COMMISSION FOR CHILDREN AND YOUNG PEOPLE

CCYPD/22/4804

[redacted]
Department of Justice and Community Safety

By email: [redacted]

Dear [redacted]

Statutory Review of the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*

Thank you for inviting the Commission for Children and Young People (the Commission) to make a submission to the statutory review of the *Children and Justice Legislation Amendment (Youth Justice Reform Act) 2017* (the Youth Justice Reform Act).

As you are aware, in April 2017, the Commission provided feedback to the then Department of Justice and Regulation on the proposed Children and Justice Legislation Amendment (Youth Justice Reform) Bill. In our feedback, we expressed concerns about several aspects of the proposed Bill. While some of these amendments were not ultimately included in the Youth Justice Reform Act, many were – most notably the 'serious youth offences' regime and a series of amendments aimed at increasing the likelihood and length of custodial sentences for children and young people who commit offences in youth justice facilities.

The Commission remains strongly opposed to these aspects of the Youth Justice Reform Act and recommends their repeal. In contrast, we remain strongly supportive of the Children's Court Youth Diversion service and recommend measures to expand its use. We also support the retention of the youth control order, subject to some minor amendments.

Our submission to the statutory review is enclosed. If you would like to discuss the submission, please contact [redacted].

Yours sincerely

Liana Buchanan
Principal Commissioner

7 April 2022

[redacted]

COMMISSION FOR CHILDREN AND YOUNG PEOPLE

Submission - Statutory Review of the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017

General comments

When Victoria's Youth Justice Reform Act was developed in 2017, the youth justice system was facing a number of significant challenges. Sensationalised and ongoing media coverage about 'youth gangs', high-profile youth offending and critical incidents at the Parkville and Malmsbury youth justice centres contributed to community perceptions that Victoria was in the grip of a 'youth crime wave'.[1]

However, such reporting ignored a range of other major challenges in youth justice custodial settings at that time, including poor infrastructure, inadequate staffing levels, extensive and often inappropriate use of isolation and lockdowns, and inconsistent and inadequate responses to children and young people with complex needs and challenging behaviours.

While the Youth Justice Reform Act included some amendments that were based on the principles of diversion and rehabilitation, the overall tone of the Act was one of deterrence: most measures were intended to be 'tough' on children and young people engaging in offending behaviour, to send a message that such behaviour would 'not be tolerated'.[2]

In the Commission's view, this approach was fundamentally misguided, as reflected in our 2017 submission on the Youth Justice Reform Bill to the then Department of Justice and Regulation.[3] The Commission opposed the punitive measures proposed for inclusion in the Youth Justice Reform Bill.

There is a wide body of evidence to demonstrate that harsh, punitive approaches to addressing youth offending do not work. In many instances they can have the opposite effect, exposing young people to further trauma and stigma, disrupting their education and severing important links to family, community and culture.[4]

In particular, it is well established that custodial sentences are not effective in addressing the underlying causes of children's offending behaviour or reducing their likelihood of reoffending.[5] Rather, such responses tend to entrench children and young people in the youth justice system and increase the likelihood of their entry into the adult justice system.

The Commission is particularly concerned about the effect that harsh and punitive approaches have had on Aboriginal children and young people and the systemic racism they continue to experience at all stages of their involvement in the youth justice system.[6]

Prevention, early intervention and diversion – responses that keep children and young people in the community and limit their exposure to the youth justice system – are far more effective at reducing offending and increasing community safety.

The approach to youth justice in Victoria has changed considerably since 2017. The punitive measures introduced by the Youth Justice Reform Act are at odds with the evidence-based approach to youth justice described in the Youth Justice Strategic Plan 2020–2030 and *Wirkara Kulpa*, the Aboriginal Youth Justice Strategy 2022–2032.

The deterrence approach of the Youth Justice Reform Act is also inconsistent with the principles of the Youth Justice legislation being drafted by the department, which emphasises prevention,

diversion, minimum intervention and rehabilitation, and recognises that children are developmentally distinct from adults and have a unique capacity for rehabilitation and positive development when properly supported.

There is no evidence that the punitive measures of the Youth Justice Reform Act have achieved their objectives of reducing offending by children and young people or increasing community safety. The Commission recommends their repeal.

In this submission, the Commission comments specifically on the policy objectives of the Youth Justice Reform Act, the operation of the reforms, the impact of the reforms and whether additional reform is required (following the structure of the discussion paper). Our comments address most of the questions in the discussion paper.

