand

In New Zealand the Youth Offending Risk Assessment Tool (YORST) is utilised at the diversionary stage (see Appendix 6). There are 14 individual items that comprise the total YORST risk score. Total YORST risk scores can range from 0 to 100. These scores are categorised into low, medium or high risk based on the following cut-off points:

- Low risk (total YORST risk scores of 0 to 29)
- Medium risk (total YORST risk scores of 30 to 69)
- High risk (total YORST risk scores of 70 to 100). (Mossman 2011: 1)

However, it is important to note that the diversionary processes in New Zealand under the *Children, Young Persons, and Their Families Act 1989*, ss 211-213, differ from Australian jurisdictions.

If the police believe that a warning is not sufficient and instead intend to charge the child or young person in the Youth Court, they may refer the matter to a youth justice co-ordinator for the purposes of holding a youth justice family group. **A formal police caution is an alternative to a criminal prosecution that can result from a youth justice family group**

[4] http://www.youthontrack.justice.nsw.gov.au/Pages/yot/need_yot/risk_protective_factors.aspx. See also Australian Institute of Family Studies for similar identification of Indigenous status as a risk factor. https://aifs.gov.au/cfca/2015/09/09/young-delinquents-risk-and-protective-factors-australian-children.

conference. Once the matter has been referred to a family group conference, a caution may be given if:

- the young person admits the charge, or it is proven, and
- the family group conference recommends a caution, and
- the police agree to a caution.

The young person will be given a formal police caution at the police station by a senior police officer in the presence of a parent, guardian, or caregiver, or an adult nominated by the young person.[5]

England and Wales

The out-of-court (diversionary) framework in England and Wales encourages joint decision-making between police and youth offending teams (YOTs) in making decisions about diversion for young offenders (Ministry of Justice and Youth Justice Board 2013). There are three formal diversionary disposals: community resolution, youth caution and youth conditional caution (see Appendix 7). 'No further action' is also available where 'no action is appropriate or warranted in a particular case. This could arise if there is no substantive offence or if the young person makes no admission and there is insufficient independent evidence to charge them' (Ministry of Justice and Youth Justice Board 2013:7).

To help police assess the seriousness of an offence, a Youth Gravity Factor Matrix has been developed under which all offences can be given a gravity score of between one (for the most minor offences) and four (for the most serious offences). To help police assess the seriousness of an offence, the Association of Chief Police Officers (ACPO) has devised a Youth Gravity Factor Matrix, under which all offences can be given a gravity score of between one (for the most minor offences) and four (for the most serious offences) (Ministry of Justice and Youth Justice Board 2013:13). Factors which can make an offence more serious are shown as aggravating (+) while mitigating factors, making an offence less serious, are shown as (-). Some factors apply to all offences, and are listed as 'General Factors' while others are only applicable to specific offences and are listed as 'Offence Specific Gravity Factors'. For a description of the offences and aggravating and mitigating factors and relative

[5] See http://communitylaw.org.nz/community-law-manual/chapter-9-youth-justice/action-that-can-be-taken-against-young-offenders-chapter-9/.

complexity of determining offence gravity, see the ACPO Youth Offender Case Disposal Gravity Factor Matrix.[6] The Youth Gravity Factor Matrix is not strictly a risk assessment tool, but a tool for determining the seriousness of the offence and associated factors as a guide to decision-making.

Aboriginal Young People, Risk Assessment and Risk and Protective Factors

In general, it is worth noting that risk assessment tools do not explicitly consider 'protective factors'. They are primarily tools for measuring and predicting risk of re-offending based on factors known to be associated with re-offending from aggregate populations. In considering the relationship between Aboriginal young people and risk assessment there are two important points.

- First, there is evidence that racial minorities fare badly on existing risk assessment tools.
- Secondly, there is virtually no literature on what a risk assessment tool might look like from an Indigenous perspective. Indeed, as we noted above some risk assessments regard *being Indigenous as a risk factor*.

There has only been limited discussion of how risk assessment tools impact on Indigenous, black and ethnic minority young people. In Canada, Maurutto and Hannah-Moffat (2006) have warned that few risk/need assessment tools have been examined to determine whether their criteria capture the particular situation of Indigenous people, and that the tools appear not to address the broader socio-cultural context or unique issues facing Indigenous people. In Australia there has been recommendations that juvenile correctional facilities develop specific risk assessment tools for Indigenous inmates (Office of the Inspector of Custodial Services 2006: 16). Priday (2006: 418) has noted in relation to risk assessment and Indigenous young people that:

> [They] already have the so-called objective risk assessment stacked against them. The processes that result in higher levels of risk, do not acknowledge the specific history of colonisation and dispossession of Indigenous Australians and the associated structural

[6] https://static1.squarespace.com/static/579fce76d2b857f883038fa5/t/57a485bf725e25acf934d438/1470399936178/Gravity+Matrix+May09.pdf.

> barriers they face. By cloaking risk in more general terms and without reference to the above-mentioned aspects, assessments run the risk of perpetuating discourses that pathologise Indigenous young people and continue policies of removal but under the guise of the justice system.

In England and Wales, May *et al* (2010: 83-85) found that the proportion of boys who had 'high' scores predicting the likelihood of re-offending on the *Asset* scale was larger for those of black or mixed race than for whites, and that having a medium or high score compared to a low score further increased the odds of being remanded in custody. In the United States it has been noted that:

> The embedded nature of race is what causes a potential problem with risk assessment instruments. Because the instruments decontextualize race, the associations between race and the risk factors linked to race (e.g. family characteristics, neighborhood residence, gang affiliation, school activities, parents' criminal history) are rendered invisible and can lead to higher risk scores – and hence harsher punishments – for minority youth and to lower risk scores and less-harsh punishments for White youth (Moore and Padavic 2011: 855-856).

If we were to take the New Zealand YORST risk assessment tool (see Appendix XX) for diversion and apply it in the Victorian context it is not difficult to see how Koori children would score poorly on a range of the 14 identified factors, including age of offending, prior offending, peers known to police, educational history, care and protection history, alcohol and/or drug use, family violence history, socio-economic status of residential location, concerns with living situation, and family members with offending history.

Aboriginal Risk and Protective Factors

Current risk assessment tools appear to be inconsistent with Aboriginal strength-based approaches, and with basic requirements around cultural awareness, cultural safety and cultural security. It is difficult to find literature that considers specific risk and protective factors from an Aboriginal perspective in the context of adult or juvenile criminal justice.

However, there has been far greater concentration on these issues in the public health literature and particularly how specifically Aboriginal risk and protective factors relate to

emotional and social well-being. *Beyond Blue* provides a useful summary of the public health literature on protective and risk factors:

Protective factors enable people to feel strong and resilient. For Aboriginal and Torres Strait Islander communities these may include:

- social connectedness and sense of belonging
- connection to land, culture, spirituality and ancestry
- living on or near traditional lands
- self-determination
- strong Community governance
- passing on of cultural practices.

Significant risk factors that can impact on the social emotional wellbeing of Aboriginal and Torres Strait Islander communities include:

- widespread grief and loss
- impacts of the Stolen Generations and removal of children
- unresolved trauma
- separation from culture and identity issues
- discrimination based on race or culture
- economic and social disadvantage
- physical health problems
- incarceration
- violence
- substance misuse.

(Beyond Blue, https://www.beyondblue.org.au/who-does-it-affect/aboriginal-and-torres-strait-islander-people/risk-factors).

The issues which arise from the discussion on risk assessment and potential application at the cautioning stage revolve around the need for a risk assessment tool that:

- does not disadvantage Indigenous children;
- is strengths-based rather than focusing on negative characteristics;
- understands risk and protective factors from an Indigenous perspective; and

- is simple and brief enough to use so as not to provide a disincentive to caution.

Questions Relating to Cautioning Scheme

Who should authorise the caution: sergeant, all ranks, specially trained and/or dedicated officers?

At what point do Aboriginal organisations become involved in the decision-making process around cautioning?

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

How do we ensure that an Aboriginal Youth Cautioning Scheme leads to greater equity in the use of cautions particularly for older Aboriginal children?

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

How would an Aboriginal Youth Cautioning Scheme sit with other police diversionary options (drug diversion cautions, official warnings, court diversion)?

What are the criminal justice objectives of an Aboriginal Youth Cautioning Scheme? For example:

- Is the model only targeting low level offending and first or second or younger aged offenders and therefore primarily aimed at increasing the rate of cautioning?
- Is it aimed at particular types of offences – for example those offences which are likely to lead to bail refusal?
- Is the model aimed at repeat older offenders?

What might an Aboriginal developed risk assessment tool look like? What 'risk' would it measure and what would specific Aboriginal protective factors be taken into account?

3. Alternative Diversionary and Cautioning Practices: A Review of the National and International Literature

This chapter will provide a review of the literature on alternative diversionary practices that primarily focus on Indigenous (young) offenders. One purpose of the literature review is to assist in finding innovative practices that may be used to divert Indigenous young people from the criminal justice system. Another purpose of the review is to provide an overview of the range of diversionary programs currently in practice in Australian jurisdictions as well as overseas. Many of the initiatives discussed in this section have not been subject of extensive evaluation or research, however information that is publicly available has been summarised and included below in Table 3.1.

Table 3.1: Table summarising Australian and International diversion practices, programs and initiatives

Jurisdiction	Initiative	Indigenous specific	Youth specific	Key components and characteristics
Victoria, Australia	Aboriginal Co-operative Initiatives	Y	Y	• Initiatives developed by a number of Aboriginal Co-operatives in Victoria which have been developed to divert Aboriginal youth from criminal offending. • Target local Aboriginal young people of any ages who are in need of support, flexible approach as to age limit. • Examples include the 'Youth Justice and Early School Leavers Program' developed by the Mildura District Aboriginal Services, the 'After School Program' of the Ballarat and District Aboriginal Co-operative and the Youth Service program run by the Dandenong and District Aboriginal Co-operative.
NSW, Australia	Protected Admissions Scheme	N	Y	• Program developed by NSWPF in 2014 which permits police and a young person to come to an agreement about the young

				person's eligibility for a caution and a use of admission • Available to any young person for minor offences that are not excluded under section 8 of the Young Offenders Act, or graffiti offences. • The program has received a mixed reviews, being described by NSWPF as a "circuit breaker" but seen as a "missed opportunity" by ALS lawyers.
NSW, Australia (Blacktown, Hunter, Mid North Coast, Central West, Coffs Harbour and New England)	Youth on Track	N	Y	• A program developed by the NSW Department of Justice which adopts a case management approach to respond to the 'underlying causes of youth offending'. • Targets young people aged 10 - 17 years who have never received a supervised court order. • Discretionary referrals by NSW Police Youth Liaison Officers and local schools • Provides one-on-one case management involving a Youth of Track caseworker.
Queensland, Australia (Brisbane)	Co-ordinated Response to Young People at Risk (CYPAR)	N	Y	• Community-policing partnership enables police to refer 'at risk' young people to community agencies who provide support and services to 'address identified risk factors such as substance misuse, mental health issues or family conflict' • Provided to young people aged up to 25 years, with most youths aged between 14 to 16 years old • Referral is made by police to the services required and representatives from these service agencies independently contact the young person within 48 hours • Initiated in several northern Brisbane suburbs during 2004 and has since been implemented

				in Brisbane, Logan and Rockhampton
Victoria, Australia (Knox)	Knox Link	N	Y	• Partnership between Knox Youth Services and Knox police, aiming to coordinate community services to help address risk factors of young people. • Provided to young people aged 12 to 17 years who live in the city of Knox, Victoria and have been either formally cautioned by the police, charged or are victims of crime. • The program offers services including accommodation, drug and alcohol services, legal advice, counselling, parenting advice and vocational training. • The initiative also offers services to parents and refers them to other agencies who can assist them manage their child's behaviour.
Victoria, Australia (Frankston)	Youth Assist Program	N	Y	• Partnership between the Frankston Police and Mission Australia aims to provide pathways to better education, health and employment opportunities for young people. • Targets young people aged 8 to 17 years in the Frankston area of Victoria who are socio-economically disadvantaged and displaying 'anti-social behaviour'. • Interventions are tailored to the specific risks and needs of the young person. Community services coordinated include: mental health, accommodation, substance use and family conflict
NSW, Australia (state wide policy)	Targeted Programming Model	N	Y	• Partnership between NSWPF and the Police and Community Youth Clubs (PCYC) • Targets prevention of recidivism, although also aims to assist "at risk" young people

