

Response to the Victorian Government's Discussion Paper on Juvenile Diversion

**'Practical Lessons, Fair Consequences:
Improving Diversion for Young People in Victoria'**

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The authors generally endorse the *Smart Justice for Young People Coalition's* submission to this consultation process, including each of the 11 principles the Coalition has identified as being fundamental to the effective implementation of juvenile diversion in Victoria:¹

- Principle 1:** Community safety requires long-term solutions to both prevent children & young people from offending and to stop them progressing through the criminal justice system.
- Principle 2:** Children and young people will be diverted from the justice system before court proceedings are initiated 'whenever appropriate and desirable'², and after court proceedings have been initiated (i.e. post-summons or charge). A child should not be arrested and criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter. Where criminal proceedings are appropriate, the diversionary principles in the *Children Youth & Families Act 2005* (Vic) apply, including custody being a measure of last resort.
- Principle 3:** A primary focus of diversion is supporting and rehabilitating children and young people who are vulnerable or at risk of coming into contact with the youth justice system, by managing and reducing their identified risk factors and strengthening and sustaining protective factors.
- Principle 4:** Consistent and equitable access for young people to diversion options requires a legislated diversion framework covering both pre-court options (i.e. police cautioning) and court options.
- Principle 5:** The rights, needs and best interests of the young person will be taken into account in all decisions involving a young person. Diversion measures are available to all children and young people regardless of race, sex, ethnic origin, status, religion, ability and place of residence.
- Principle 6:** Diversion programs are flexible, culturally safe and relevant and tailored to individual needs, gender, and circumstances of the child or young person within the context of their culture, family, community and peers. Culturally specific diversion programs are offered for particular cultural groups who are overrepresented in the youth justice

¹ Smart Justice for Young People, *Entrenching diversion in the youth justice system: Smart Justice for Young People's Response to Diversion Discussion Paper "Practical Lessons, Fair Consequences: Improving Diversion for Young People in Victoria"* (Melbourne, 3 October 2012) 3-4.

² "Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected" (From CRC Art 40).

system. Koori specific diversion initiatives and programs with Koori staff members are made available as an option for young Koori offenders.

Principle 7: Diversion options for a young person who has offended should be focused on supporting and encouraging them to accept responsibility & be accountable for their actions.

Principle 8: Young people should be supported to engage meaningfully with and have their voices heard in any decisions made during the referral and the diversion process. Children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice. Young people should be supported to understand and make informed choices about whether to participate in any diversionary programs.

Principle 9: Police must responsibly exercise their discretionary power to divert a young person from formal proceedings, on the basis of established criteria and practice guidelines, taking into account the young person's specific circumstances and needs.

Principle 10: An integrated whole-of-government and whole-of-community services system approach to diversion requires innovative approaches to funding that recognise the interface between legal and welfare interventions and the savings that will be made from long-term and appropriate levels of resourcing in this area.

Principle 11: Diversion programs, initiatives and services are grounded in evidence and are regularly evaluated to ensure effectiveness and efficiency. All evaluations and any program design must be informed by the perspectives and voice of young people involved in or affected by diversionary schemes.

In addition, the authors wish to provide a further response to questions 1, 10, 11 and 14 of the Discussion Paper, based on their recent (unpublished) research examining access to existing youth diversion programs in Victoria.

Question 1. In what circumstances do you think diversion is an appropriate response to a young person who has committed crime?

Diversion should be considered in **all cases involving juveniles** within the Victorian Children's Court jurisdiction, with exception of certain serious sexual offences³ and causing serious injury

³ Eg *Crimes Act 1958* (Vic) s 38 (rape); s 40(1) (assault with intent to rape); s 53 (administration of drugs etc.); s 55 (abduction or detention).

intentionally.⁴ In our view, sentencing and adjudication by the Court should be conducted as a last resort.