Policy objectives of the Youth Justice Reform Act

The underlying policy objectives of the Youth Justice Reform Act were not specified in the Act. The second reading speech accompanying the Bill referred to various policy objectives, including to:

- 'address community concerns about crimes committed by children and young people'
- protect the community 'from children and young people who commit serious offences'
- 'improve safety and security in youth justice facilities'.[7]

The second reading speech also referred to an additional group of objectives in the Bill:

- The objective of the diversion provisions was to 'prevent a life of crime before it starts' in order to protect the community.[8]
- The objective of the youth control order provisions was to give 'suitable young people' the opportunity to rehabilitate.[9]
- The objective of the uplift provisions was to 'ensure that serious offences are heard in the higher courts with a full range of sentencing options available, serving the interests of justice and community safety'.[10]
- The objectives of the suite of provisions aimed at 'increasing consequences for offending in youth justice facilities' were to ensure that youth justice staff would be safe at work, and that the public would 'not have to continue to bear the cost of damage to youth justice facilities'.[11]
- The second reading speech also noted that the government was 'determined to ensure public confidence in the youth justice system and to address any behaviour which undermines the rehabilitation and wellbeing of children and young people detained' in youth justice custody.[12]

The Commission has considered the appropriateness of these identified policy objectives and the measures included in the Youth Justice Reform Act to achieve them.

Addressing community concerns, protecting the community and ensuring public confidence in the youth justice system

It is appropriate for the youth justice system to aim to increase community safety. However, this objective must be achieved through evidence-based measures. The Youth Justice Strategic Plan 2020–2030 recognises that the youth justice system can only build community confidence and enhance community safety 'by delivering evidence-based programs that reduce young people's offending'.[13]

Unfortunately, as noted above, media coverage of incidents at the Parkville and Malmsbury youth justice centres in 2016 and 2017 demanded 'tough' responses to offending by children and young people. Research conducted by Dr Faith Gordon has demonstrated that

sensationalist and pejorative media representations of young people in conflict with the law can amplify social tensions and perpetuate detrimental social constructions of childhood, leading to poor policy outcomes and reactionary justice policies.[14]

The Commission acknowledges the harm experienced by victims of crime. However, punitive responses to youth crime reflect short-term thinking and may ultimately contribute to increased rates of offending and reoffending among children and young people. They do not increase community safety in the long term.

There is no evidence that the Youth Justice Reform Act has reduced serious offending by children and young people, or improved community safety. Data included in the discussion paper does not indicate any clear or consistent reduction in the rate at which children have been charged with 'serious youth offences' since the commencement of the relevant amendments in 2018 (this is discussed in more detail under 'Impact of reforms').

As the Youth Justice Strategic Plan 2020–2030 appropriately recognises, 'prevention, diversion and early intervention are the most effective and fiscally responsible ways of reducing youth crime in the long term'.[15] A youth justice system that focuses on prevention, early intervention and diversion, and provides holistic, community-based interventions that respond to children's specific risks and needs is far more likely to reduce offending and increase community safety in the long term than a system that focuses on punishment and deterrence.

Improving safety and security in youth justice facilities, ensuring that staff are safe at work and addressing problematic behaviour in custody

The key measures included in the Youth Justice Reform Act to achieve these objectives were:

- introducing a presumption of cumulative sentencing where a child or young person is found guilty of committing certain offences in youth justice custody, including escape and property damage
- expanding mandatory minimum custodial sentences for young people aged 18 or over to include assaults on youth justice custodial workers
- limiting the power of adult courts to sentence young people to youth justice custody via the dual track system in respect of serious youth offences
- requiring the Children's Court in sentencing a child to take into account the need to deter the child from committing offences in youth justice facilities
- increasing the maximum penalties for certain offences committed in youth justice facilities, including escape.

These measures lacked a sound policy basis. As noted above, custodial sentences are ineffective in reducing offending among children and young people. Research indicates that longer periods of detention have, at best, no effect on recidivism and that detention should be used sparingly with children and young people.[16]

Further, these amendments were not appropriate for achieving the policy objective of improving safety and security in youth justice centres. By focusing on the deterrence element of custodial sentences, these measures failed to acknowledge or address the broader context of many children and young people's challenging behaviour in custody. In particular:

- There are many reasons why children and young people in custody may engage in such behaviour including histories of trauma, neglect or abuse, difficulty in regulating emotions, immaturity and impulsivity. Many children and young people in custody live with intellectual disabilities or acquired brain injuries, experience of mental health issues, and have a history of drug and/or alcohol misuse that may affect their behaviour. Many have a history of involvement with Child Protection.[17]

- Without comprehensive trauma-informed assessments, supports and interventions for children and young people with complex needs in custody, staff were ill-equipped to de-escalate or respond effectively to challenging situations.
- An unacceptably high number of children and young people on remand, poor infrastructure, inadequate staffing levels and an over-reliance on isolation and lockdowns also contributed to unsettled conditions in youth justice centres in the period preceding the introduction of the Youth Justice Reform Act.[18]

While there are indications that conditions in youth justice custody have improved since 2017, the evidence is not consistent:

- The number of physical assaults against custodial staff has fluctuated considerably since 2017–18. For example, in 2017–18, Youth Justice recorded 31 category one physical assaults by children and young people against staff, compared with 15 in 2018–19, 24 in 2019–20 and 12 in 2020–21.[19] The most recent combined category 1 and 2 incident data indicates that the number of physical assaults against staff has increased in 2021-2022, to date.
- The number of isolations in youth justice centres has decreased since 2017–18[20] and the use of 'lockdowns'[21] has reduced substantially since 2019–20.[22]
- Youth Justice recorded fewer category one 'assault' incidents and fewer 'behaviour'-related incidents in 2020–21 compared to the previous year.[23]

The Commission's analysis, informed by our monitoring of youth justice centres, is that improvements are more likely attributable to non-legislative measures introduced by Youth Justice, such as implementation of the Youth Justice Case Management Framework and custodial operating philosophy in 2019. Reductions in isolations, lockdowns and critical incidents are also likely to be related to notable reductions in the number of children and young people in custody in recent years (see further discussion below under 'Impact of reforms').

