

COVID RECOVERY:

YOUNG PEOPLE

The isolating effect of COVID-19 has been felt acutely by Victoria's young people, with lockdown measures disrupting the routines and connections that keep young people safe and engaged. Many vulnerable Victorians will be exposed to increased risk of family violence, mental health pressures due to financial and health stresses and financial disadvantage as a result of the pandemic. For children and young people, who have less agency and fewer resources to protect themselves, especially in the context of increased social isolation, the impact may be more severe.

Therefore, the community legal sector and youth advocacy services are concerned that as more children and young people are impacted by the risks and changes from COVID-19, there may be other longer-term consequences experienced by these cohorts. For example, young people may become disengaged from education, and as a result, we anticipate an increase in interactions with the justice system – especially amongst already marginalised groups such as Aboriginal and Torres Strait Islander children, and children from refugee and newly arrived culturally and linguistically diverse backgrounds. A just and equitable recovery from COVID-19 must be one that protects, rather than punishes, children and young people at risk of coming into contact with the justice system.

We know that early experiences with the criminal justice system is a strong risk factor for further offending, and we know that this risk is heightened for young people who are socially marginalised, who have experienced violence or abuse, or who are disengaged from the education system. The restrictions put in place to manage COVID have created and exacerbated these risk factors, with already disadvantaged young people facing isolation at home and new barriers to staying engaged with school.

There are multiple points at which interventions can help at-risk young people to avoid or leave the justice system. The community sector, including CLCs, focuses on trying to intervene before young people get into serious trouble, educating children about their legal rights and responsibilities, assisting young people to try and de-escalate legal problems, and connecting them with a range of services they may need, including mental health, homelessness and family violence supports.

The deeper a young person's involvement with the justice system becomes, the harder it is to help them get back on track. CLCs see what happens when young people are imprisoned: too often, the adult clients with the most complex legal problems and needs were first caught up in the justice system as children, and were never supported to find their way out of the system. Instead, they were locked up, criminalised, and further ostracised from the social, educational and other supports that could have kept them safe.

The COVID recovery must include proactive steps to strengthen the interventions that take and keep young people away from the criminal justice system, or we will risk leaving our most vulnerable children and young people behind.

AVOIDING INJUSTICE FOR YOUNG PEOPLE IN THE COVID RECOVERY

Some parts of the Victorian Government's response to the COVID-19 pandemic have unfairly impacted on young people, and will impact them in the COVID recovery. Usually, Victoria's infringements system recognises that young people are neither as morally responsible for illegal conduct nor as financially capable of paying fines as adults. However, young people have been hit with the same COVID-19 fines as adults, with disproportionately severe consequences. Meanwhile, in the child protection context, social distancing measures are impeding families' and carers' ability to address protective concerns and meet other requirements necessary to achieve family reunification. The barriers faced by parents, families and carers have unfair flow-on impacts for children, whose ability to maintain relationships is threatened by events beyond their control.

COVID-19 FINES

Police have been fining children and young people for breaches of COVID restrictions at higher rates in Victoria than in other states¹, with some young people reporting that they feel targeted and numerous reports of children being fined rather than warned by Victoria Police. Fining children and young people to the same degree as adults fails to recognise either the lesser moral culpability children have for their actions or their lower financial capacity to pay fines, and risks unnecessarily pushing young people into the justice system. Fines will continue to be issued by Victoria Police as long as there are COVID-related restrictions in place, and the COVID recovery must include measures to protect young people from the disproportionately severe consequences of infringements.

In the Children's Court, there are limits on the amount that a Magistrate or Registrar can fine a young person². In this context, a COVID-specific fine issued to a child is 10 times greater than what a court could impose if they were charged and found guilty of breaching the same COVID-19 directions³. The reduced fines for children in Victoria's laws recognise children's reduced financial capacity to pay fines, and that fining children any greater amount is setting them up to fail. The real aim of

the infringements system's application to children is education and rehabilitation – not punishment in the form of a financial burden they can't meet, and stress and anxiety about an issue they can't address.