				• Referrals made from the Crime Management Unit of the NSWPF or other agencies • Incorporates sports, life skills and recreation programs to assist young people who are at risk of becoming involved in criminal behaviour.
Canada (New Brunswick)	Youth Intervention and Diversion Program	N	Y	• Government Youth Intervention program established in 2009 based on 'Risk/Need/Responsivity' approach to youth crime. • Targets young people aged 12 to 17 years in New Brunswick region. • Young people are selected by police officers of the Royal Canadian Mounted Police using screening and assessment told to identity risk factors associated with offending patterns and participation in the program appears to be compulsory. • The Committee completes assessments, does case planning and refers participants to community services.
Canada (nation wide)	First Nations Policing Program	Y	N	• Program which supports policing services that are 'professional, dedicated and responsive to First Nation communities'. • Two policing agreements exist: (1) Self-administered Police Service Agreements, where a First Nation or Inuit community manages its own police service under provincial policing legislation and regulations or (2) Community Tripartite Agreements, where a dedicated contingent of officers from the RCMP provides policing services to a First Nation or Inuit Community • The program provides for communities the possibility to have a seat at the table with the local police, including a degree

				of oversight of police operations and improved accountability for policing services on Aboriginal and Inuit country. • The program was launched in 2014 and in the 2015 financial year, CA$120 million was provided for 185 policing agreements and 1299 police officers.
Ontario, Canada	Aboriginal Community Justice Program	Y	Y	• Funded under the national Aboriginal Justice Strategy (AJS) • Program which provides an alternative to court for Indigenous youth with criminal charges. • Targets Aboriginal youth and adults. • Applications for diversion are submitted by Aboriginal court-workers or the program staff of the Department of Justice and Attorney General and, if approved, the matter is adjourned for six months to participate in the program. • The participant works with a case worker and Community Council Members to jointly create a Healing Plan, which sets out the underlying causes that lead to the offence. • Each program has an operational protocol agreement with the local Department of Justice and Attorney General which outlines the process, charge types and eligibility requirements to participate in the program.
NSW, Australia (Redfern)	Clean Slate Without Prejudice	Y	Y	• Partnership between Aboriginal corporation (Tribal Warrior) and Redfern Local Area Command geared towards improving police/youth relations and providing support and mentoring for Aboriginal youth.

				• Targets young people, with most young people aged between 14 and 23. • Young people are recruited via word of mouth, family networks and community networks. • Based at local community centre, the National Centre for Indigenous Excellence.
WA, Australia (West Kimberly)	Yiriman Project	Y	Y	• Community justice and healing initiative developed, organised and directed by local cultural Elders from four language groups. • Targets young people of any age, including young adults, according to local need and responsive to local events. • Intensive 'on country' healing program geared towards connecting with country, culture and community.
NT, Australia (Alice Springs)	BushMob Apmere Mwerre Program	Y	Y	• Community justice initiative developed, organised and directed by local Aboriginal Corporation, BushMob. • Program targets Aboriginal young people aged 12 to 25 years experiencing problems with substance addiction. • Intensive residential treatment facility with an intensive outreach and case management including bush trips and other cultural activities. • Referrals can be made through the justice system or other local organisations.
NT, Australia (Yuendumu, Lajamanu, Nyirripi and Willowra)	Warlpiri Youth Development (aka the 'Mount	Y	Y	• Community justice initiative developed, organised and operated by the Warlpiri Youth Development Aboriginal Corporation, who run Aboriginal youth diversionary services in the communities of Yuendumu, Lajamanu, Nyirripi and Willowra.

	Theo' initiative)			• Targets Warlpiri young people of any age. • The purpose is to support young people to creative positive and meaningful futures through weekly bush trips and cultural activities that develop a sense of self, family and culture. • The Mount Theo initiative receives referrals through the police, the courts, the Department of Community Services, schools as well as the community.
NT, Australia (Tiwi Islands)	Tiwi Islands Youth Development and Diversion Unit	Y	Y	• A case-management team who provide 'culturally appropriate formal and informal diversionary programs' for Tiwi youth. • Targets Tiwi youth of any age, focusing on developing participant's attachment to family, community and school. • The Tiwi Islands Youth Development and Diversion Unit are supported by the diversion team within the Northern Territory Police.
Canada (Saskatoon)	Saskatoon Tribal Council Community Justice, Extrajudicial Measures and Reintegration Programs	Y	N	• Saskatoon Tribal Council provide support and assistance to young people, adults and their families for the duration of their involvement in the criminal justice system. • Targets Aboriginal young people and adults. • The program offers extrajudicial measures (such as mentoring and mediation services) for those who are referred for the first time as well as more intensive supports and community reintegration (such as a community safety plan and more intensive case management) for those who are currently serving time in detention.

NSW, Australia (Bourke)	Maranguka Justice Reinvestment	Y	N	• whole-of-community justice reinvestment approach, with the local police, justice organisations and community organisations working together to problem solve solutions to local crime and safety issues.
SA, Australia (Adelaide)	Panyappi Indigenous Youth Mentoring Project	Y	Y	• Indigenous Youth Mentoring project set up in Adelaide in 2001. • Targets Indigenous youth aged 10 to 15 years with a history of poor school attendance, substance abuse, unstable living environment and experiences of abuse. • Participation is voluntary and potential participants are referred via community organisations, family and, in some cases, the police. • Participants are assigned an Indigenous mentor with whom they work closely over time.
Alaska, USA	Tlingit and Haida Village Public Safety Officer Program	Y	N	• The Village Public Safety Officer program employs a local community member as the first responders to all emergency calls in the local village—police, fire, emergency medical service and search and rescue. • VPSOs work closely with Village mayors, the Tribal Council, councils and other stakeholders to determine the most pressing criminal justice needs. • VPSOs are overseen by and accountable to the local First Nations Council.
Montana, USA	Confederated Salish and Kootenai	Y	N	• Aboriginal-controlled Police Department overseen by and accountable to the Council of the Flathead Indian Reservation. • Headquarters consist of 17 sworn positions and 13 administrative staff.

	Police Department			
Kansas, USA (Potawatomi Reservation)	Prairie Band Potawatomi Tribal Police Department	Y	N	• Community-controlled Police Department with 12 sworn officers established in 1997 to improve control and oversight over criminal justice policy and processes on the Potawatomi Reservation. • The Department consists of 12 sworn officers who work in close partnership with county law enforcement, casino private security and other tribal organisations. • The Department employs a School Resource Officer who splits his or her time between the three local public schools and interacts with students on a regular basis.
NSW, Australia (Redfern)	Redfern Streetbeat	Y	Y	• Community-based justice initiative which patrols 'hot spots' in Redfern/Waterloo area to maximise the safety and wellbeing of young people and to prevent contact between young people and the police. • Targets young people in suburban Sydney region, contact initiated by youth by phone or by hailing down the van. • Involves mentoring, looking out for young people and sharing information with agencies to assist young people who are at risk of coming into contact with the police—in particular those who are on curfew, have bail restrictions, homeless youth and those who have been recently released from Juvenile Detention Facilities.

Washington State, USA	Tulalip Healing to Wellness Court	Y	N	• Community-based justice initiative commenced in 1996 with jurisdiction over criminal matters. • Targets all Aboriginal community members of any of the six Tulalip Tribes. • Conversations are held with the participant with a large circle of interested people: judge, participant, prosecutor, defence lawyer, compliance officer, service providers, Elders, family member, peers. Members of the Tribes' Board of Directors will attend a session as will law enforcement officers, a representative from the gaming commission etc.
Aotearoa/New Zealand	Ngā Kooti Rangatahi / Rangatahi Youth Courts	Y	Y	• Rangatahi Courts commenced in 2008 and monitor Family Group Conference (FGC) plans, which are the cornerstone of the Aotearoa New Zealand youth justice process. • FGC plans are developed at family group conferences where the offender (who must have admitted the offence) and their family meets with the 'victim' and their family along with members of the enforcement agency to decide upon an appropriate penalty.

Navajo Nation, USA	Navajo Peacemaker Division	Y	N	• Navajo peace-making model was created in 1982 to resolve disputes and deal with wrongdoing outside of the conventional criminal justice system, reflecting traditional Navajo values about the perceptions of justice. • Targets Aboriginal youth and adults of any age within Navajo jurisdiction. • Peacemaking applies the traditional notion of 'talking things out' and consensus decision-making to solve community problems among all parties with an interest. Blame is not part of the process and the involvement of all interested parties tends to act as a reality check on what is said by the parties about the events that led to the dispute. If the wrongdoer does not fulfil the agreed actions, then the dispute is referred to the adversarial court system.

The above table provides an illustration of the breadth and diversity of diversionary initiatives. In broad terms, the above examples might be thought of in terms of the following categories: (i) government programs, (ii) 'on country' models (iii) partnerships, (iv) shared jurisdiction, (v) mentoring, and (vi) conferencing, healing and peace-making. We will describe each category briefly in turn.

(i) Government Programs

These diversionary initiatives involve programs developed by government agencies, such as the police or department of justice. These tend to be general in application, rather than focussed specifically on Indigenous children, although Indigenous children may be recognised as a particular target group within the program. Some examples from the literature review above include the Protected Admissions Scheme (which was developed by the New South Wales Police Force), the Co-ordinated Response to Young People at Risk (developed by the Queensland Department of Justice and Attorney General), the Youth of Track program

(developed by the NSW Department of Justice and Attorney General) and the Youth Intervention and Diversion Program (overseen by the Canadian Department of Justice).

(ii) 'On Country' models

A second set of initiatives we refer to as 'On Country' models—that is, models which adopt a highly localised, holistic and whole-of-community approach to working with Aboriginal young people, Elders, community and partner organisations. '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. There are some examples of 'On Country' diversionary models which have taken place in partnership with local police. Examples of 'On Country' models of diversionary practices: (1) the Yiriman project in West Kimberly, Western Australia and (2) the Maranguka Justice Reinvestment project in Bourke, New South Wales. These initiatives will be discussed in greater detail in Chapter Four.

(iii) Partnerships

Many of the above initiatives involve partnering and 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. Chapter Four considers the case study of a police partnership involving the Redfern Local Area Command and an Aboriginal not-for-profit organisation called Tribal Warrior. However, there are a number of forums, such as the Aboriginal Co-operatives and Regional Aboriginal Justice Advisory Committees (RAJACs) which appear in the table above, who work actively in the community justice space. These community organisations and collectives 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.

(iv) Shared Jurisdiction

A third set of initiatives can be loosely described as reflecting the principle of 'shared jurisdiction' or legal pluralism. That is, they are examples of Indigenous police departments,

policing and patrolling. Legal pluralism refers to the existence of multiple legal systems operating simultaneously within the one geographical area. As the Australian Law Reform Commission (1986) *Report on the Recognition of Customary Laws* found, Indigenous law or lore is 'a fact of life' for Indigenous peoples, nations and communities around Australia. As a research participant described in the Western Australian Law Reform Commission report *Aboriginal Customary Laws* (2006): 'Aboriginal law is the table, the solid structure underneath. Whitefella law is like the tablecloth that covers the table, so you can't see it, but the table is still there.'

These examples are mainly drawn from North America, though several examples can be found equally in the Australian context. While varying greatly from state models of policing and police reform, these examples have been included to reflect the 'blue sky' nature of themes presented within the discussion paper, and to open up discussion for potential models that acknowledge and work within Indigenous jurisdictions, legal systems and governance structures.

The examples of case studies which have been utilised here are drawn from regions of shared or overlapping jurisdiction—not only in terms of the overlapping jurisdictions within the State legal system (including local, state, territorial, federal and international jurisdiction), but also as between the state and Indigenous legal systems. The oftentimes ambiguous nature of the criminal jurisdiction further contributes to this complexity.

In this Discussion Paper we focus on various examples of shared jurisdiction. Four such examples of shared jurisdiction in policing include: (1) the Prairie Band Potawatomi Tribal Police Department, (2) the Confederated Salish and Kootenai Police Department, (3) the Tlingit and Haida Village Public Safety Officer Program, and (4) the Redfern Streetbeat. Examples of shared jurisdiction in relation to court processes include, for example, the the Tsuu T'ina First Nation Court (see case studies below). While there are many other examples that could be drawn upon to illustrate issues of shared jurisdiction both in Australia and abroad, the following examples were selected either as drawing together elements of best practice or for their relevance for contemporary discussions of Aboriginal youth cautioning practices in the Victorian context. These case studies will be discussed in Chapter Four.

(v) 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 Indigenous children in being able to provide for the transmission of cultural knowledge. Thus mentoring can be an important component of ensuring the cultural integrity of a diversionary program.