While youth justice centres are considerably more settled now than in 2016–17, the Commission continues to hold concerns about the safety of many children and young people in youth justice custody.[24] Improving safety in youth justice centres for both young people and staff remains a relevant policy objective for the youth justice system.

The Commission's *Our youth, our way* inquiry made a series of recommendations aimed at improving conditions in youth justice custody for Aboriginal children and young people.[25] This included fast-tracking plans to equip custodial staff with the training and skills needed to undertake trauma-informed, evidence-based and person-centred interventions, including support to anticipate, de-escalate and respond effectively to challenging behaviours without resorting to the use of force.[26]

Full implementation of these recommendations would benefit all children and young people in custody, with positive flow-on effects for the safety of custodial staff. The Commission notes that the Victorian Government recently indicated support or in-principle support for almost all of the *Our youth, our way* recommendations relating to custody.[27]

Preventing a life of crime before it starts

The policy objectives of prevention and early intervention remain highly relevant and should be the primary focus of Victoria's youth justice system.[28]

As noted above, one of the principles underpinning the youth justice system is that prevention, diversion and early intervention are the most effective and fiscally responsible ways of reducing youth crime in the long term.[29] This is also supported by the Victorian Government's 2021 Crime Prevention Strategy, which recognised that community safety and effective crime prevention

require early intervention and whole-of-government services and supports to address the underlying causes of offending.[30]

The second reading speech for the Youth Justice Reform Bill linked this policy objective to the provisions creating a statutory diversion scheme in the Children's Court. The Commission is strongly supportive of Children's Court diversion (see comments below). However, the youth justice system requires a considerably greater focus on prevention and early intervention.

The *Our youth, our way* inquiry found that the youth justice system is disproportionately focused on late, crisis-driven, punitive responses to offending behaviour, at the expense of effective early interventions and supports for Aboriginal children and young people.[31] The inquiry made a series of recommendations aimed at strengthening prevention and early intervention for Aboriginal children and young people.[32]

The Commission welcomes the government's support for most of these recommendations. However, early intervention and prevention efforts would be significantly strengthened by increasing the minimum age of criminal responsibility in Victoria to 14 years and providing alternative, community-based responses to children aged 10 to 13 years who engage in anti-social behaviour.[33]

Giving 'suitable young people' the opportunity to rehabilitate

The second reading speech links this policy objective to the introduction of youth control orders. The Commission's views on the effectiveness of youth control orders in supporting the rehabilitation of children and young people are set out below.

The discussion paper seeks stakeholders' views more broadly on the appropriateness of this policy objective. Rehabilitation for children and young people who are found guilty of an offence is a fundamental guiding principle of the youth justice system. However, the Commission does not support the notion of limiting opportunities for rehabilitation to a sub-category of 'suitable young people'. This suggests that some children and young people are 'beyond help', presumably due to their repeated or serious offending. This is not consistent with contemporary understandings of adolescent development or the Youth Justice Strategic Plan 2020–2030.[34]

In order to maximise their opportunities for rehabilitation, all children who are alleged to have committed an offence should be given the benefit of the Children's Court jurisdiction – a specialist jurisdiction with the appropriate expertise and resources to determine the best outcome for the child – and the sentencing dispositions available under the CYFA.[35] This is consistent with the United Nations Convention on the Rights of the Child[36] and the Charter of Human Rights and Responsibilities (the Charter).[37]

Ensuring that serious offences are heard in the higher courts in the interests of justice and community safety

In the Commission's view, having serious offences heard in the higher courts was not an appropriate policy objective in 2017, nor is it relevant or appropriate in 2022. It does not serve the interests of justice or community safety to limit the jurisdiction of the Children's Court in respect of young people aged 16 or 17 years who are charged with 'serious youth offences', and to have such charges determined in the higher courts. Data provided in the briefing paper does not support the view that the serious youth offences regime has reduced 'serious youth offending' by children and young people or improved community safety.

This policy objective is inconsistent with the Youth Justice Strategic Plan 2020–2030, which indicates that, for children and young people who commit serious offences and reoffend more often, 'we need to have a comprehensive understanding of what causes this behaviour and to tailor interventions that target those causes'.[38] The serious youth offence provisions do not constitute an evidence-based, tailored intervention that targets the causes of serious repeat offending by children and young people.