There are also procedural protections in place for children who are fined. Ordinarily when a child cannot pay a fine, the fine will be registered with the Children's Court through the specialist CAYPINS process. This system allows for enforcement orders to be made in a way that does not result in criminal proceedings or a criminal record for a child, and the Registrar responsible for administering the CAYPINS process has indicated that COVID-19 fines issued to children can be registered on the database. However, as at October 2020, Victoria Police have not adopted the practice of registering COVID-19 fines they issue to children and young people with CAYPINS – meaning that the fines can continue to be enforced by Fines Victoria. The experience of receiving escalating infringement and warrant notices can, for a child perhaps even more so than an adult, be extremely stressful, especially in the frequent circumstances of the child having no financial capacity to meet the fine.

Fines Victoria has resumed its enforcement of infringements after a moratorium in the early months of the COVID pandemic. Because Victoria Police are not registering COVID fines with CAYPINS, children and young people are and will continue to be pursued through the court system for fines they cannot pay. This will use up limited court resources and cause significant stress for young people and their families, without delivering any discernible benefit to the state given the inability for most young people – especially those already experiencing disadvantage – to pay their fines. The Federation recommends that all outstanding infringements issued to children and young people for breaches of public health restrictions are retracted and instead prioritise a service, education and health-based response.

Recommendation: Withdraw all COVID-related fines issued to children and young people aged 18 and under, and prioritise a service, education and health-based response.

FAMILY PRESERVATION AND REUNIFICATION

When families come to the attention of the Department of Health and Human Services ('DHHS') for child protection concerns, requirements can be placed on parents, families or carers to demonstrate their capacity to care for the children in question in order to retain custody or, if children have been removed, to regain caring responsibilities. In the case of many vulnerable children impacted by the child protection system, their carers or parents may be on bail, on parole, undertaking Community Corrections Orders, or in prison.

Laws relating to child protection and the separation of families by the government are built around the fundamental importance of ongoing and consistent contact between children and families to children's development and recovery. For Aboriginal children and families – who are vastly over-represented in Victoria's child protection system - the Aboriginal Child Placement Principle recognise the importance of preserving Aboriginal children and young people's connections to their own culture, family, kinship networks and community for their wellbeing.

Measures introduced in response to COVID have seriously impacted the ability of particular cohorts to meet these requirements. The suspension of in-person visits to prisons, as well as the general restrictions on travel and socialising, have meant that many parents and carers involved in the child protection system cannot currently communicate with their children, or can only do so via phone or video. This is an extremely challenging, and often impossible, situation when contact is with babies, young children or those with complex communication needs. It is also the case that many families/carers don't have access to video facilities and consequently cannot exercise that option even when it is afforded.

In many cases, contact between parents or carers and children is mediated by other parties, such as extended family members or service providers. The COVID crisis and public health measures have meant that these intermediaries are unavailable or unwilling to facilitate contact. Not only does this impact on the emotional bond that these contact mechanisms are designed to preserve, but in some cases, the resulting lack of contact is interpreted by authorities (such as DHHS or the courts) as the parent/carer's disinterest or inability to contact their children. Aboriginal families face particular disadvantage in this respect, as kinship carers are often of advanced age and immunocompromised.

Parents or carers may also be required to address DHHS concerns about their capacity to care for their children by, for example, attending residential rehabilitation facilities, completing supervised urine drug screens, attending counselling and engaging with other support services. The closures and reduced capacity of many such services during this time has meant that people subject to these requirements are unable to meet them – again with consequences for themselves and their children.

If addressing these issues isn't an immediate part of the Victorian Government's COVID recovery, some of Victoria's most vulnerable children will feel the impacts of this crisis in a very specific and unjust way for the rest of their lives. The CLC sector asks the government to take urgent steps to amend the *Children, Youth and Families Act 2005* to allow the courts to extend the timeframes for parents and carers to meet family reunification requirements, and to support families to reinstate meaningful contact with their children. Already struggling families should not be required to shoulder the burden of the current service constraints⁴.

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Recommendation: Amend the *Children, Youth and Families Act* to allow the extension of family reunification obligations, and support families/carers to safely reinstate meaningful contact with their children.