Research suggests that the way the mentoring program is run and the nature of the relationship between mentor and mentee are crucial in determining the outcomes of youth mentoring programs (Ware 2013). A useful summary is provided by Ware (2013):

> Changes in risk and protective factors are facilitated by providing young people with a positive role model to observe and emulate and by breaking the links between risk factors and spiralling antisocial behaviour by providing space to think, reflect and imagine positive alternatives.

Empirical research conducted by Pawson describes four basic mechanisms through which mentoring helps bring about positive change (Pawson 2004:7):

1) **Affective contacts:** emotional support, friendship and helping the mentee to 'feel differently about themselves';
2) **Direction setting:** advice and guidance as the mentee sets new directions and navigates their way 'through the difficult choices confronting [them]'

3) **Coaching:** building the mentee's aptitude for participating fully in society; 'encouraging, pushing and coaxing their protégés [mentees] into practical gains, skills and qualifications';
4) **Advocacy:** advocating on behalf of the mentee, 'grab[bing] the mentees' hands, introducing them to this network, sponsoring them in that opportunity, using the institutional wherewithal at their disposal'.

There are many examples of formal and informal mentoring schemes currently operating in First Nation contexts around the globe. Examples include the AIME Australian Indigenous Mentoring Experience, which was started in Sydney schools in 2011, the work of night patrols, as well as many informal models operating out of community youth centres such as the Glebe Youth Centre, Gulwan Gulwan Youth Aboriginal Corporation, the Dandenong and District Aboriginal Co-operative's Youth Group, among many others. Despite the wealth of examples, there is limited empirical research or information on the public record about these initiatives. Here we use the example of an initiative which has been evaluated: the Panyappi Indigenous Youth Mentoring Project. As we note further in Chapter 4, mentoring is often used in an Indigenous context in combination with other approaches (such as conferencing or other programs).

(v) Conferencing, Healing and Peacemaking

The final set of examples are examples of Indigenous youth conferencing, healing plans and peacemaking, based on the principle of restorative justice. Broadly conceived, Indigenous youth conferencing involves the participation of Indigenous community members in the cautioning, trial and sentencing of Indigenous young people and other efforts aimed at improving the cultural appropriateness of criminal justice processes. In this section we are primarily concerned with examples which are relevant at the pre-trial or cautionary stage.

There are many different models of conferencing and restorative justice—youth conferencing, family conferencing, sentencing courts, and so on—at various stages of the criminal justice process (caution, trial, and sentencing). Some Indigenous sentencing courts in Australia employ a 'conferencing' type model where young people meet with Elders

and/or Indigenous community justice group members. Some Indigenous sentencing courts operate informally while others are governed through legislative frameworks.[7]

Generally speaking, Indigenous sentencing courts have been evaluated in positive terms (Marchetti and Daly 2004; Marchetti 2015). Research suggests that offenders find Indigenous courts more challenging and confronting than mainstream courts (Marchetti 2015). Similarly, sentencing courts play a role in improving communication and understanding between judicial officials, offenders and the Indigenous community (Marchetti and Daly 2004). Other benefits include improving a sense of inclusiveness; transparency and accountability in sentencing outcomes for Indigenous offenders; and providing the opportunity for community input over the sentencing process. Shortcomings of Indigenous courts include their limited reach both in terms of jurisdiction and eligibility; the relatively small proportion of Indigenous offenders sentenced before such courts; and, more generally, questions regarding the meaningfulness of Indigenous agency and oversight over court sentencing processes (Cunneen and Tauri 2016).

While there are many examples of Indigenous conferencing around the globe, our focus is on examples of conferencing designed specifically for Indigenous youth. We focus on three examples: (1) the Tsuu T'ina First Nation Court, (2) the Rangatahi Youth Courts and (3) the Tulalip Healing and Wellness model. Other examples which employ Indigenous youth conferencing as part of their overall approach include: (1) the Warlpiri Youth Development Aboriginal Corporation (WYDAC), NT and (2) the Tiwi Islands Youth Diversion and Development Unit. The Aboriginal Community Justice Program in Ontario (which is funded under the Aboriginal Justice Strategy) utilizes community developed healing plans. These case studies are discussed further in Chapter Four.

The Importance of Understanding Context

When looking at criminal justice strategies and practices, it is important to have a basic understanding of law enforcement structure and criminal law jurisdiction. As the following

[7] Such as the *Magistrates' Court (Koori Court) Act 2002* (VIC) which added section 4D to the *Magistrates' Court Act 1989* (VIC) to establish the Koori Court Division, and the *Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2003* (SA) which led to amendments to the *Criminal Law (Sentencing) Act 1988* (SA) and, later, the creation of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

case studies will demonstrate, both the socio-political setting in which policing and diversion occurs and the local context are critical in this respect.

Research has consistently noted the importance of local agency and know-how in the design, implementation and management of justice policy and initiatives (Behrendt *et al* 2018). Indigenous peoples, communities and nations are extremely heterogeneous. Criminal justice policies and approaches to law enforcement, diversion and sanctioning that work in one town will not necessarily work in another (Behrendt *et al* 2018).

There is also substantial criminological literature which discusses the problems and issues in understanding policy and program transfer from one site to another (ie across countries, jurisdictions, localities). Karstedt (2004) has referred to the importance of understanding path-dependency and diverse trajectories in the way criminal justice policies and programs may be adapted and developed in different locations, affected by a range of historical, cultural, legal, constitutional, social and political factors.

In addition, Muncie (2001) has drawn attention to the growth of the 'what works' paradigm particularly in relation to juvenile justice, and how the search for 'what works' policies and programs has reinforced the idea that such programs can simply be transferred and relocated in other settings. Policy makers have become 'free to trawl the world for evidence of what seems to "work", to pilot "the promising" back home' (Muncie 2001: 27) without adequate consideration of local factors affecting the likelihood of successful implementation.

Some preliminary words of caution are required regarding the contingency of legal frameworks. Significant differences in terms of funding and the legal structures of the criminal justice system from which the following examples have been drawn. In Australia, for example, criminal law is administered at the state and territory level through the state police force. However, certain federal offences (such as drug trafficking, terrorism, money laundering) are enforced by the Australian Federal Police and some local crimes (eg parking fines) are administered by wardens, officers and rangers employed by local city councils at the local government level.

In the United States, criminal justice in Indian country falls into two categories: one blending federal and tribal authority ('638 contracts') and the other blending state and tribal authority ('Public Law 280 jurisdictions'). The first of these, 638 contracts, refer to contracts made

between the Bureau of Indian Affairs ('BIA') and First Nations under the *Indian Self-Determination and Assistance Act* 1975 (also known as 'Public Law 93-638'). This arrangement is commonly referred to as a '638 contract' under which police departments are administered by tribes under contract with the BIA Office of Justice Services. It is the most common administrative arrangement in First Nation communities in the United States.

As such there are many examples of First Nation Police Departments in the United States. For example, one of the first tribes in the USA to acquire control over policing from the federal government and administer their own police department under a 638 contract was the Tohono O'odham Nation in southcentral Arizona, USA (Wakeling *et al* 2001: 29). The Tohono O'odham Nation Police Department entered into a 638 contract to administer their police department in October 1982, with 22 civilian employees and 11 detention officers.

The second form of policing governance arrangement in the United States is the example of 'Public Law 280 or PL-280' jurisdictions. These governance arrangements involve a transfer of legal jurisdiction in American Indian Country from the federal to the state governments under the *Public Law 83-280* 1953, which grants extensive criminal and civil jurisdiction over tribal lands. At present, the states of California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska have PL-280 status, while Arizona, Idaho, Iowa, Montana, Nevada, North Dakota and South Dakota, Utah and Washington have optional PL-280 status within the United States. According to the International Association of Chiefs of Police (2016: 7-9), the PL-280 law impacts tribes in the following ways:

- Tribes in PL-280 states have to share more criminal authority with the state government. This arrangement applies nearly all state criminal laws to Indigenous peoples on reservations, including minor offences. By contrast, tribes that share criminal jurisdiction with the federal government may have criminal authority over minor crimes or misdemeanours, especially over Indian-on-Indian crime. This allows traditional tribal justice systems to govern their own people by employing state law.

- PL-280 and similar laws did not provide any federal funding to support state jurisdiction, making them unfunded mandates. Since Indian trust lands are not subject to state and local property tax, may states and counties with jurisdiction over tribes have underfunded law enforcement and criminal justice court systems.

Overall there are 178 tribal law enforcement agencies in the United States which range in size from just a few officers to agencies which employ several hundred tribal police (Cunneen and Tauri 2016: 84).

We noted above in Table 3.1 the Canadian First Nations Policing Program. While Canadian First Nations do not exercise the same jurisdiction over policing as federally recognised Tribes in the United States, the First Nations Policing Program does provide for Indigenous input and/or control over policing including through for example, the Self-Administered Police Service Agreements, where a First Nation or Inuit community manages its own police service under provincial policing legislation and regulations.

There is nothing comparable in Australia to either Canada or the United States in relation to the exercise of Indigenous jurisdiction or contractual control over policing. Research on Indigenous 'governance' and 'nation building' practices in Australia has considered the proliferation in the use of contracts between Indigenous nations and the Australian 'state' in respect of water supply, services and environmental resources (Vivian et al 2018; Hunt 2008). There is also the use of contracts in Western Australia between corrections and Aboriginal communities for the local provision of community supervision for sentenced offenders (see for example, the *Young Offenders Act 1994*, s17b)[8]. We are unaware of any Australian examples of contracts between Indigenous nations with respect to policing.

[8] 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

4 Examples of Good Practice Relevant to Current Victorian Practice

This section of the Discussion Paper outlines and contextualises examples of good practice in Indigenous youth diversion and cautioning practices from Australian and overseas. Fifteen case studies have been selected from a variety of national and international jurisdictions. These case studies have been selected in part to reflect the diversity of youth diversion initiatives taking place and also to reflect the breadth and diversity of themes and issues: 'shared jurisdiction', 'partnerships', 'mentoring', 'conferencing and peacemaking' and 'on country' models, as discussed in the previous chapter. As we will see, some of the most innovative and impactful practices manage to combine elements of all of these models. For example, the example of Tribal Warrior's Clean Slate Without Prejudice, the Yiriman Project and the Maranguka Project involve 'partnerships', 'mentoring' as well as reflecting elements of the 'peace-making' and 'on country' models. We will discuss each initiative and its relevance to the Victorian context in turn.

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."

While research on Tribal Warrior's CSWP remains very limited, in December 2017 the initiative won gold at the National Australian Crime and Violence Prevention Awards.

Sources and Further Reading:

Tribal Warrior CYWP website: http://tribalwarrior.org/clean-slate-without-prejudice/

Lessons for the Victorian context

The Clean Slate Without Prejudice initiative provides several key lessons for the Victorian context in terms of partnering with existing community organisations. First of all, there is strong anecdotal evidence of the initiative improving police relations with young people, as well as some evidence of the partnership contributing to lower crime rates generally. Figures from the NSW Bureau of Crime Statistics and Research show much faster falls in Redfern than elsewhere. Robberies fell 73 per cent between 2008, the year before Clean Slate Without

Prejudice was set up, and 2014, the last year for which statistics are available, while assaults on police were down 57 per cent and break-and-enters halved.

Second, the example of Clean Slate Without Prejudice demonstrates the benefits of engaging with and supporting existing services. For the Redfern Local Area Command, the initiative provides the opportunity for informal bonding and relationship building in a positive setting between Indigenous youth and the police. Co-Chair of the initiative, Shane Phillips, emphasized the importance of the activities taking place in a culturally safe setting, in this case the National Centre for Indigenous Excellence ('NCIE'), a local community centre in Redfern. This was seen as significant in neutralizing the normal power relations that exist between the police and young people. This was also described as being an essential "building block" for improvements in trust and social relations between young people and the police.

A third benefit relates to the benefits of networking more broadly. At present, Clean Slate Without Prejudice aims to bring together Aboriginal young people, Elders and respected community leaders, (in some years) inmates, and the local police at all levels (the Aboriginal Liaison Officers, Youth Liaison Officers and Superintendent of the Local Area Command, Luke Freudenstein). While the focus of the activity is on boxing, those involve in the initiative—the police and community representatives—spoke in very positive terms about the positive benefits over the years in terms of mutual networks and as a building block for the launching of further partnerships and collaborations.

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 and Further Reading:

* 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.