The serious youth offences regime is also inconsistent with the Charter. In limiting the jurisdiction of the Children's Court to hear and determine Category A and B offence charges for children aged 16 or 17 years, the uplift provisions are inconsistent with section 25(3) of the Charter, which gives every child charged with a criminal offence the right to a procedure that takes account of their age and the desirability of promoting the child's rehabilitation.

Children whose charges are determined in the higher courts may be sentenced to adult imprisonment. As we have stated on a number of occasions, the Commission does not support children being held in adult custody in any circumstances,[39] consistent with the Convention on the Rights of the Child[40] and the Charter.[41] Children in adult corrections are at significant risk due to their still-developing social skills, cognitive development and strong likelihood of having a background of trauma. In addition, children in adult custody are subject to a range of practices that do not occur in youth justice settings, including regular strip searches and the use of additional instruments of restraint, such as leg restraints, body belts and spitter protective hoods.

Since 2018, the Commission has monitored the placement of seven children in adult custody, five of whom were transferred by the Youth Parole Board. Several of these children have experienced poor outcomes [redacted].

As indicated above, the Commission's strong view is that all children who are alleged to have committed (non-fatal) offences under the age of 18 years should be given the benefit of the Children's Court specialist jurisdiction and tailored sentencing dispositions under the CYFA.

Alternative policy objectives

The Commission recommends that the government prioritise the following policy objectives for Victoria's youth justice system:

- increasing the system's focus on prevention, early intervention and diversion, noting the government's welcome support or in-principle support for the early intervention recommendations of *Our youth, our way*
- increasing the minimum age of criminal responsibility to 14 years and the minimum age of incarceration to 16 years, as recommended by *Our youth, our way*[42]
- reducing the number of children and young people on remand in Victoria by (among other measures) excluding children from the operation of the 2017 and 2018 amendments to bail laws and fully resourcing a statewide 24-hour bail system for children and young people, as recommended by *Our youth, our way*[43]
- further reducing the over-representation of Aboriginal children and young people in the youth justice system, noting the commitments in the Aboriginal Youth Justice Strategy and the government's welcome support for most of the recommendations of *Our youth, our way*
- reducing the over-representation of children and young people of multicultural background in the youth justice system, particularly those of South Sudanese, Māori and Pacific Islander heritage,[44] noting relevant commitments in the Youth Justice Strategic Plan 2020–2030.[45]

Operation of reforms

While the Commission's functions do not include direct monitoring children and young people's experiences of proceedings in the Children's Court or non-custodial sentencing orders, we are able to make the following general comments about the operation of youth control orders, Children's Court diversion and the 'serious youth offences' regime based on *Our youth, our way* and other sources.

[redacted]

Youth control orders

The discussion paper indicates that only 24 youth control orders have been made in the three years to 30 June 2021. Of these, nine have been successfully completed and 15 have been revoked.

While the Commission considers that there is a place for the youth control order in the CYFA's sentencing hierarchy, we note that this order is extremely intensive and requires compliance with numerous mandatory conditions. It may also involve the imposition of several optional restrictive conditions.

The youth control order's low completion rate and high revocation rate may reflect the difficulty many children and young people experience in complying with the conditions of supervised community-based orders. The Commission understands that the work/education requirements of the youth control order are often particularly challenging for young people.

The Commission's *Our youth, our way* inquiry heard that many Aboriginal children and young people found the conditions of supervised bail and community-based orders unreasonable and unrealistic – particularly curfew, residence and non-association conditions. The inquiry found that Aboriginal children and young people frequently received insufficient support to comply with conditions (for example, support to get to appointments), and that this often set them up to fail.[46]

Our youth, our way recommended legislative amendment to create a presumption against the use of restrictive conditions in supervised community orders (including the youth control order), except where necessary and achievable in the individual circumstances of the child or young person.[47] The Commission notes the government's in-principle support for this recommendation.

The Commission also recommends:

- repeal of the curfew, non-contact and social media conditions of the youth control order (sections 409F(2)(e), (f) and (i) of the CYFA)
- removal of the presumption in favour of detention following revocation of a youth control order (section 409R of the CYFA), to enable greater judicial discretion and further opportunities for the young person to remain in the community and avoid a custodial sentence.

Children's Court Youth Diversion service

The Commission is strongly supportive of the Children's Court Youth Diversion service. *Our youth, our way* found that diversion can be an effective response to offending behaviour, which can limit the ongoing involvement of children and young people in the youth justice system.[48] The Commission notes that the Children's Court Youth Diversion service oversaw 1,174 diversions of young people in Victoria in 2020-21, with a 92 per cent success rate.[49]

However, stakeholders told *Our youth, our way* that access to diversion is uneven and inconsistent across the state. This is due to variation in the types of offending considered appropriate for diversion, and the fact that diversion cannot be ordered unless the prosecutor consents. Victoria Legal Aid has also advised the Commission that the requirement for prosecutorial consent makes the process of seeking diversion inefficient and causes unnecessary delay.