It is well established that juvenile crime is predominantly episodic and young people 'grow out' of offending behaviour over time.⁵ Yet, the literature has also repeatedly shown that the stigma associated with early offending can remain with young people throughout their lives, impacting their social networks, relationships, and education and employment opportunities.⁶ Research suggests that the greater the intensity of criminal justice interventions in young people's lives, the stronger the criminogenic impact and the greater the negative impacts later in life.⁷

On the other hand, where young people can be diverted away from the criminal justice system they experience lower levels of recidivism compared to those who have been dealt with by the courts.⁸ More intensive interventions by the juvenile justice system may actually perpetuate youth offending. It is therefore important that cases that could more appropriately be remedied in informal settings within the community are able to bypass the court adjudication process.

Question 10. What is your experience of the accessibility of diversion options?

Limited diversionary pathways currently exist for young people in Victoria. Victoria's approach to juvenile diversion is characterised by short-term funded programs that are geographically based, and primarily reliant on the initiative and resources of individual communities, which limits equitable access for all Victorian young people. For example, the ROPES program is unfunded and currently only operates throughout metropolitan Melbourne and in a small number of country regions. RightStep operates solely in one small area in the south-east of Melbourne, is funded by a

⁴ *Crimes Act 1958* (Vic) s 15.

⁵ See eg Chris Cunneen and Rob White, *Juvenile justice: Youth and crime in Australia* (Oxford University Press, 2002); Satyanshu Mukherjee, *Age and Crime*, (Australian Institute of Criminology, 1983); Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (2011) *Trends and Issues in Crime and Criminal Justice* No. 409, Australian Institute of Criminology.

⁶ Shawn Bushway, 'The Impact of an Arrest on the Job Stability of Young White American Men', (1998) 35 *Journal of Research in Crime and Delinquency* 454; Jamie Fader, 'Conditions of a successful status graduation ceremony: Formerly incarcerated urban youth and their tenuous grip on success' (2011) 13 *Punishment and Society* 29; Uberto Gattiard Tremblay and Frank Vitaro, 'Iatrogenic effect of juvenile justice' (2009) 50 *Journal of Child Psychology and Psychiatry* 991; Devah Pager, 'The mark of a criminal record' (2003) 108 *American Journal of Sociology* 937; Rick Ruddell and L. Thomas Winfree, 'Setting aside criminal convictions in Canada: A successful approach to offender reintegration' (2006) 86 *The Prison Journal* 452.

⁷ Gatti, Tremblay and Vitaro, above n 6.

⁸ Troy Allard et al, 'Police Diversion of young offenders and Indigenous over-representation' (2010) *Trends and Issues in Crime and Criminal Justice* No.390, Australian Institute of Criminology; Teresa Cunningham 'Pre-court diversion in the Northern Territory: Impact on juvenile offending' (2007) *Trends and Issues in Crime and Criminal Justice* No.339, Australian Institute of Criminology; Hennessey Hayes and Kathleen Daly, 'Conferencing and re-offending in Queensland' (2003) 37 *Australian and New Zealand Journal of Criminology* 167.

philanthropic trust as a short-term pilot program, and despite its successes to date, its future remains uncertain.

The limited programs which do exist incorporate eligibility criteria that exclude particular young people, for example, those involved in the child protection system, and those who engage in repeat acts of low-level offending:

- The Youth Support Service excludes current clients of Youth Justice or the Department of Human Services (including those in child protection) from being referred to the program, which is of concern given the high correlation between young people's involvement in the criminal justice and child protection systems.⁹
- The ROPES program is restricted to young people who have no prior involvement in the program and have had no more than two prior cautions, where the offence is considered relatively minor and the young person is deemed to be unlikely to reoffend.

Consequently, a 'one chance' diversionary system applies to low-level juvenile offenders in Victoria. For those young people who have moved beyond the early stages of low-level offending virtually no diversionary pathways currently exist. Of concern, diversionary options are particularly scarce in regional and rural communities. Where diversion programs do exist, these can be limited by a paucity of community-based interventions, including accommodation services, or mental health and drug and alcohol programs.