Lessons for the Victorian context

The partnership between Fitzroy Police Station and the Yiriman project was described by its

organisers as being less about diversion and more about improving the relations between young people, Elders and the state police. Notwithstanding this, three are some important lessons for the Victorian context. The first of these lie in the questions the initiative raises in terms of the cultural context and cultural appropriateness of diversion. In particular, who is/are the most appropriate persons to deliver you cautions?

A lot of the 'diversionary' elements of the Yiriman project occurred 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. Crime and social harm, in a sense, were of secondary importance.

A second lesson from the Yiriman project relates to the benefits supporting examples of community leadership more broadly. Anecdotal evidence suggests that one of the advantages of the Fitzroy Police partnering with the Yiriman project was in the symbolism engendered by the partnerships.

Case study: Maranguka Justice Reinvestment, Bourke NSW

Maranguka is a whole of community strategy currently being trialed in Bourke, on the western plains in 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. 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 co-ordinated 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 project is currently in the second stage of a three-phase justice reinvestment strategy. The

first stage 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 involves 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 will involve 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. The Maranguka project is in its early stages and is currently in the process of being evaluated, however us is showing signs of promise.

Sources and Further Reading:

* Just Reinvest: http://www.justreinvest.org.au/justice-reinvestment-in-bourke/

* KPMG (2016) Unlocking the Future: Maranguka Justice Reinvestment Project in Bourke: Preliminary Assessment. KPMG.

* 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'.

Lessons for the Victorian context

Like the Yiriman project discussed above, 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, the Darling Local Area Command work alongside Aboriginal organisations, Bourke Council, the local TAFE, ALS, school and social workers in an interagency manner to set and achieve community justice (including youth justice) goals. While the Maranguka project is currently in the process of being evaluated, preliminary 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.

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 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 and Further Reading:

* Stacey, K. (2004) Panyappi Indigenous Youth Mentoring Program: external evaluation report. Adelaide: South Australian Department of Human Services. Available online at <http://www.dcsi.sa.gov.au/Pub/Portals/7/panyappi-Indigenous-youth-mentoringprogram-external-evaluation-report.pdf>.

* Ware,V. (2013) *Mentoring Programs for Indigenous Youth at-Risk*, Autralian Institute of Health and Welfare, Canberra, < http://dro.deakin.edu.au/eserv/DU:30069871/ware-mentoringprograms-2013.pdf>

Lessons for the Victorian context

Although the Panyappi Indigenous Youth Mentoring project is not an example of an initiative directly involving the police, there are several lessons for the Victorian context. Besides the advantages of partnering with community organisations (see above discussion), examples of mentoring demonstrate the advantages of more intensive, medium to long-term one-on-one work between mentors and young people. The Panyappi Indigenous Youth Mentoring project provides an example of Pawson's (2004) research on the four elements of mentoring in terms of 'affective contacts', 'direction setting', 'coaching' and 'advocacy'. These elements hold much relevance to potential models of youth diversion.

Case study: Prairie Band Potawatomi Tribal Police Department

The Prairie Band Potawatomi Tribal Police Department was established in 1997 and currently consists of 12 sworn officers (Chief, Assistant Chief, Sergeant Detective, three Sergeants and six Patrol Officers). It is responsible for overseeing law enforcement and safety for 800 residents within the 121 square mile reservation, located 15 miles north of Topeka, Kansas. In terms of general governance, the reservation is governed by a general manger and a tribal council that includes a chairperson, vice chairperson, secretary, treasurer and three council members. The tribe operates a tribal district court and court of appeals, as well as a separate mediator branch known as Peacemakers Circle. The tribal government provides numerous services including health services, early childhood education, student services, an Elder centre, housing services, veterans' services, a Healing Court, a tribal newspaper, and an independent police and fire service.

The Prairie Band Potawatomi Tribal Police Department works in close partnership with county law enforcement, casino personnel, and other tribal departments. Of the department's 12 officers, five are Native American. The department employs an active School Resource Officer (SRO) who splits time between the three local public schools and interacts formally and informally with students on a regular basis. The rationale of the program was to improve communication, co-ordination and to bring together youth-serving agencies through bi-monthly meetings between school and tribal service provides about concerns regarding specific children and general safety needs. The SRP teaches 'Gang Resistance Education and Training (G.R.E.A.T.)' courses to fourth and sixth graders, provides a security presence at school basketball games, dances and other public events, and makes a point of being at any event where his presence Through these meetings and through increased interaction, all of the partners gained a better understanding of each others' resources, so that now they can react quickly to emerging needs to ensure that no child falls through the cracks.

Police officers sit on the Board of local community organisations such as the Boys and Girls Club, and the department operates an Explorer program to educate teens about tribal and non-tribal law enforcement opportunities. Community outreach is also a key prevention and education strategy for the tribe's victim services department, which partners closely with the police department on its domestic violence and sexual assault programs, and works closely with the local Healing Court, which provides alternative sentencing options for non-violent

crimes.

Sources and further reading:

* Police Department website: https://www.pbpindiantribe.com/emergency-services-tribal-police-department.aspx

* International Association of Chiefs of Police (2016) *Promising Practises in Tribal Community Policing*. Washington DC: Office of Community Oriented Policing Services.

Case study: Tlingit and Haida Village Public Safety Officer Program

The Tlingit and Haida Tribes of Alaska Village Public Safety Program was established in 2009 as a means of providing rural Alaskan communities with needed public safety services at the local level (Wakeling *et al* 2001). The program operates in Tlingit and Haida (Central Council), a federally recognized tribal entity in the United States. There are 18 individual Tlingit and Haida communities in rural and remote southeastern Alaska. The program includes seven village public safety officers (VPSO) and one VPSO program manager. The VPSOs are active in seven of these villages (Wakeling *et al* 2001).

The Tlingit and Haida Central Council was awarded a grant from the Alaska State Troopers (the state police) to manage the VPSO program for Alaska's south-east region. Each village hosting a VPSO holds an agreement or Memorandum of Understanding with the VPSO program outlining their expectations and in-kind contributions to the VPSO for such things as office space, cell phone service, vehicle maintenance, and partial housing costs (Wakeling *et al* 2001).

VPSOs are assigned to one village, where they are the first responders to all emergency calls in that village—police, fire, emergency medical service, and search and rescue. Some VPSOs refer to themselves as "full patch", referring to serving all of the emergency functions shown on their uniform patch (Wakeling *et al* 2001). They work with village mayors, councils and other stakeholders to determine the most pressing needs. VPSOs are authorized to issue citations (fines) for misdemeanor and non-criminal violation offences, make arrests and

detain suspects for surrender to Alaska State Troopers (the state police). Alaska State Troopers respond to serious emergencies and felonies. However, given communication challenges, long distance response times and weather-related travel delays, VPSOs are responsible for stabilizing the scene at critical events and often conduct misdemeanor and minor felony investigations themselves.

Historically, VPSOs were not armed. However, as of July 2014, the Alaska legislature authorized arming VPSOs and making them fully sworn peace officers (Wakeling *et al* 2001). Like traditional "beat" police officers, VPSOs spend the majority of their time out of their cars interacting with the community. VPSOs have a certain degree of autonomy, and they are encouraged to develop their own style of community interaction based on their own personalities and the lifestyle of the local community. For example, one VPSO has a coffee route as he goes, while another organizes fun events for local young people. The VPSOs get to know the families in the community and they prioritise treating community members with respect even when they have to make an arrest or serve a warrant. Their interactions at the point of intervention or arrest focus not only on justice for offences, but on future considerations such as prevention and safety.

In terms of training, all VPSOs complete an initial 10-week training at the police academy led by the Alaska State Troopers (the state police). The training covers law enforcement, first aid, firefighting and other public safety issues. VPSOs also receive an additional two-week fire protection specialist class, a one-week emergency trauma class and continuing and annual training in law enforcement, search and rescue, emergency medical services and fire protection.

Sources and further reading:

* VPSO website: https://dps.alaska.gov/AST/VPSO/Home

* International Association of Chiefs of Police (2016) *Promising Practises in Tribal Community Policing*. Washington DC: Office of Community Oriented Policing Services.

Case study: The Confederated Salish and Kootenai Police Department

The Confederated Salish and Kootenai Police Department is located on the lands of the Flathead Indian Reservation, which is located in northwestern Montana, USA. The nation consists of around 1.2 million acres with a population of 4,500 enrolments and 18,000 non-Indian Americans and an additional 2,700 enrolments living off-reservation. Because of the history of homesteading, more non-Indians than Indians reside on the Flathead Indian Reservation. This mix of tribal and non-tribal residents makes it an even more complex case study of jurisdictional complexity than exists on most American reservations. For example, in addition to the state and tribal police, four counties (Flathead, Lake, Missoula and Sanders) and four municipalities (Hot Springs, Polson, Ronan and St Ignacious) operate their own law enforcement agencies within the reservation boundaries.

The Police Headquarters has 17 sworn positions: 11 patrol officers, 2 investigators, 2 sergeants, 1 lieutenant and 1 police chief. All sworn officers were tribal members. The department also included 13 civilians—5 jailers, 6 dispatchers, 1 clerk and 1 cook. In terms of governance structure, the Police Headquarters are overseen by the Tribal Council who submits its budget requests to the tribal government.

According to a group of researchers who visited the Police Headquarters, the Salish and Kootenai police department is 'a well-run, professional department. [It] is well connected to the tribal government oversight purposes, has been increasing in size consistent with community needs, boasts an extremely competent and generally well liked staff, and is concern about the traditional problems under its purview' (Jorgensen et al: 34).

Sources and Further Reading:

* Tribal Police website: http://www.csktribes.org/judicial/tribal-police

* Wakeling, T. et al (2001) *Policing on American Indian Reservations*. Washington: National Institute of Justice.

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 ('MOU') between SSACRC and the NSW Police Service was negotiated in 1998 which outlines 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 *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*.

Lessons for the Victorian Context

Although each of the four examples above provide quite distinct examples of 'shared jurisdiction', they raise several important issues for the Victorian context. Research conducted on Aboriginal and First Nation Police Departments is very limited and has provided extremely mixed accounts. A report by Wakely *et al* (2001) found that problems with the four Aboriginal Police Departments they visited in the early 2000s included under-resourcing, poor record keeping and lack of clear processes. However, the team of researchers also visited examples of what they interpreted as 'best practice' models which have been included as case studies above. The strengths of these examples include direct

feedback from Indigenous community organisations and self-determination as 'in built' in the design and operation of the local police. The above case studies also raise significant questions about the possibility of 'giving up' or ceding control over certain categories of offences.

By contrast, 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 raises the idea of joint-delivery and shared responsibility of diversionary mechanisms for Aboriginal youth.

Case study: Tulalip Healing to Wellness Court

Native American tribes in the United States hold a unique position in regards to their relationship with the State. From the outset, the relationship was one of nation to nation, where tribes entered into treaties with the British colonisers, first in relation to trade and military allegiance, and later in relation to cession of certain lands with guaranteed rights in return. Although these treaties are enforceable legal documents (unlike the Treaty of Waitangi for instance), they were largely ignored and the rights contained within them whittled away. Nonetheless, the continued sovereignty of tribal governments was first recognised by the courts in the mid-1800s, although in a modified form. Tribes have retained powers of law making and self-government as "domestic dependent nations" and continue to be ruled by their own laws while being subject to federal government jurisdiction. Civil and criminal jurisdiction of tribes is complex and jurisdiction varies according to where the matter arose or offence occurred, whether the parties are members of the tribe, are Indian or non-Indian and, if a criminal matter, whether the crime is considered to be a serious crime. If serious, the federal government has jurisdiction.