In its recently completed *Inquiry into Victoria's criminal justice system*, the Victorian Parliament's Legal and Social Issues Committee similarly found that Victoria Police's provision of prosecutorial consent for court-based diversion varies between offences and across courts. The committee concluded that this was because Victoria Police's policies and decision-making tools 'poorly reflect the legislative basis for diversion programs and offer vague guidance, leaving it to the discretion of individual officers to grant or reject access to a diversion program'.[50]

Our youth, our way recommended that the legislative provisions supporting Children's Court diversion be amended to maximise opportunities for children and young people to obtain diversion, including the creation of a presumption in favour of diversion, removal of the requirement for prosecutorial consent and a review of excluded offences.[51]

The Commission notes the government's in-principle support for this recommendation, and the current evaluation of the Children's Court Youth Diversion service. We strongly encourage the evaluation to take into account the evidence and recommendation in *Our youth, our way*, and would welcome consultation on the evaluation in due course.

Serious youth offences regime

The Commission continues to oppose the serious youth offences regime introduced by the Youth Justice Reform Act, and recommends its repeal, as indicated above.

In terms of the operation of this regime, the Commission understands that the uplift provisions have resulted in reduced access to bail for children charged with Category A and B offences. In addition, delays in the resolution of applications for summary jurisdiction in respect of Category A or B charges can result in children spending unnecessarily lengthy periods in remand, with the risk of further trauma and stigma for the child.

The discussion paper seeks specific feedback on the operation of the limitations to the dual track system introduced by the serious youth offences regime. The effect of these changes was that young people under the age of 21 years who were sentenced by an adult court in respect of a relevant serious youth offence could no longer be sentenced to youth justice custody unless they could show 'exceptional circumstances' beyond immaturity and vulnerability.[52]

The Commission has previously expressed strong support for the reversal of these restrictions on the dual track system, along with the uplift provisions.[53]

The Commission is not aware of any published data indicating sentencing outcomes since the commencement of the Youth Justice Reform Act for young people who would otherwise have been eligible for dual track in respect of Category A or Category B offences. However, we note that, overall, there has been a substantial decrease in the number of dual track sentencing orders made by the Magistrates' Court and the higher courts since 2017–18, from 213 orders in 2017–18 to 66 orders in 2020–21.[54]

In its 2019 report *Rethinking sentencing for young adult offenders*, the Sentencing Advisory Council (SAC) noted that some of the Category A and Category B serious youth offences can cover a wide range of seriousness, and that some charges, such as home invasion or aggravated home invasion, may relate to 'offending typical of immature young offenders'.[55] SAC referred to consultation suggesting that there were at least some young people aged 18 to 20 years who might have received a youth justice centre order but for the operation of the Youth Justice Reform Act.

The Commission agrees with SAC that 'in situations where an offence can cover a wide range of criminality, it may be more effective to allow a judicial officer with access to all the information on the offending, the offender and the available sentencing options to decide the appropriate sentence, rather than limiting judicial discretion'.[56]

More generally, the Commission reiterates its strong support for the dual track system, which reflects research indicating that young adults have more in common neurobiologically, cognitively and psychologically with children than with adults.

The dual track system also recognises the potential vulnerability of young adults in the adult prison system and the importance of providing them with a response based on rehabilitation rather than punishment. This is in the community's interest because once a young person

enters the adult prison system, the prospect of their rehabilitation is reduced and the likelihood of them becoming entrenched in criminal activity increases.

The Commission does not support legislative or non-legislative measures aimed at narrowing eligibility for dual track. *Our youth, our way* indicated the importance of ensuring that Aboriginal young people aged 18 to 20 years, some of whom have long histories of involvement in the child protection and youth justice systems, continued to have access to youth justice custody as an alternative to adult imprisonment.[57]

As the Commission has previously indicated,[58] we support expanding the availability of the dual track system, by increasing the age of eligibility to up to 25 years, as proposed by SAC.[59]

Impact of reforms

Impact on rates of offending, rates of incarceration, community safety and the wellbeing of children in the youth justice system

Crime Statistics Agency data on alleged offender incidents recorded in respect of children aged 10 to 17 years shows that the number of incidents recorded each year remained stable from 2017 to 2020, but decreased in 2021.[60] The timing of this decrease suggests that is it not due to the impact of the Youth Justice Reform Act. Of the data included in the discussion paper, the Commission notes that:

- overall, the number of children aged 10 to 17 years charged with a Category A or B offence has increased since 2016–17[61]
- the number of children aged 10 to 17 years charged with key Category A offences has either remained stable since the commencement of the Youth Justice Reform Act or increased, with a notable increase in the number of children charged with aggravated carjacking from 2019–20 to 2020–21[62]
- since the commencement of the Youth Justice Reform Act, the number of children aged 10 to 17 years charged with carjacking or home invasion has increased.[63]

These snapshots suggest that the Youth Justice Reform Act has had an adverse impact on rates of alleged offending by children in some categories, and has failed in its objective of increasing community safety.