Question 14. Are there any other strengths, limitations or changes that have not been identified? If so, please describe.

A further limitation of the state's approach to diversion, which is only briefly highlighted by the discussion paper, is that diversion in Victoria is almost solely dependent upon police discretion. Specifically, Victoria Police acts as a primary gatekeeper to the ROPES program, as well as to the juvenile justice system more broadly, deciding who will be diverted through informal and formal cautions, and which young people will continue to be processed through the justice system, via the courts.

Victoria Police currently has the lowest rate of diversion among all Australian states and territories,¹⁰ particularly in relation to the issuing of cautions. Our research demonstrates that since 2006 there

⁹ Devon Indig et al, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice, 2011); Dianna Kenny and Paul Nelson, *Young offenders on community orders: Health, welfare and criminogenic needs* (Sydney University Press, 2008); Hilary Little and Tal Karp, *Sentencing Children and Young People in Victoria* (Sentencing Advisory Council, 2012).

¹⁰ Kelly Richards, *Juveniles' contact with the criminal justice system in Australia* (Australian Institute of Criminology, 2009).

has been a downward trend in the proportion of cautions issued to young offenders in Victoria for all offence types other than drug offences (which have their own unique cautioning program). Our research also suggests an ad hoc approach to cautioning across the state, with formal cautioning rates ranging widely across metropolitan and regional areas.

Question 11. Within current resource constraints, what measures could be implemented to improve availability and use of diversion programs?

The introduction of a Children’s Court-based legislated diversion scheme would provide a coordinated approach to youth diversion in Victoria. An effective juvenile diversionary framework requires multiple referral pathways to ensure young people are provided with every opportunity to be diverted away from the justice system, at multiple points along the way. The introduction of Children’s Court–based legislative scheme would enable judicial review of the police as gatekeepers. It would also compel the court to consider diversion as an option for all young people prior to adjudication, including repeat offenders and those young people engaged in more serious offending.

However, if the State Government is committed to reducing recidivism amongst young people and breaking the cycle of crime before young people become entrenched in the adult corrections system, it is vital that such a legislated diversionary framework be matched with adequate and sustained resourcing. In NSW, where such court-based legislative schemes exist, concern remains regarding the diversionary options available given limited program rollout and funding.¹¹ The most successful diversion schemes are those that provide coordinated and more intensive and holistic individualised caseworker support,¹² such as the RightStep program in south-east Melbourne.

Special consideration must also be given to the rural and regional context. Appropriate service planning and delivery for regional young people requires a focus on coordinated programs that acknowledges the local context, including consideration of the *availability* of services, the *accessibility* of services (transport and accessibility for young people from diverse backgrounds) and *acceptability* of services (respecting community values and ensuring privacy and confidentiality).¹³

¹¹ Youth Justice Coalition, *Review of the Young Offenders Act and Children Criminal Proceedings Act: Submission to the Department of Attorney General and Justice* (Youth Justice Coalition, 2011).

¹² Australian Human Rights Commission, *Best practice principles for the diversion of juvenile offenders*, Human Rights Brief No.5 (Australian Human Rights Commission, 2001); Harry Blagg, *Youth Justice in Western Australia* (Report prepared for the Commissioner for Children and Young People, Western Australia, 2009); Melissa Bull, *Just treatment: A review of international programs for the diversion of drug related offenders from the criminal justice system* (Department of the Premier and Cabinet, 2003); Megan Passey, ‘The Magistrates Early Referral Into Treatment (MERIT) Pilot Program: Court Outcomes and Recidivism’, (2007) 40 *Australian and New Zealand Journal of Criminology* 199.

¹³ Lisa Metsch and Clyde McCoy, ‘Drug treatment experiences: Rural and urban comparisons’ (1999) 34 *Substance Use and Misuse* 763.