The Tulalip Tribes is a confederation of six Coast Salish Tribes and associated bands that were cosignatories to the 1855 Treaty of Point Elliott. Their traditional Country covered a

large area of western Washington State but today the Tulalip community is located on a 22,000 acre reservation north of Seattle. The Tribe has about 4,300 enrolled members with approximately half living on the reservation, where the majority of residents are non-Indian. Washington is a PL-280 State which means that tribes can request that the state assumes criminal jurisdiction for the tribe. From 1958 Washington exercised criminal jurisdiction on the reservation but did not provide sufficient resourcing and law enforcement. Criminal justice was at best inadequate and, at worst, non-existent. It was a difficult place to live with harsh conditions and where 'serious crimes such as murder, rape and aggravated assaults often went uninvestigated and perpetrators were not prosecuted or punished.' In 1996, the tribe decided that it was time to build its own criminal justice system because the federal government had failed to fulfil its responsibility and state criminal responsibility was ineffective. The tribe sought to have state authority removed and took on control of law enforcement for Indigenous and non-Indigenous people on the reservation and later established its court, through the Northwest Intertribal Court system. Initially the court was modelled on mainstream American courts and did not seem to be achieving the community's aims. As Tulalip prosecutor, Brian Kilgore explains, 'When all you have is a hammer, everything is a nail.' Instead the tribes wanted to create a justice system that contributed to the health and wellbeing of the community. Integral to this aim is the Healing-to-Wellness (Drug) Court that was created in response to drug-related crimes and provides an alternative to sentencing. Program participants typically have been charged with possessing or purchasing drugs; are non-violent offenders; do not have a history of drug-trafficking arrest or more than two previous non-felony convictions. Participants may be on GPS monitoring with ankle bracelets, have regular drug tests, return to court regularly (initially weekly) to review their progress, receive counselling, attend educational and/or vocational courses and job search programs. They may be asked to attend Elders meetings, secure their driver's license and attend classes on life skills, healthy living, parenting, anger and stress management, or family violence perpetrator courses. Tulalip prosecutor, Brian Kilgore, described programs that do not take a holistic approach as feeling 'like a game of whack-a-mole.' He explained: We fix one thing then another pops up. If all you offer an addict is housing, then in a couple of years, you have drug houses. If you only offer counselling, then individuals with addictions to meth move onto opiates to treat pain because they have raw exposed nerves in their teeth from tooth decay. You have to address all the issues at the same time if you want people to change.

Conversations are held with the participant with a large circle of interested people: judge, participant, prosecutor, defence lawyer, compliance officer, service providers, Elders, family member, peers. Members of the Tribes' Board of Directors will attend a session as will law enforcement officers, a representative from the gaming commission etc. As originally established, the program was largely run on a volunteer basis that heaped additional responsibilities on people who were already overburdened and ultimately proved to be structurally unsound. When there was staff turnover, or when volunteers were burned out or had other commitments, much needed support would come to an end. A new version commenced in January 2017 that is properly funded and is staffed by paid workers. The focus of the program is on correcting behaviour and not penalising crime. The Tribes claim that they have tried the experiment of punishing crime but that doesn't work.

Sources and Further Reading:

* Tulalip Healing to Wellness Court website: https://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/TulalipHealingtoWellnessCourt.aspx

Case study: Ngā Kooti Rangatahi / Rangatahi Youth Courts

The concept of Ngā Kooti Rangatahi (Rangatahi Courts) emerged from a community meeting hosted by the Gisborne Youth Court in January 2008, where youth justice professionals expressed their dissatisfaction with the current system. They were deeply concerned about successive generations of Māori youth making their way from Youth Court to District Court to prison. They decided to try an entirely new approach. Informed by the experience of Koori Courts, Rangatahi Courts are Youth Courts with the same jurisdiction as other Youth Courts but are held on a marae (traditional Māori meeting place) and incorporate te reo Māori (Māori language), tikanga Māori (Māori protocol) and marae kawa (ceremonial rituals) as part of the ceremony and processes of the court.

Rangatahi Courts monitor Family Group Conference (FGC) plans, which are the cornerstone of the Aotearoa New Zealand youth justice process. FGC plans are developed at family group conferences where the offender (who must have admitted the offence) and their family meets

with the 'victim' and their family along with members of the enforcement agency to decide upon an appropriate penalty. Judge Heemi Taumaunu, who was the presiding judge for the first Rangatahi Court, explains that because so many rangatahi (young people) who appear before the court have lost touch with their sense of identity as Māori, the court emphasises the young person understanding 'who you are and where you are from', drawing on traditional Māori beliefs about whakapapa (genealogy) and whakawhanaungatanga (making connections and relationships. Therefore, court processes involve a powhiri (ritual ceremony of welcome), exchange of karanga (traditional calls of welcomeand reply), a karakia (blessing), whaikōrero (formal speeches of welcome and reply), waiata (songs), hongi (formal pressing of noses) to signify that the visitors are people of the mareae of the time being and a whakawhanaungatanga (round of introductions to establish relationships) whereby the tangata whenua (people of the marae) and visitors introduce themselves. Morning tea is shared to break tapu (a state of spiritual restriction created by the powhiri) and then the court proceedings can begin. Each young person is individually called to the wharenui (meeting house) of the marae where they are greeted by kaumātua and kuia (male and female respected elders of the marae). The kaumātua and kuia do not have a legal role but remain for each hearing and speak to the young people, often with words of encouragement and advice. The young person will deliver his or her pepeha (traditional tribal saying) or mihi (greeting in Māori language), which for many will be the first time that they speak Māori and the court proceeding may be the first occasion that they have encountered Māori protocol or been to a marae. They are assisted by a lay advocate who is appointed by the court, who will assist them to prepare their mihi, research their family background, represent their whanau (extended family), hapu (sub tribe) or iwi (tribe), and will ensure that the Court is informed about any relevant cultural matters involving that young person. The lay advocate will support the young person throughout the entire process and will endeavour to connect that young person with their cultural heritage.

Overrepresentation of Māori young people in the criminal justice system is a cause for serious concern. As at November 2014, Māori young people comprise 22% of the general population aged 14-16 inclusive but make up 51% of apprehensions of 14-16 year olds, approximately 53% of Youth Court appearances, 60 % of supervision with residence orders and 53% of conviction and transfer orders made by the Youth Court. Approximately 6% of Māori young people who are within the appropriate age range, appear in Youth Court.

Sources and Further Reading:

* Rangatahi Courts website: https://www.youthcourt.govt.nz/about-youth-court/rangatahi-courts-and-pasifika-courts/

* Taumaunu, H. (2014) 'Rangatahi Courts of Aotearoa New Zealand' *Maori Law Review* (November 2014).

Relevance for Victorian Context

While noting that Rangatahi Courts were in the early stages of development, a 2012 evaluation of Rangatahi Courts commissioned by the Ministry of Justice found that the young people, their families, the marae community, youth justice professionals and the judiciary reported positive outcomes in terms of their engagement. According to the evaluators, the cultural relevance of the marae venue and the inherent cultural processes were critical success factors because they increased the legitimacy of the court for the young people and their families and engendered respect. In this environment, it was easier for young people to engage in the difficult discussions about accountability for offending, the FGC plan requirements, and compliance.

The roles of the Elders and lay advocates were also highlighted for their contribution. Elders were seemingly able to draw out respect and positive behaviour from the young people and were able to inspire a positive pathway. In addition, justice professionals noted that lay advocates were able often to develop more trusting and respectful relationships with families than social workers can achieve. The judges also valued the resulting depth and quality of the information that lay advocates were able to provide to the court. The final factor identified in the evaluation was the commitment of the youth justice professionals and the marae community to the process.

However, while the evaluation was positive, Judge Taumaunu advises caution in relying on Rangatahi Courts for systemic change. The reasons for the overrepresentation of Māori young people in the criminal justice system are complex and interrelated, ranging from

'poverty, lack of educational achievement, unemployment and boredom, alcohol and drug use, and dysfunctional family dynamics.' Other underlying causes include lack of self-esteem, self-identity confusion, and strong resentment that can lead to anger. Therefore, while the success of the Rangatahi Court system should be acknowledged, Judge Taumaunu's concern is that these culturally appropriate and positive resources are directed at the wrong end of the spectrum. Given the complexity of the factors contributing to offending, a wide-ranging community and government strategy is required if there is to be change in overrepresentation. Judge Taumaunu claims that the community cannot rely on the court system for the needed shift.

Aboriginal Community Justice Program: Diversion to Aboriginal Healing, Ontario

The Aboriginal Community Justice Program (Ontario) provides an alternative to court for Indigenous adults and youth that have acquired criminal charges. In communities where these programs exist, Indigenous 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 Indigenous 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

Lessons for the Victorian context

The examples of Aboriginal Community Justice Program are primarily court diversion programs rather police diversion. However, its 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 & counselling; addictions programs; cultural programs to help empower the individual's sense of identity; and other suitable programs suitable for the individual offender.

Aboriginal Justice Strategy Program

The *Aboriginal Justice Strategy* supports Aboriginal community-based justice programs that offer alternatives to mainstream justice processes in appropriate circumstances. 'The AJS is a federally led, cost-shared program that has been supporting Indigenous 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. We have chosen two (the Saskatoon Tribal Council and the United Chiefs and Councils of Mnidoo Mnising Community Justice Program, Ontario) 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).

Lessons for the Victorian context

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 jurisdiction it allows for the development 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 are 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.

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 (NTRC 2017: 273). The program has been operating for over 10 years.

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).

Source: van Gent et al (2018:19-20).

Lessons for the Victorian context

The Tiwi Islands Youth Diversion and Development Unit provides an example of 'best practice' in youth diversion. The focus in on usually 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.

Warlpiri Youth Development Aboriginal Corporation (WYDAC), NT

WYDAC operates youth diversionary programs across four Warlpiri communities: Yuendumu, Lajamanu, Nyirripi and Willowra. 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* (NTRC 2017: 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: 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).

Source: van Gent et al (2018:18-19).

Lessons for the Victorian context

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.

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

Lessons for the Victorian context

The majority of clients of BushMob come from the justice system, but also includes other referrals. It has been assessed as a 'best practice' model in adventure therapy. BushMob focusses on issues of substance addiction and provides a residential treatment facility as well as intensive outreach, case management and adventure therapy. BushMob receives referrals of young people from across the Northern Territory.

Guiding Principles

From the above discussion of various case studies we are able to discern a number of guiding principles as follows:

- **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' diversionary practices:** Many of the examples of best practice share in common the fact that they take place 'on country', 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.
- **Evidence of diversionary mechanisms being more powerful when they are delivered in a culturally appropriate way:** The case studies provide some evidence to suggest that cautions being more powerful when they are delivered in a culturally

safe way. This includes not only **how** the cautions are delivered but also the location in which it is delivered (i.e. **where?** police station? community centre? on country?) and by cultural leaders (i.e. **by whom?** police? Aboriginal Liaison Officer? Elders? respected community?). 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 'on country'.

- **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 Indigenous 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.

Questions Arising from a Consideration of Good Practice and Relevance for the Victorian Context:

What would the above examples of good practice look like in the Victorian context?

What would the above examples of good practice look like in the localised context for urban, rural and remote Aboriginal communities?

What examples are there of existing community justice initiatives—of youth mentoring, 'on country' diversion, and so on—that the local Victorian police could form partnerships and work alongside?

Are there examples of current or past partnerships in place between Aboriginal youth organisations and the Victorian Police?

What would the protocol be for working alongside and in partnership with existing Aboriginal community justice initiatives? Would the Victorian Police have a statement for guiding principles or the like?

How would a Victorian Police youth cautioning protocol or program work alongside the concept of legal pluralism and shared jurisdiction? (i.e. what if the charges are contested?)

Who should be involved in the process of diverting youth?

How do you ensure cultural safety in the delivery of cautions and warnings to Aboriginal youth? Who is/are the most appropriate persons to deliver you cautions and what is the most culturally appropriate way to do so?

If cultural Elders and respected community leaders were to be involved in the process of issuing warnings and cautions, what would this look like?

5 Enablers, Barriers and Elements of a Potential Model. Questions for Discussion

This chapter summarises the key themes and issues youth diversion practices in the context of Indigenous self-determination. The following section identifies potential barriers and enablers, extrapolates principles of best practice and sets out a series of open questions which emerge from the literature with respect to the context of Victorian policing. The following discussion has been put together as a guide to discussions, it is not intended to pre-empt or anticipate any components of a model, and is intended as an aid to facilitate discussions between VPS and Aboriginal communities across the state of Victoria.

In reflecting on the themes and issues presented in this Discussion Paper, the following distinction may be useful when considering what Aboriginal youth cautioning practices look like in the context of Aboriginal self-determination:

(1) Structural elements of Aboriginal youth cautioning

(2) Processes of Aboriginal youth cautioning

These two elements—'the what' and 'the how' of youth cautioning in the context of Aboriginal self-determination—become critical to thinking about both the structural components of potential models of Aboriginal youth cautioning as well as questions as to the processes of implementation and practice. We will discuss each of these components in turn.

Aboriginal Youth Cautioning in 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.