The number of children and young people in youth justice custody has fallen since 2017–18. According to data published by the Australian Institute of Health Welfare (AIHW), from 2017–18 to 2020–21, the number of children and young people (of all ages) in youth justice detention in Victoria on an average day fell from 202.8 in 2017–18 to 163.4 in 2020–21.[64]

While this reduction is extremely encouraging, in the Commission's view, it cannot be attributed to the punitive measures of the Youth Justice Reform Act. As noted above, many of the 2017 amendments were aimed at increasing the likelihood of a custodial sentence, or increasing the length of custodial sentences imposed on children and young people. Such measures are inconsistent with evidence on what works to reduce offending by children and young people.

The Commission considers that the reduction in the number of children and young people in youth justice custody from 2017–18 can be attributed to various positive changes in policy and practice implemented by Youth Justice since 2018. These include implementation of the Youth Justice Case Management Framework, which involves a more structured and individualised way of working that is focused on responding to a young person's assessed risks and needs in order to reduce offending behaviour.

Despite the reduction in the youth justice custodial population, the Commission remains concerned about the wellbeing of children and young people in youth justice custody, particularly those who are on remand. Recently published AIHW data indicates that, of the

163.4 children and young people in detention in Victoria on an average day in 2020–21, 93.2 or 57 per cent were unsentenced.[65] This is a substantial increase from 2017–18, when 37.5 per cent of children and young people in detention on an average day were unsentenced.[66]

Impact of the serious youth offences regime

As indicated above, the serious youth offences regime is inconsistent with the Charter and has not achieved its objectives of reducing offending by children and young people, or increasing community safety. By increasing children's exposure to remand and the adult correctional system, it cannot be said to have had a positive impact on the wellbeing of children and young people. In the Commission's view, the regime is entirely unacceptable.

Impact on Aboriginal or Torres Strait Islander children and young people

The Commission notes that from 2017–18 to 2020–21, the number of Aboriginal children and young people in youth justice detention on an average day fell from 33.5 to 18.5.[67] The detention rate for Aboriginal children and young people aged 10 to 17 years decreased from 18.8 in 2017–18 to 9.6 in 2020–21.[68] In 2020–21 the detention rate for non-Aboriginal children aged 10 to 17 years was 1.5 per 10,000 non-Aboriginal children in this age group.[69]

While Aboriginal children and young people remain substantially over-represented in youth justice detention (and across every point of the youth justice system), these reductions are highly encouraging. In the Commission's view, these improvements have been achieved in spite of the punitive measures introduced by the Youth Justice Reform Act.

The Commission welcomes the government's support for most of the recommendations of *Our youth, our way*. We urge the government to increase the minimum age of criminal responsibility to 14 years and the minimum age of incarceration to 16 years, and to fully implement the recommendations in relation to bail and remand in order to further reduce Aboriginal over-representation in the youth justice system.

As stated above, further reducing this over-representation must remain a clear priority, to change the 'everyday reality that Aboriginal children and young people in Victoria are disproportionately targeted by the police, sentenced by the courts, and removed from their families and communities'.[70]

Impact on children from culturally and linguistically diverse backgrounds

From the data included in the discussion paper, the Commission notes the substantial number of children and young people from culturally and linguistically diverse backgrounds charged with aggravated carjacking and aggravated home invasion in 2018–19, 2019–20 and 2020–21.[71] In 2018–19, two-thirds (12 of 18) of the children charged with aggravated home invasion were children from culturally and linguistically diverse backgrounds.[72]

The Commission continues to see children and young people from multicultural backgrounds over-represented in the youth justice system, particularly those from South Sudanese, Māori and Pacific Islander backgrounds.

In 2020–21, children and young people of African background comprised 38 per cent of the average monthly custodial population in youth justice facilities.[73] This is a substantial increase from 2018–19, when they accounted for 29 per cent of the average monthly custodial population. Children and young people of Māori and Pacific Islander backgrounds comprised nine per cent of the average monthly youth justice custodial population in 2020–21.

The Commission and the Victorian Multicultural Commission have urged the Victorian Government to adopt a whole-of-system approach to address the social and systemic issues multicultural young people face in the youth justice and broader service system.[74] This approach should be supported by a coordinated strategy where initiatives and support for multicultural

young people are continuous and holistic. This should be the focus of efforts to reduce the over-representation of children and young people from culturally and linguistically diverse backgrounds in the youth justice system, rather than retention of the punitive serious youth offences regime.

The Commission notes that the department's draft Justice Strategic Plan, provided to the Commission in November 2021, noted the need to reduce the disproportionate representation of children and young people from African backgrounds across the criminal justice system. We also note the commitments in the Youth Justice Strategic Plan 2020–2030 to deliver culturally appropriate interventions and supports to help address the overrepresentation of cultural groups.