ADOLESCENT VIOLENCE

Risk factors for family violence have been exacerbated during the COVID restrictions period. Not only has this been the case for victims but also for adolescents using family violence in the home. Matters involving young people using family violence are heard in the Melbourne Children's Court, where a specialist approach is taken to respond to young people's behaviour in a rehabilitative manner. This can involve, for example, identifying factors within the young person's life that may be causing the violent behaviour, and linking them with support services to address these issues.

As part of its response to COVID-19, the Children's Court developed a practice of adjourning matters for eight weeks as a means of minimising health risks to young people and their families. However, this has had the side effect of young people going for long periods of time without the ability to speak to a lawyer or to engage with other support services they may have otherwise been linked in with following an appearance at court. This created concerns that young people – already isolated by the public health measures from school, extended family and friends, and at increased risk of violence at home – were missing out on the opportunity for a positive intervention through the court process.

Addressing this access gap should be a key part of any COVID recovery plan. The initiative led by the CLC sector and Victoria Legal Aid to try and reach young people before, or as soon as possible after, their initial court date by streamlining an early referral processes with the court is an example of how to close this access gap. Through this process, the family violence registry at the Children's Court obtains the consent of young people and their families to pass on their contact details to their lawyers. The legal services are then able to proactively make contact to provide legal advice and referrals to relevant non-legal services at an early stage, before the conflict escalates further.

These moves toward pre-court referrals and advice for parties in family violence matters constitute a significant change in practice. Whereas previously, parties would routinely only receive advice on the day of court (which could be some weeks after a violent incident in the home), this new opportunity for advice, advocacy and referral may increase the safety of young people and their families from the point of crisis. The Federation recommends that this process be embedded through formal processes and resourcing in the COVID recovery, and should be expanded to all Children's Courts across Victoria.

Recommendation: Support the development, retention and expansion of pre-court referrals and advice for parties to family violence matters heard at the Children's Court.

INTERVENING EARLY TO REDUCE MARGINALISATION AND AVOID THE 'REVOLVING DOOR' OF JUSTICE

It has been well established that, particularly for already vulnerable or marginalised groups, early contact with the justice system sets children and young people up for failure. Once they have entered the criminal justice system – especially if they are formally arrested and placed on remand – it is very, very difficult for children to find their way out. Recognising this, cautioning and diversion programs aim to intervene at the point of initial arrest to link at-risk children to services to support behaviour change and, often, re-engagement with education and social connections. CLCs focus on early intervention services for young people, building their capacity to understand legal rights and responsibilities, the consequences of getting into trouble with the law, and where they can turn to help with an issue that might otherwise push them into offending behaviour – such as experiencing family violence or other forms of abuse.

COVID has caused huge disruption to the structures and supports that keep children out of the justice system – and has increased the risk of factors that push them into it, including poorer mental wellbeing, financial disadvantage, poverty and family violence. The CLC sector is concerned that the impacts of COVID on young people may lead to an increase in interactions with the justice system. Now more than ever, early interventions must be available and proactively used for all children and young people to stop an escalation in the 'revolving door' of youth justice.

CAUTIONING AND DIVERSION

Victoria's system for responding to antisocial behaviour by young people is designed to provide multiple points of exit, at which intervention can pull young people out of the path of trouble and help them get back on track. These points of exit are controlled by decision-makers within the legal system. After families and educational institutions, the police carry the responsibility for the earliest exit pathways: police decide whether to stop a young person, whether to caution them, whether to arrest them, whether to press charges, and whether to advocate for bail or remand. Some of these decisions are contained, to a limited extent, by laws guiding their use, but police retain a considerable degree of discretion.

The CLC sector is concerned that Victoria Police have, on more occasions than is justified, taken a punitive response to young people alleged to have breached the COVID restrictions. Victoria Police has an important role in law enforcement and have the capacity to tailor their approach to children that consistently takes into account their age and stage of development.

Although Victoria is entering the COVID recovery period, it will take time for the fracturing of young people's support networks to heal, and risk factors for contact with the justice system will remain heightened for some time, particularly among cohorts and families who were already disadvantaged prior to the pandemic.