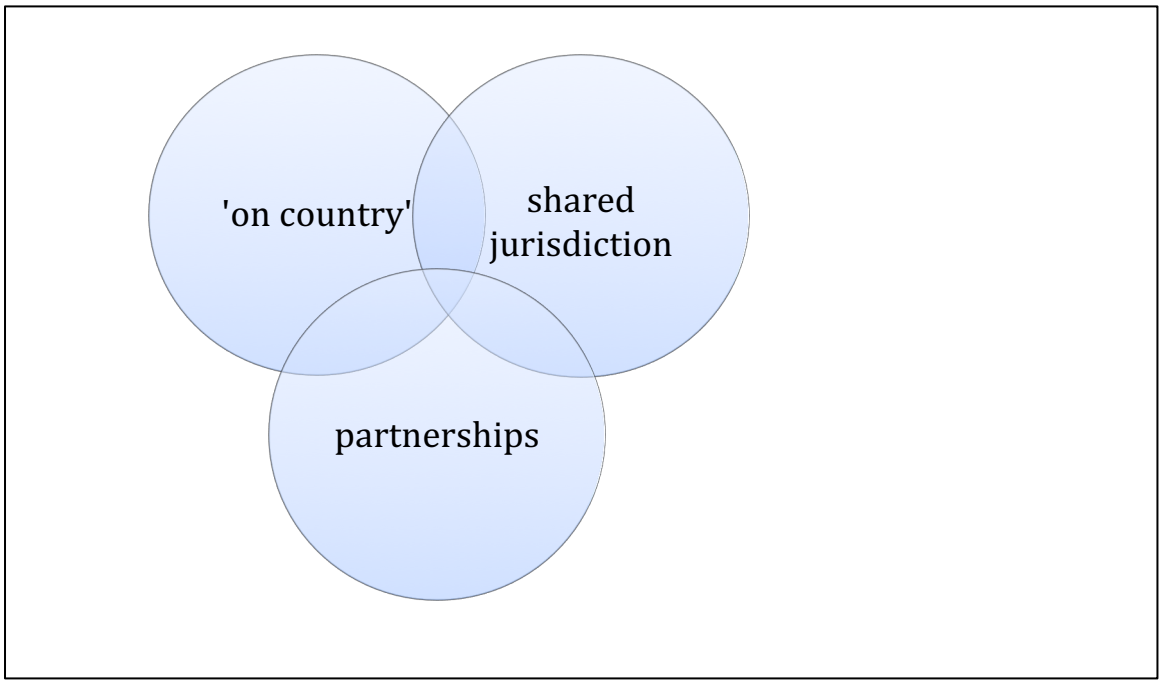
The ‘best practice’ case studies in Chapter Four share many common structural features. For example, many examples of best practice took place ‘on country’ in that they reflect highly localised, holistic and whole-of-community approaches. Most examples also involved decentralised decision-making—with 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 collaborating with Aboriginal organisations, Elder groups and other community justice initiatives.

Figure 5.1 provides an illustration of the interaction between these different components in Aboriginal youth cautioning practices. These components can be broken down as follows:

(i) ‘On Country’

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

Figure 5.1: A structural model for youth diversion in a self-determination context



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' 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 (see Chapter Four).

(ii) Partnerships

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. 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. There are many examples of community justice initiatives like these—Aboriginal youth centres, clubs, collectives and organisations—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.

(iii) Shared Jurisdiction

Another building block of successful youth diversionary practices seems to be an acknowledgment and willingness to work within a framework of shared jurisdiction. Many of

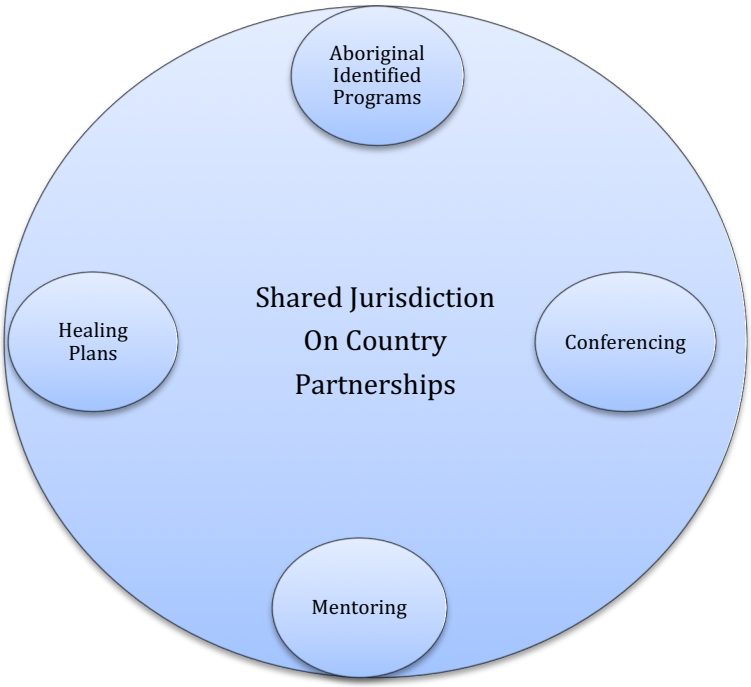
the examples of best practice took for granted and worked within the philosophy of Aboriginal sovereignty, of 'shared jurisdiction' and legal pluralism. For these examples, Aboriginal sovereignty and authority was simply a 'fact' which was built into the design and an integral part of the everyday working 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 the 'Self-Administered Police Service Agreements' in Canada, and the contractual agreement between the Confederated Salish and Kootenai Police Department and the United States Bureau of Indian Affairs. 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 in Chapter Four). 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' mechanisms appear to be common structural elements or building blocks of successful Aboriginal youth diversionary practices.

Aboriginal Youth Cautioning in the Context of Self-Determination: Processes

In addition to structural elements of Aboriginal youth cautioning practices, it is important to turn our attention to the question of process. 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.

Figure 5.2: A model for youth diversion in a self-determination context: process and structure



(i) 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 in Chapter Four—the Yiriman project, Clean Slate Without Prejudice, Warlpiri Youth Development, the Maranguka project—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. Conversely, lack of community input was identified as a barrier, especially in terms of problems in the delivery of Aboriginal youth diversion programs. Unfortunately, these initiatives seem to represent a minority of youth diversionary programs in national and international practice.

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 (see Chapter Three). These tend to be general in application, rather than focussed specifically on Indigenous children, although Indigenous children may be recognised as a particular target group within the program. Some examples from the literature review above include the Protected Admissions Scheme (which was developed by

the New South Wales Police Force), the Co-ordinated Response to Young People at Risk (developed by the Queensland Department of Justice and Attorney General), the Youth of Track program (developed by the NSW Department of Justice and Attorney General) and the Youth Intervention and Diversion Program (overseen by the Canadian Department of Justice). Some of the barriers identified included lack of cultural safety and lack engagement with Elders and key community organisations (see Chapter Two).

(ii) 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 Indigenous children in being able to provide for the transmission of cultural knowledge. As we discussed in Chapter Four, mentoring is often used in an Indigenous context in combination with other approaches (such as conferencing or other programs).

(iii) Conferencing, Healing and Peacemaking

Another example of successful processes in Indigenous youth diversionary practices involve conferencing, healing and peacemaking. Broadly conceived, Indigenous youth conferencing involves the participation of Indigenous community members in the cautioning, trial and sentencing of Indigenous 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 (caution, trial, and sentencing). While there are many examples of Indigenous conferencing and healing approaches around the globe, we have provided a range of examples in Chapter Four including court models (the Tsuu T'ina First Nation Court, the Rangatahi Youth Courts and the Tulalip Healing and Wellness model) and pre-court diversionary approaches (the Warlpiri Youth Development Aboriginal Corporation, the Tiwi Islands Youth Diversion and Development Unit, and the Aboriginal Community Justice Program in Ontario).

Taken together, the essential building blocks for successful models of Aboriginal youth cautioning include shared jurisdiction, partnerships and 'On Country' practices. Against this backdrop, a range of successful processes and practices have been identified which include (but are not limited to) mentoring, healing plans, conferences and other Aboriginal designed programs. In addition to these issues of structure and process, it is also important to turn our attention to some of the potential 'barriers' and 'enablers' for youth diversion in the context of Aboriginal self-determination.

Potential Enablers and Barriers for Aboriginal Cautioning in the Context of Aboriginal Self-Determination

The following discussion of potential 'barriers' and 'enablers' draws on the work presented in previous chapters. The barriers and enablers are discussed in the context of both police cautioning and Aboriginal diversionary programs more generally. Table 5.1 presents barriers and enablers in summary form.

Table 5.1 Potential Barriers and Enablers

Barriers
Limited access to diversionary programs
Referrals to Aboriginal diversionary programs
Eligibility criteria for referral to Aboriginal cautioning
The point at which Indigenous organisations are involved in decision-making
Risk assessment
Failure to receive support from other agencies
Failure to ensure that legislative provisions and policies to enhance Indigenous 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' 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

1. Potential Barriers

Factors which act as barriers to the development of successful cautioning and 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 cannot be funded (Department of Justice Canada 2016: 25-26). In Canada a majority of Indigenous communities do not receive funding from the AJS, which means that a large number of Indigenous 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, prosecutor 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 was 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 s**ome criminal justice personnel applied their own eligibility criteria** (such as prior offending) which was not criteria established in legislation or policy.[9]

Eligibility criteria for referral to Aboriginal cautioning

A potential barrier to an effective Aboriginal cautioning scheme is limited eligibility criteria. Various limitations may be imposed including seriousness of offence, the number of previous cautions 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 also recommended that Victoria Police should adopt a 'Failure to Divert Declaration' 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.

[9] In the Victorian context 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 Indigenous organisations are involved in decision-making

Perhaps one of the most significant potential barriers to effective police cautioning processes in the context of Aboriginal self-determination is **the point at which Aboriginal organisations are involved in the decision-making process**. 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 Indigenous organisations thoroughly and in good faith when decisions are being made about an Indigenous 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 Indigenous young people need to be made in consultation with Indigenous organisations.** Recommendation 53 sets out fifteen rules relating to juvenile justice decision-making. Of particular interest to us are Rules 3 and 4:

- Rule 3 requires notification of an accredited Indigenous organisation whenever an Indigenous young person has been arrested or detained.
- Rule 4 requires consultation with the accredited organisation before any further decisions are made.

These Rules embed the principle that accredited Indigenous organisations must play a fundamental role in making decisions affecting Indigenous children and young people in the criminal process.

Currently there are no examples in Australia where Indigenous organisations or Elders are involved in the decision as to whether to caution. It is difficult to see definitively from the desk-top review of the literature whether this is also the case internationally, but it appears to be so.

Risk assessment

As we identified in Chapter Two, risk assessment tools may disadvantage Aboriginal young people and limit their access to cautioning and other diversionary mechanisms. There is a

clear need to develop an Indigenous perspective on the suitability of risk assessment in accessing diversionary programs. A strengths-based approach may be a more suitable framework for assessment.

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 Indigenous 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 Indigenous people in the cautioning process because of the failure to meaningfully implement the policy. An example of the latter is the Protected Admission Scheme in NSW where police practices of using a formal record of interview undermine 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 AJS found that because of limited training resources that:

- 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).

2. Potential Enablers

At the end of Chapter Four we noted the Guiding Principles which emerged from the discussion on the case studies. 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 Indigenous people, that is, where Indigenous 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 AJS 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 Indigenous programs reinforce Indigenous 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 AJS '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 AJS programs' 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 some evidence to suggest that cautions are more powerful when they are delivered in a culturally safe way. This includes not only **how** the cautions are delivered but also the location in which it is delivered (i.e. **where?** police station? community centre? on country?) and by cultural leaders (i.e. **by whom?** police? Aboriginal Liaison Officer? 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 'on country'. Self-determination is essential to ensure cultural relevancy. In Canada it has been argued that 'cultural relevancy is inherent in the AJS 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' diversionary practices

Many of the examples of best practice share in common the fact that they take place 'on country', 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

Our 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 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 AJS (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 Indigenous peoples move beyond 'cultural awareness' to actively ensuring that cultural needs are met for individuals. Further, individual assessment processes need to move beyond non-Indigenous 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

Previously we noted the importance of First Nations' jurisdiction over policing by many federally recognised Tribes in the United States, and the Self-Administered Police Service Agreements in Canada. We also noted there was nothing comparable in Australia to either Canada or the United States in relation to the exercise of Indigenous jurisdiction or contractual control over policing.

A contractual relationship between police and Indigenous organisations for the delivery of cautioning and 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-Indigenous and Indigenous views of 'justice'. On the one hand there is a 'prevailing perspective in [Indigenous] 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-Indigenous criminal justice systems to respond effectively to Indigenous communities and that Aboriginal community-based justice diversionary programs offer alternatives to the non-Indigenous criminal justice system that reflect local cultural values.

The review of the Canadian AJS 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-Indigenous criminal justice agencies can have significant effects on, for example, the extent to which referrals are made to Indigenous community-based diversionary programs.