Impact on children and young people of different genders, sexual orientation or sexual identity

The Commission is not aware of any specific impacts of the Youth Justice Reform Act on children and young people of diverse genders, sexual orientation or sexual identity. However, we note that LGBTQI+ young people, and in particular gender non-conforming and transgender young people, can be especially vulnerable in custodial settings.[75]

The Commission's *Our youth, our way* inquiry recommended the implementation of training for all Youth Justice staff in relation to working with LGBTQI+ children and young people, and a review of policies, procedures and accommodation options to ensure that the needs of transgender and gender-diverse children and young people are met.[76] We note the government's support for this recommendation.

Whether additional reform is required

The Commission does not support the retention of the amendments to section 534 of the CYFA made by the Youth Justice Reform Act, which allow the Secretary to grant permission for the publication of images of children who have escaped from youth justice custody. The Commission considers that decisions regarding the publication of identifying images of children should be made by the Children's Court.

Recommendations

In relation to the Youth Justice Reform Act, the Commission strongly recommends:

- repeal of the 'serious youth offences' regime, including the uplift provisions, mandatory parole provisions and limitations to the dual track system
- removal of the presumption that custodial sentences are to be served cumulatively where one of the offences involves an assault on a youth justice custodial worker, or escape from or property damage to a youth justice facility
- removal of assault on a youth justice custodial worker from the mandatory minimum custodial sentencing provisions of the *Sentencing Act 1991*
- repeal of the increased maximum penalties specified for escape and other offences related to youth justice custody
- removal of the requirement for prosecutorial consent to diversion
- repeal of the curfew, non-contact and social media conditions of the youth control order (sections 409F(2)(e), (f) and (i) of the CYFA, respectively)
- removal of the presumption in favour of detention in the event of breach and revocation of a youth control order
- amendment to the provisions relating to restrictions on the publication of proceedings, so

that any decision to permit the publication of an identifying particular of a child or young person who has escaped from a youth justice facility is made by the Children's Court rather than the Secretary of DJCS.

Endnotes

[1] Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, 2021, p 96.
[2] Parliament of Victoria, Parliamentary Debates, Legislative Assembly, 25 May 2017, p 1502.
[3] Letter to [redacted] Department of Justice and Regulation, 20 April 2017, and enclosed submission.
[4] *Our youth, our way*, Chapter 5.
[5] *Our youth, our way*, Chapter 5.
[6] *Our youth, our way*, p 21.
[7] Page 1502.
[8] Page 1502.
[9] Page 1502.
[10] Page 1503.
[11] Page 1502.
[12] Page 1504.
[13] Victorian Government, *Youth Justice Strategic Plan 2020–2030*, 2020, p 16.
[14] *Our youth, our way*, p 96.
[15] *Youth Justice Strategic Plan 2020–2030*, p 16.
[16] *Youth justice review and strategy*, Executive summary, p 15. See also Sentencing Advisory Council, *Does imprisonment deter? A review of the evidence*, 2011.
[17] See Department of Justice and Community Safety, *Youth Parole Board Annual Report 2020–21*, 2021, p 31.
[18] Commission for Children and Young People, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system*, 2017.
[19] Commission for Children and Young People, *Annual report 2018–19*, 2019, p 46; Commission for Children and Young People, *Annual report 2020–21*, 2021, p 56.
[20] Commission for Children and Young People, *Annual report 2020–21*, 2021, p 55.
[21] Lockdowns are isolations under section 488(7) of the *Children, Youth and Families Act 2005*.
[22] Commission for Children and Young People, *Annual report 2020–21*, 2021, p 54.
[23] See Commission for Children and Young People, *Annual report 2020–21*, 2021, pp 56–57.
[24] See *Our youth, our way*, Chapter 13.2.
[25] Recommendations 68–74, pp 500–551.
[26] Recommendation 73, p 544.
[27] Victorian Government, *Government response to the 'Our youth, our way' inquiry*, 2022, pp 29–31.
[28] See *Our youth, our way*, Chapter 5.1.
[29] *Youth Justice Strategic Plan 2020–2030*, p 16.
[30] Victorian Government, *Crime Prevention Strategy*, 2021, p 4.
[31] *Our youth, our way*, p 136.
[32] These include recommendations in relation to education, health and wellbeing, family support and the child protection system.
[33] Recommendation 8 of *Our youth, our way* is to increase the minimum age of criminal responsibility in Victoria to 14 years, while recommendation 9 is to develop and provide a range of culturally responsive and gender-specific programs and services that are tailored to meet the needs of Aboriginal children under the age of 14 years who are engaging in anti-social behaviour, and to address the factors contributing to the behaviour.
[34] As noted in the Youth Justice Strategic Plan 2020–2030 (at page 10), '[a]dolescent brains do not fully develop until young people are well into their early 20s. This means that children and young people have a greater capacity for rehabilitation and change'.
[35] The Commission notes that, prior to the commencement of the Youth Justice Reform Act, homicide offences were excluded from the Children's Court's jurisdiction. The Commission does not recommend any change to this.
[36] Article 37(c).
[37] Sections 23 and 25(3).
[38] *Youth Justice Strategic Plan 2020–2030*, p 11.
[39] See, for example, the Commission's submissions to the department on the Sentencing Act Reform Project (August 2020). The Commission reiterated its views in its recent submission to the Cultural Review of the Adult Correctional System (December 2021).
[40] Article 37(c).
[41] Section 23.
[42] Recommendations 8 and 10. The Commission notes that in the recently tabled *Inquiry into Victoria's criminal justice system*, the Legal and Social Issues Committee of the Victorian Parliament recommended that the minimum age of criminal responsibility in Victoria be increased (recommendation 10).
[43] Recommendations 57 and 59. In its 2022 *Inquiry into Victoria's criminal justice system*, the Victorian Parliament's Legal and Social Issues Committee recommended that the Victorian Government review the operation of bail laws