To avoid this translating into rising numbers of children and young people becoming trapped in the youth justice cycle, Victoria Police must exercise the discretionary powers that they alone hold to redirect young people away from the justice system at each stage they can do so: warning and referring instead of cautioning, cautioning instead of charging, summoning instead of arresting, and pushing for bail instead of remand. This should be facilitated through the development of a comprehensive Victoria Police Manual Procedure and Guideline dedicated to dealing with a child that consolidates disparate advices to members found across the manual. This guidance should acknowledge the need to address overrepresentation cohorts including Aboriginal and Torres Strait Islander Children and children with a history of child protection and embed presumptions in favour of cautions, diversion and summons for these groups of children. The Federation also acknowledges the partnership between WEstjustice and Victoria police through the Youth Early Intervention Pilot currently in its design phase.

Victoria Police must exercise their discretionary powers to caution young people and divert them away from the justice system, to avoid an increase in the number of children and young people getting trapped in the youth justice cycle.

The CLC sector also supports that the requirement for Victoria Police or prosecutions to consent to a diversion could be removed from the *Criminal Procedure Act 2009 (Vic)*. The Magistrates' Court of Victoria Annual Report 2015-16 internal review of diversion programs formed the view that: 'diversion should be available at the instance of a magistrate and not initiated by notice of a member of Victoria Police' and that diversion should not be subject to veto by the prosecution.⁵

Recommendation: Improved exercise of discretionary powers by Victoria Police to divert children and young people from the justice system including through the development of a comprehensive Victoria Police Manual Procedure and Guideline.

Recommendation: Remove the requirement for Victoria Police or prosecutions to consent to a diversion in the *Criminal Procedure Act 2009 (Vic)*, making diversion available at the instance of a magistrate.

TAKING AND KEEPING CHILDREN OUT OF PRISON

There are some circumstances in which children and young people will end up in custody. As the risk factors for young people coming into contact with the justice system increase as a result of COVID, it is more important than ever that custody is considered a last resort.

Children under 14 should never be incarcerated: they are too young to fully understand the consequences of their actions, and they are too vulnerable to the severely adverse mental, social and physical consequences of imprisonment. At the same time, the significant decline in the youth prison population over the course of the pandemic indicates that the pre-COVID levels of incarceration – particularly in the remand context – were unnecessarily high. Recent research by the Sentencing Advisory Committee indicates that some young people are imprisoned pending sentencing because they don't have a safe place to live. Prison should never be the answer to children being unsafe at home, and there are changes that can and must be made to improve bail in the youth justice context – especially in the wake of such significant disruptions to young people's lives.

RAISE THE AGE

Community legal centres, charities, social service organisations and advocates from across Victoria and Australia have been calling for the minimum age of imprisonment to be raised from 10 to 14 for decades, yet children who cannot even sign up for most social media accounts are still being put behind bars. This is unacceptable and must be changed. The CLC sector has welcomed the recent announcement made by the Australian Capital Territory to raise the age of criminal responsibility. Victoria can and must take the lead here, or risk entrenching disadvantage – and criminal behaviour – amongst its most vulnerable young people, including Aboriginal and Torres Strait Islander children and young people, girls and young women, and children who are also involved in the child protection system.

The impacts of prison on young people, the disproportionate representation of already

disadvantaged children within the justice system, and the clear links between incarceration and further marginalisation and offending have been established and set out for government repeatedly and comprehensively in recent years. We call attention particularly to the submissions made by the Federation, a number of CLCs and the Victorian Aboriginal Legal Service to the Council of Attorney-Generals' 2020 Review of the Age of Criminal Responsibility; to the *Ngaga-dji* report published by Koorie Youth Council in 2019; and to the many reports and submissions prepared by the Raise the Age campaign.

Children under 14 have always been too young to be imprisoned, but with the economic impacts, social isolation and the closure of schools as a result of COVID-19 increasing risk factors for criminalisation, it is vital that Victoria acts now to prevent more children ending up in prison, where no child should be.

Recommendation: Raise the minimum age of imprisonment in Victoria to at least 14 years.