Questions for Discussion

Questions Arising from a Consideration of Aboriginal Self-Determination and the Development of Aboriginal Youth Cautioning Program:

- How is a negotiation framework developed with localised Koori communities in relation to the development of an Aboriginal Youth Cautioning Program?
- How can flexibility in approach to Aboriginal Youth Cautioning be achieved to allow for localised contexts and enable localised input?
- How is state-wide consistency in an Aboriginal Youth Cautioning Program balanced with the requirement for localised negotiation, input and tailored responses?
- Should there be specific consultation and engagement with Aboriginal young people about prospective models for Aboriginal Youth Cautioning?
- How do we ensure that an Aboriginal Youth Cautioning Program meets the requirements of Cultural Safety?

Questions Relating to Cautioning Scheme:

- Who should authorise the caution: sergeant, all ranks, specially trained and/or dedicated officers?
- At what point do Aboriginal organisations become involved in the decision-making process around cautioning?
- Is there a requirement for a legislative base to cautioning and how would this take into account the specific requirements for an Aboriginal Youth Cautioning Scheme?
- How do we ensure that an Aboriginal Youth Cautioning Scheme leads to greater equity in the use of cautions particularly for older Aboriginal children?
- Should there be specific offences excluded from cautioning and/or should there be a limit on the number cautions an individual child can receive?
- How would an Aboriginal Youth Cautioning Scheme sit with other police diversionary options (drug diversion cautions, official warnings, court diversion)?
- What are the criminal justice objectives of an Aboriginal Youth Cautioning Scheme? For example:

    - Is the model only targeting low level offending and first or second or younger aged offenders and therefore primarily aimed at increasing the rate of cautioning?
    - Is it aimed at particular types of offences – for example those offences which are likely to lead to bail refusal?
    - Is the model aimed at repeat older offenders?
- What might an Aboriginal developed risk assessment tool look like? What 'risk' would it measure and what would specific Aboriginal protective factors be taken into account?

Questions Arising from a Consideration of the Case Studies and Relevance for the Victorian Context:

- What would the above examples of good practice look like in the Victorian context?
- What would the above examples of good practice look like in the localised context for urban, rural and remote Aboriginal communities?
- What examples are there of existing community justice initiatives—of youth mentoring, 'on country' diversion, and so on—that the local Victorian police could form partnerships and work alongside?
- Are there examples of current or past partnerships in place between Aboriginal youth organisations and the Victorian Police?
- What would the protocol be for working alongside and in partnership with existing Aboriginal community justice initiatives? Would the Victorian Police have a statement for guiding principles or the like?
- How would a Victorian Police youth cautioning protocol or program work alongside the concept of legal pluralism and shared jurisdiction? (i.e. what if the charges are contested?)
- Who should be involved in the process of diverting youth?
- How do you ensure cultural safety in the delivery of cautions and warnings to Aboriginal youth? Who is/are the most appropriate persons to deliver you cautions and what is the most culturally appropriate way to do so?
- If cultural Elders and respected community leaders were to be involved in the process of issuing warnings and cautions, what would this look like?

- Are contractual arrangements between police and Aboriginal organisations for the delivery of Aboriginal cautioning and diversionary programs an important consideration?
- How might conflicting views of ‘justice’ between police and Aboriginal organisations be managed?

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APPENDICES

Appendix 1 Comparative Legal Frameworks for Youth Conferencing

Jurisdiction	Legislation	Division/Section	Parties who must attend	Parties who may attend
NSW	*Young Offenders Act* 1997	Part 4 (Cautions, 3 Divisions) Part 3 (Warnings)	Not stipulated	• the young person • conference convenor • person responsible for the young person • member of young person's family • an adult chosen by the young person • the victim • victim's representative • victim support person • investigating official • specialist youth officer • a legal representative of the young person • other parties at the discretion of the convenor
ACT	*Crimes (Restorative Justice) Act* 2004	Section 20	The young person and victim or the victim's parent,	• the relevant police officer • a parent of the victim

		or a substitute for the victim's parent	• a parent of the young person • a family member of the victim • a family member of the young person • a family member of the victim • support persons for the young person, the victim and/or the parent of the victim • otherparties deemed relevant by the convenor
Vic	*Children, Youth and Families Act* 2005 *Courts Legislation (Neighbourhood Justice Centre)* Act 2006	The young person, the young person's legal practitioner, the conference convenor and the police informant	• member of the young person's family • other persons significant to the young person • the victim or victim representative • other persons permitted by

				the conference convenor
Qld	*Youth Justice Act* 1992		Not stipulated	• conference convenor • the young person • the young person's parent • the victim • a representative of the referring agency (police or court) • a lawyer, adult family member or another person at the young person's request • a lawyer, support person and/or family person at the victim's request
WA	*Young Offenders Act* 1994	Sections 1 & 2	Not stipulated, though participants *cannot* be represented by a legal practitioner	• a co-ordinator • a police officer • member of the Aboriginal community, ethnic or other minority group • other persons appointed by co-ordinator

SA	*Young Offenders Act* 1993	Section 6	The conference facilitator, the young person and the representative of the Commissioner of the Police	• the young person • the guardian or relatives of the young person • other persons associated with the young person • an Aboriginal Elder • the victim • support person for the victim • other parties deemed relevant by the facilitator
Tas	*Youth Justice Act* 1997		The conference facilitator, the young person and the representative of the Commissioner of the Police	• the young person • the guardian or relatives of the young person • other persons associated with the young person • an Aboriginal Elder • the victim • support person for the victim • other parties deemed relevant by the facilitator
NT	*Youth Justice Act*		Not stipulated	Not stipulated
Canada	*Youth Criminal Justice Act*			
Aotearoa New Zealand				

SOURCE: adapted from Richards (2010).

Appendix 2 NSW Young Offenders Legal Referral (Tag and Release)

Young Offenders Legal Referral

Broken Hill Police Station
252 Argent Street,
Broken Hill NSW 2880
Ph: 08) 8087 0299
Fax: 08) 8087 0244

TO: Western Aboriginal Legal Service
35 Sulphide Street
Broken Hill NSW 2880
Ph: 08) 8087 3233
Fax: 08) 8087 6627

Young Person	
Parent / Care Provider	
Address	
Offence/s	
Date of Offence/s	
Date & Time spoken to	
DATE OF REPLY	

At the time and date stated the young person was spoken to by Police regarding the above offence in the company of a parent / care provider. At that time the young person declined to be interviewed, provide a statement or make admission regarding the offence.

The young person has been released and advised to seek legal advice AS A MATTER OF URGENCY, and in any case, no later than the "DATE OF REPLY" stated above. After this date consideration will be given to dealing with this matter by other means.

This incident falls within the boundaries of section 8 of the Young Offenders Act 1997 and would be more appropriately dealt with under this legislation, if possible.

The young person and parent / care provider has been provided with your address and contact details. We would appreciate your assistance in providing the young person and their parent / care provider with appropriate legal advice at the first available opportunity.

Thankyou for your assistance,

Name:
Rank:
Broken Hill Police Station

Young Offenders Legal Referral Contacts

The matter you have been spoken to about falls within the boundaries of the Young Offenders Act and may be dealt with under that legislation. With your consent a notification will be forwarded to the Western Aboriginal Legal Service advising them of the circumstances of the incident. It is recommended that you seek legal advice regarding the matter as soon as possible.

If you obtain legal advice and wish to be interviewed further by Police, you should contact Police by _____. Unless contact is made with Police by that date, consideration will be given to dealing with this matter by other means.

Below is a list of contact numbers where you can get legal advice.

Western Aboriginal Legal Service Broken Hill Ph: 08) 8087 3233

Mobile ph: 0439 6330161 A.H. 02) 6884 9667

Legal Aid Under 18s Hotline: 1800 10 18 10

Consent

I agree for notification to be forwarded to the Western Aboriginal Legal Service.

Signed:_____

Appendix 3 NSW PROTECTED ADMISSIONS FORM

Protected Admissions Form

S.21A, *Young Offenders Act* 1997

PART A - Details					
	Name of Child:				
	Investigating police officer:				
	Police email				
	Phone			**Fax**	
Date				**Police Station**	
Offences:	1				
	2				
	3				
	4				
	5				
	6				
	7				
	8				
Note: Do not list more than eight offences on this form. Use a new form for additional offences					
	Brief description of offences:				

PART B - Protected admission notice

I,_____ am the investigating police officer for the offences listed in this notice. I believe you have committed the offences listed in this notice. You have not admitted those offences. If you admit the offences listed in this notice, you can be cautioned and no other proceedings will be taken against you for those offences.

1. You may make an admission to me in writing personally or through your lawyer.
2. I may ask you questions when you make your admission, but only about offences listed in this notice.
3. Anything you say during the interview will not be used in any criminal proceedings for any offence under any circumstances

PART C - Admission by child

This Part should be completed and returned to the investigating police officer.

Child to complete

I, _____ am _____ years old. I have read this notice / had this notice explained to me. I admit that I am responsible for the offences listed in this notice.

(Name)	Signature	Date

Parent or Guardian to witness (if present)

(Name)	Signature	Date

Legal representative to complete OR return to investigating police officer via email this endorsement

I, _____ am the legal representative of _____

I have explained this notice to my client and am instructed to admit the offences listed in this notice on their behalf.

(Name)	Signature	Date

Appendix 4 NSW POLICE INFORMATION SHEET

INFORMATION FOR YOUNG PERSON

WHAT IS THE PROTECTED ADMISSIONS SCHEME ?

Before you can be dealt with by caution, (see Your rights under the Young Offenders Act, given to you by police) you must first admit the offence.

If you have decided not to admit the offence and have exercised your right to silence, the police may offer you the opportunity to make a **protected admission**. The police may do this if they believe that the offence could appropriately be dealt with by giving you a caution if you admit the offence.

If the police decide to caution you for an offence it means that you will not have to go to court.

If you agree to make a protected admission the police will consider issuing you with a caution. The police will promise not to use anything you say during the interview in any criminal proceedings for any offence under any circumstances. The police will give you a document which will contain this promise in writing.

WHAT DO I NEED TO DO BEFORE I MAKE A PROTECTED ADMISSION ?

You should always seek legal advice before making a protected admission. You can call the Legal Aid hotline, ALS or a solicitor of your choosing.

HOW DO I MAKE A PROTECTED ADMISSION?

The police may conduct a formal interview with you, during which you will admit your part in the offence.

Legal Aid Hotline—Free Service
1800 10 18 10
Monday to Thursday 9am to Midnight Fridays, Saturdays, Sundays and Public Holidays - 24h rs
If you are Aboriginal/Torres Strait Islander you will have the opportunity to speak to an ALS lawyer on the telephone 24hours a day, 7 days a week.

The police may be satisfied that the protected admissions form signed by you is sufficient to offer you a caution

WHAT WILL HAPPEN DURING THE INTERVIEW?

Before the interview the police will give you a document which will describe the offences for which you may be questioned about. They will not ask you about any other offences during the interview. If you provide details about other offences, the interview may be suspended but what you say in the interview will not be used in criminal proceedings against you.

The police will expect you to be honest about what happened and your role on the offence.

WHAT WILL HAPPEN IF I DON'TAGREE TO MAKE A PROTECTED ADMISSION?

If you do not make a protected admission the police may take criminal proceedings against you for the offence, if they believe there is enough evidence to do so. You may be required to go to court.

You will not be dealt with by caution if you have not admitted the offence.

WHY HAVE I BEEN OFFERED A PROTECTED ADMISSION ?

The offence that you have committed falls under the Young Offenders Act. Taking into account the type of offence and your criminal history, the police have decided that if you make admissions to the offence you are eligible for a caution.

Appendix 5 NSW Code of Practice for Crime, Protected Admissions

CODE of PRACTICE for CRIME.

Protected admissions – the Protected Admissions Scheme

In certain circumstances, a child suspect will be eligible for a caution (under the *Young Offenders Act 1997*) provided they admit the offence. The Protected Admissions Scheme (PAS) allows you to offer a protected admission to a child suspect to enable the child to decide whether to admit an offence (so that they can receive a caution and avoid going to court).

Use the PAS in a case where you are considering giving a caution but can't because the child has not admitted the offence; do not use the PAS if the child voluntarily admits the offence.