(recommendation 52) and investigate the establishment of a statewide 24-hour bail system for children (recommendation 59).
[44] In 2020–21, children and young people of African background made up 38 per cent of the average monthly custodial population in youth justice facilities, while children and young people of Polynesian (including Māori) background made up 9 per cent: Commission for Children and Young People, *Annual report 2020–21*, 2021, p 55.
[45] *Youth Justice Strategic Plan 2020–2030*, pp 40–42.
[46] *Our youth, our way*.
[47] Recommendation 67, p 490.
[48] *Our youth, our way*, p 445.
[49] *Government response to the 'Our youth, our way' inquiry*, p 26.
[50] Finding 20: Parliament of Victoria, Legal and Social Issues Committee, *Inquiry into Victoria's criminal justice system*, Volume 1, 2022, p 227.
[51] Recommendation 56, p 450. In its *Inquiry into Victoria's criminal justice system*, the Victorian Parliament's Legal and Social Issues Committee recommended that the Victorian Government review the requirement for prosecutorial consent to Children's Court diversion (recommendation 24).
[52] The Commission notes that, according to the second reading speech for the Youth Justice Reform Bill, these provisions were intended to apply only to young people aged 18 to 20 years, however they were drafted as applying to all young people under the age of 21 years (see section 32 of the Sentencing Act and the definition of 'young offender' in section 3).
[53] See the Commission's submissions to the department on the Sentencing Act Reform Project (August 2020).
[54] Department of Justice and Community Safety, *Youth Parole Board Annual Report 2020–21*, 2021, p 35.
[55] Sentencing Advisory Council, *Rethinking sentencing for young adult offenders*, 2019, p 78.
[56] *Rethinking sentencing for young adult offenders*, p 78.
[57] *Our youth, our way*, pp 174–175.
[58] See the Commission's submission on the Sentencing Act Reform Project (August 2020).
[59] *Rethinking sentencing for young adult offenders*, p 65.
[60] Crime Statistics Agency, *Alleged offender incidents and rate per 100,000 per population of youth offenders by sex and age*, 2022.
[61] See graph on page 16 of the discussion paper.
[62] See graph on page 17 of the discussion paper.
[63] See graph on page 20 of the discussion paper. The Commission notes that these increases may be explained in part by the fact that the offences of carjacking and home invasion were introduced into the *Crimes Act 1958* in 2016, and it may have taken some time for police to become aware of them.
[64] Australian Institute of Health and Welfare (AIHW), *Youth Justice in Australia 2020–21*, 2022, Supplementary data tables, Table S82a.
[65] AIHW, *Youth Justice in Australia 2020–21*, 2022, Supplementary data tables, Table S111.
[66] AIHW, *Youth Justice in Australia 2020–21*, 2022, Supplementary data tables, Table S111.
[67] AIHW, *Youth Justice in Australia 2020–21*, 2022, Supplementary data tables, Table S82a.
[68] AIHW, *Youth Justice in Australia 2020–21*, 2022, Supplementary data tables, Table S83a.
[69] AIHW, *Youth Justice in Australia 2020–21*, 2022, Supplementary data tables, Table S83a.
[70] *Our youth, our way*, p 21. See the data set out on p 21 showing, for example, Victoria Police is more likely to arrest and detain, and less likely to caution, Aboriginal children and young people than their non-Aboriginal peers; Aboriginal children and young people are overrepresented in every category of Youth Justice court order, including supervised bail, remand, community-based sentences and custodial sentences; and Aboriginal children and young people enter Youth Justice supervision at a younger age than non-Aboriginal children and young people.
[71] Graphs on pages 17 and 19 of the discussion paper.
[72] The Commission queries whether these figures may in fact be higher, given that the Crime Statistics Agency collects data based on country of birth rather than cultural heritage or background.
[73] Commission for Children and Young People, *Annual report 2020–21*, 2021, p 55.
[74] Letter to the Hon. Natalie Hutchins MP, Minister for Crime Prevention, Corrections and Youth Justice, 29 September 2020.
[75] *Our youth, our way*, pp 231–232.
[76] Recommendations 21(e) and (f), p 233.