BAIL AND REMAND

Recent research by the Victorian Sentencing Advisory Council investigated the outcomes of cases when children are held on remand.⁶ Since June 2010, the average daily number of unsentenced children held in custody increased by 106%.⁷ The CLC sector is deeply concerned by the data which shows two-thirds of the children held on remand do not ultimately serve custodial sentences.⁸ This means that children are being incarcerated in circumstances where their conduct did not warrant imprisonment. This is supported by the significant decline in the number of young people remanded in custody since March 2020. This decline clearly shows that children and young people can be kept out of prison while awaiting sentencing without compromising their safety or the safety of the community. This provides a strong rationale for not allowing the remand population to return to pre-COVID levels.

Another trend of concern to the CLC sector is the continuing remand of chronically overrepresented groups of children, for example, children in Out of Home Care and children from refugee backgrounds and/or new and emerging culturally and linguistically diverse communities. The decisions over the past several months which have resulted in a reduced remand population should also extend to these overrepresented and vulnerable groups of children and young people.



The harmful effects of incarceration on children are not limited to post-sentence imprisonment: even a short period in custody alienates and marginalises children, disrupting connections to community, education and family, and compounding self-perceptions of being a 'bad' kid which only serve to make further anti-social behaviour more likely. At the same time, the rehabilitative and educational programs that are used to help young people serving sentences in prison are often not available to those on remand.

Even more concerning is the likely possibility that some young people are being refused bail and held on remand because they do not have safe accommodation. Although Victoria's laws stipulate that bail must not be refused for a child solely due to a lack of adequate accommodation,⁹ both the Sentencing Advisory Council¹⁰ and the Armytage & Ogloff review of Victoria's youth justice system in 2019 concluded that young people without adequate housing are more likely to be remanded.¹¹ Another related issue is the lack of support services – including housing – for young people arrested outside of business hours. The Central After-Hours Assessment and Bail Placement Service (CAHABPS), which assesses the suitability of a child for bail and assists with organising accommodation, is not a 24-hour service. This means that some young people are not able to be linked up with services they may need to be released into the community, and are instead held in custody.¹²

COVID has caused huge disruptions to young people's lives, but has also shown that the remand of many young people whose behaviour doesn't

even justify imprisonment can be avoided. The CLC sector supports the Sentencing Advisory Council's recommendation that government action should prioritise efforts to ensure that all children have access to specialist bail decision-makers, and to adequate bail support, supervision and accommodation services, especially outside of business hours.¹³ CLCs also recommend the expansion of the specialised Children's Court to headquarter courts across Victoria with dedicated magistrates trained in youth crime, child protection and causes of AVITH, to mitigate against the risk of 'postcode justice' disadvantaging young people in regional and rural areas who have come into contact with the justice system during the COVID period.

Recommendation: Ensure that all children have access to specialist bail decision-makers, and to adequate bail support, supervision and accommodation services, on a 24-hour, 7 days a week basis.

Recommendation: Expand the Children's Court to headquarter courts across Victoria with dedicated magistrates trained in youth crime, child protection and causes of AVITH.

REFERENCES

- 1 See <https://www.theage.com.au/national/victoria/ahead-on-penalties-victoria-leads-nation-on-covid-19-lockdown-fines-20200527-p54x0d.html>
- 2 A child under 15 years can only be fined up to \$165.20 for a single offence and a child aged 15 to 17 years can only be fined up to \$826.6
- 3 In relation to the new fine of \$4,967 for taking part in unlawful gatherings, the fine is 30 times higher than what a child under 15 could be fined by the Children's Court and is six times higher than what a 15 to 17-year old could be fined.
- 4 See <https://www.legalaid.vic.gov.au/about-us/news/more-work-needed-to-achieve-safe-and-certain-homes-for-victorian-children>
- 5 Magistrates' Court of Victoria, Annual Report 2015-16 (30 September 2016) 12,14.
- 6 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020).
- 7 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), ix.
- 8 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), x.
- 9 *Bail Act 1977* (Vic) s3B(3).
- 10 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), x, 53.
- 11 Ogloff and Armytage, 163.
- 12 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), 28.
- 13 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), 70.