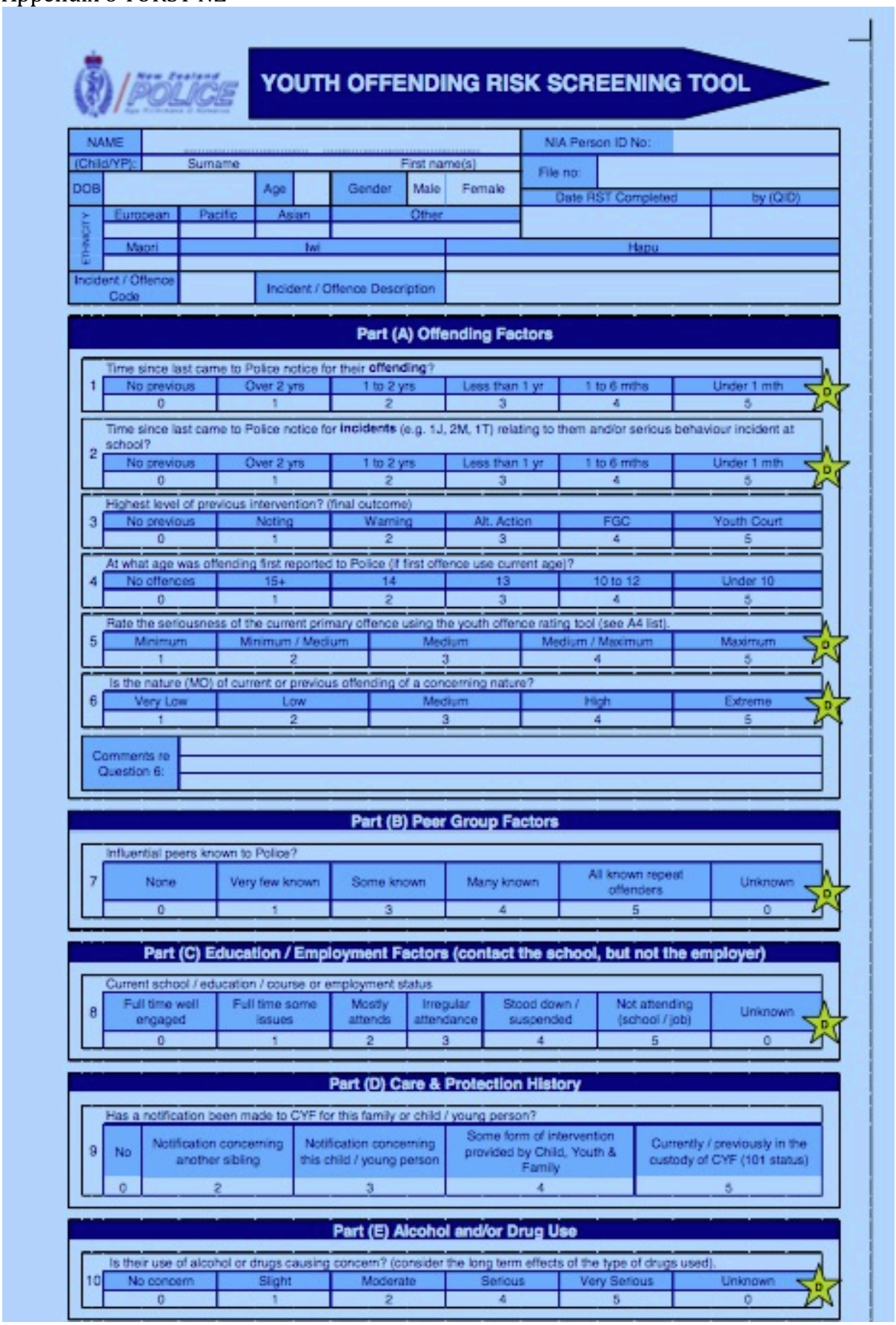
Under the scheme, the child is given an opportunity to admit the offence with an undertaking from police that anything the child says, including any admissions they make, will not be used in any criminal proceedings against them or any other person.

The scheme should be offered to the child in the company of their parent, guardian, approved adult and/or lawyer. There is a one page information sheet about PAS that you should give to the child and their support person. Ensure the child can access Legal Aid or Aboriginal Legal Services to discuss the protected admissions offer.

If the child accepts the offer, anything they say will be protected. This includes any information they give you about another person committing an offence. However, you may ask the child (separately and following the interview) to give a statement about that other person's offending. If the child gives a statement, then that statement may be used in proceedings.

If the child admits other offences, and they are eligible for cautions for those offences, then you can apply the scheme to those offences. However, a child can only ever receive a maximum of three cautions (this includes any previous cautions given by police or by a court). If the child has already received three cautions, it is not appropriate to use PAS.

Appendix 6 YORST NZ



YOUTH OFFENDING RISK SCREENING TOOL

NAME						NIA Person ID No:	
(Child/YP):	Surname		First name(s)			File no:	
DOB		Age		Gender	Male / Female	Date RST Completed	by (QID)
ETHNICITY	European	Pacific	Asian	Other			
	Maori	Iwi		Hapu			
Incident / Offence Code		Incident / Offence Description					

Part (A) Offending Factors

1. Time since last came to Police notice for their **offending**?

No previous	Over 2 yrs	1 to 2 yrs	Less than 1 yr	1 to 6 mths	Under 1 mth
0	1	2	3	4	5

2. Time since last came to Police notice for **incidents** (e.g. 1J, 2M, 1T) relating to them and/or serious behaviour incident at school?

No previous	Over 2 yrs	1 to 2 yrs	Less than 1 yr	1 to 6 mths	Under 1 mth
0	1	2	3	4	5

3. Highest level of previous intervention? (final outcome)

No previous	Noting	Warning	Alt. Action	FGC	Youth Court
0	1	2	3	4	5

4. At what age was offending first reported to Police (if first offence use current age)?

No offences	15+	14	13	10 to 12	Under 10
0	1	2	3	4	5

5. Rate the seriousness of the current primary offence using the youth offence rating tool (see A4 list).

Minimum	Minimum / Medium	Medium	Medium / Maximum	Maximum
1	2	3	4	5

6. Is the nature (MO) of current or previous offending of a concerning nature?

Very Low	Low	Medium	High	Extreme
1	2	3	4	5

Comments re Question 6:

Part (B) Peer Group Factors

7. Influential peers known to Police?

None	Very few known	Some known	Many known	All known repeat offenders	Unknown
0	1	3	4	5	0

Part (C) Education / Employment Factors (contact the school, but not the employer)

8. Current school / education / course or employment status

Full time well engaged	Full time some issues	Mostly attends	Irregular attendance	Stood down / suspended	Not attending (school / job)	Unknown
0	1	2	3	4	5	0

Part (D) Care & Protection History

9. Has a notification been made to CYF for this family or child / young person?

No	Notification concerning another sibling	Notification concerning this child / young person	Some form of intervention provided by Child, Youth & Family	Currently / previously in the custody of CYF (101 status)
0	2	3	4	5

Part (E) Alcohol and/or Drug Use

10. Is their use of alcohol or drugs causing concern? (consider the long term effects of the type of drugs used).

No concern	Slight	Moderate	Serious	Very Serious	Unknown
0	1	2	4	5	0

Part (F) Family Factors

	If there are FAMILY VIOLENCE records in NIA for this family / address, what is the highest FV score?				
11	Zero Records	Records, but no score	Score from 1 - 8	Score from 9 - 16	Score 17 or over
	0	2	3	4	5

	Where do they live? (socio economic area decile rating of local state primary school)				
12	8 - 10	4 - 7	2 - 3	1	Transient / Motor Camp
	0	2	3	4	5

	Are there concerns in the living situation? e.g. parent / caregiver support and supervision of child / young person, parental mental health problems, drug and alcohol use, suspected child abuse and / or unrecorded family violence						
13	None	Very minor concerns	Some concerns	Major concerns	Some major concerns	Young Person Transient	Unknown
	0	1	2	3	4	5	0

Detail Concerns:	

	Family members have offending history?					
14	None	Parent(s) with minor history	Parent/s with major history (imprisonment)	Parent(s) have offended within past 12 months	Sibling(s) have offended within last 12 months	Unknown
	0	2	3	4	5	0

Any General Comments:	

Information Sources

Spoken To	Child / young person	Parent / caregiver	School / course provider / MOE	Child Youth & Family	Other agency
This time					
Previously					
Not At All					

Scoring Instructions — Risk Screening

Questions			Answers			YORST Score	
No. of Questions		Max	Sum of the Scores (Above)	=		x 100 =	%
Not Answered:	Answered:	x 5	Max. Total for Answered Questions	=			

Dynamic Risk Factors

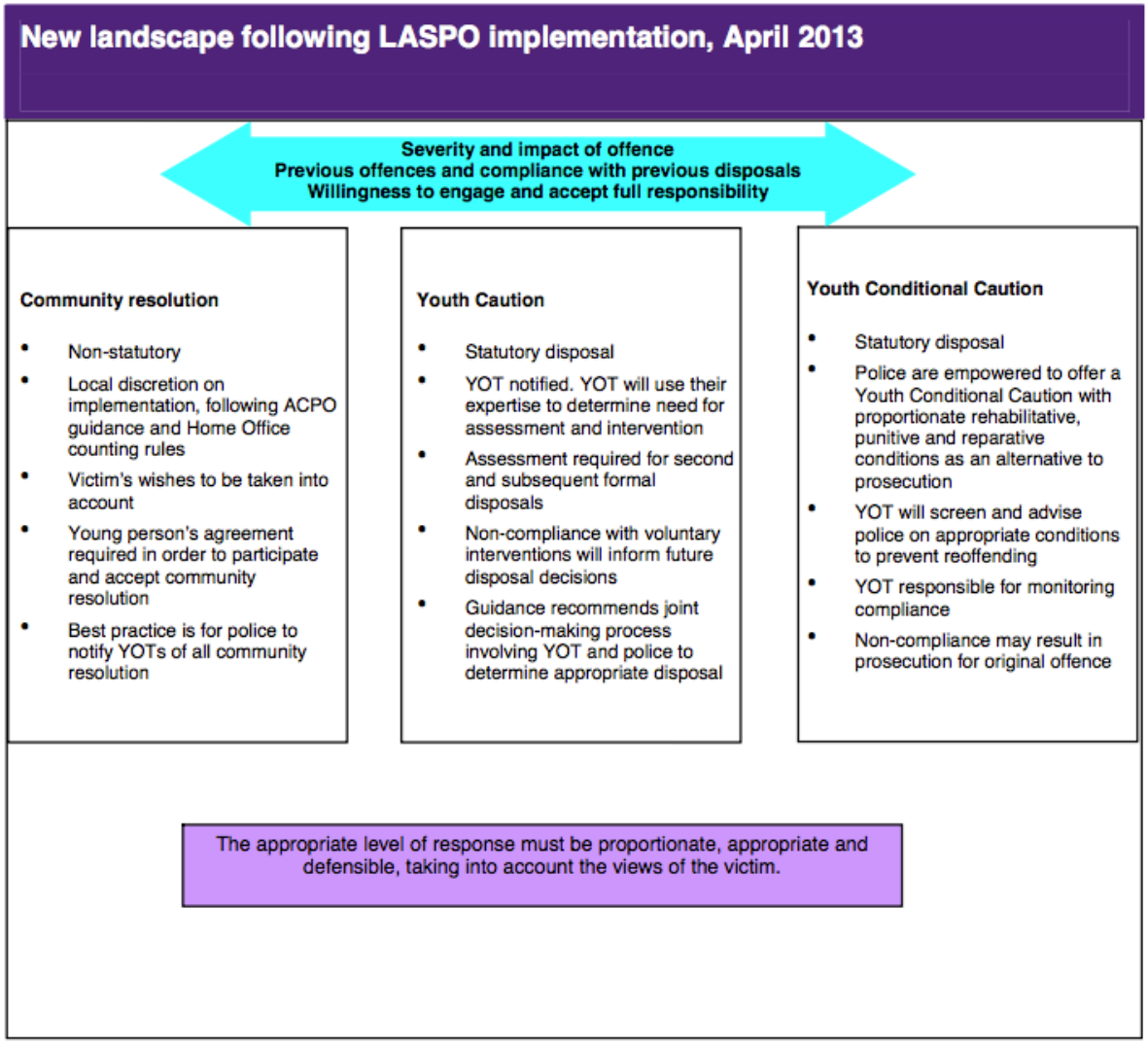
Static Factor Results		Dynamic YORST Score	
Sum of Dynamic Factors		x 100 =	%
Maximum Possible Total for Dynamic Factors	45		

Youth Aid Response

Warning	AA	FGC	Youth Court	Police Youth Development	Other	Your Station

Appendix 7 England and Wales Out of Court Disposals

3.1 The diagram below provides a summary of the out-of-court disposals available following the implementation of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 in April 2013.



(Ministry of Justice and Youth Justice Board 2013)