



SUBMISSION

Prepared by South-East Monash Legal Service Inc. for the
Senate Standing Committees on Legal and Constitutional Affairs
In relation to the
Inquiry into Australia's youth justice and incarceration system

Date submitted: 10 October 2024

Head Office

A: 5 Osborne Avenue, Springvale
Vic 3171
P: (03) 9545 7400
PO Box 312, Springvale, VIC 3171
W: smls.com.au

Branch Office

A: Suite 1, Level 2, 64 Victor Crescent, Narre Warren
Vic 3805
P: (03) 9038 8002
ABN: 96 206 448 228 | Reg: A0013997D



Our organisation

Established in 1973, South-East Monash Legal Service ('**SMLS**') is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community within the City of Greater Dandenong, the City of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit and Family Court, and Victims of Crime Assistance Tribunal.

SMLS has one of the oldest clinical legal education programs in Australia, in partnership with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree.

SMLS has an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in.

SMLS provides integrated, wrap around services through our Support Connect Integrated Program (SCIP), where clients receive legal assistance, assistance from social workers and financial counselling through a partnership with Good Shepherd.

SMLS also has a significant policy, advocacy, and law reform program, contributing to reforms in family violence laws and practices, access to civil procedure reforms, employment law, sexual assault and victims of crime, youth law, gambling and electronic gaming machines and other legal topics relevant to our service delivery and the needs of our community.

SMLS and Youth Justice

In addition to the above, SMLS delivers several programs specifically tailored to the needs of young people including our Sporting Change program which is a preventive community development program that contributes to young people engaging constructively in their community and in society by using sport to teach young people about the law. The program also increases access to justice for young people through an integrated school lawyer based within the school environment. We also deliver community legal education on healthy relationships with a focus on young people from a CARM background with various schools and youth services across the south east.

Acknowledgement of Country

SMLS acknowledges the Bunurong People and the Wurundjeri People, the traditional owners of the land where we work, and First Peoples language groups and communities across Victoria and Australia. We pay our respects to Elders past and present. We celebrate the people, traditions, culture and strength of Aboriginal and Torres Strait Islander peoples, and the fight for survival, justice and country that has taken place across Victoria and Australia.

We sincerely thank the Traditional Custodians for caring for Country for thousands of generations. SMLS recognises the ongoing impact of colonisation, dispossession and racism experienced by Aboriginal peoples. As a Community Legal Centre, we acknowledge the violence of Australian law and its ongoing role in processes of colonisation. We recognise that sovereignty was never ceded, and that this always was and always will be Aboriginal land.

Terms of Reference

- a) the outcomes and impacts of youth incarceration in jurisdictions across Australia;
- b) the over-incarceration of First Nations children;
- c) the degree of compliance and non-compliance by state, territory and federal prisons and detention centres with the human rights of children and young people in detention;
- d) the Commonwealth's international obligations in regards to youth justice including the rights of the child, freedom from torture and civil rights;
- e) the benefits and need for enforceable national minimum standards for youth justice consistent with our international obligations; and
- f) any related matters.

Scope of submission

Many of the questions are outside of the scope of SMLS services. We have only provided comments where we were confident that our expertise was a valuable contribution to the subjects raised.

Acronyms

SMLS	South-East Monash Legal Service Inc.
CARM	Culturally and racially marginalised
CLC	Community legal centre

Terminology

Aboriginal and Torres Strait Islander peoples

We acknowledge that there is diversity in terms of the preferred way that First Nations People identify themselves and that for the sake of consistency we will use 'Aboriginal and Torres Strait Islander peoples' throughout.

Executive Summary

We welcome the opportunity to provide feedback on the Senate Legal and Constitutional Affairs Committee's Inquiry into Australia's youth justice and incarceration system.

This Inquiry is a critical opportunity to change the course of youth justice in Australia, reduce rates of youth incarceration, and instead divert young people away from the criminal justice system by providing trauma-informed care and support.

We are acutely aware and concerned about the over-representation of some marginalised members of our communities. In Victoria, the most over-represented groups in the criminal justice system include:

- 'Aboriginal and Torres Strait Islander children and young people;
- Multicultural children and young people;
- Children who live in out-of-home residential care;
- 18–25 year olds; and
- Girls and young women with complex needs.¹

This harmful over-representation in the criminal justice system can be attributed to failings by government agencies and statutory institutions as well as the lack of capacity and underrepresentation in the provision of support services by community organisations.²

The watershed report, Our Youth, Our Way, showed that justice system contact can dramatically alter the life trajectory of First Nations children, and adversely affect the social and emotional wellbeing of their families and communities'.³ Any police contact, including being questioned or searched, sends powerful negative messages to young people about their belonging, trustworthiness and their status.⁴ It can cause them to withdraw and disengage from public life.⁵ Detention can have long term developmental impacts on children and cause significant trauma.⁶ In addition, the particular stage of a young person's development may make it even harder to manage their impulses and emotions in prison, not

¹ Working Together Action Plan to End the Over-Representation of Particular Groups of Young People in the Criminal Justice System October 2023

² Working Together Action Plan to End the Over-Representation of Particular Groups of Young People in the Criminal Justice System October 2023 p 4.

³ 2021 Our Youth, Our Way Report, above, n [7], p 19-21

⁴ Leanne Weber, You're Going to Be in the System Forever: Policing, Risk and Belonging in Greater Dandenong (Monash University, April 2020); Charles R Epp, Steven Maynard-Moody and Donald HaiderMarkel, Pulled over: How Police Stops Define Race and Citizenship (University of Chicago Press, 2014).

⁵ *ibid*

⁶ Armytage and Ogloff above n 24 (Part 2) at 81 affirmed the disruptive impact of time in custody for adolescents is undisputed, particularly the detrimental impact of time away from family, social networks, education, employment, recreation and community programs. See also for example online opinion by Baldry and Cunneen OPINION Locking up kids damages their mental health and leads to more disadvantage. Is this what we want?, 21 June 2019

*to mention the added complexities of mental health issues and cognitive, linguistic and neurological challenges that they may be further navigating.*⁷

As a supporter of the “Raise the Age Campaign” and a member of the Smart Justice for Young People Coalition, we are calling for the Australian Government to urgently implement national reforms to improve youth justice systems across the country. These reforms discussed in this submission include raising the age of criminal responsibility, ending the over-representation of over-policed groups, and improving diversion away from the criminal justice system. The recommendations below are founded on years of research and the experience of professionals working in the sector.

Key Learnings

Through our work, we have observed that young people may experience unique disadvantages attributable to their age. Young people tend to be low-income earners, may not be well-informed of their legal rights and responsibilities, may have minimal or underdeveloped skills to self-advocate, are vulnerable to exploitation and may not readily access legal assistance. Age-based disadvantage may be compounded by other layers of disadvantage as experienced by the clients we see at SMLS. Many of the young people we see may be from migrant families where English may also be a second language; may have a disability, including mental health issues; experience drug and alcohol dependency; and have past experience of trauma. These experiences of disadvantage hamper opportunities for young people to fully participate in social, political, economic and civic life. Moreover, these disadvantages place young people at risk of having a negative interaction with the justice system - whether as an offender, a victim of a crime or other forms of exploitation. Young people are also at risk of allowing their legal problems to escalate if unprompted to receive legal assistance.

The concern for our clients is that they are now a "part" of the criminal justice system. Early support and intervention is needed to mitigate the damage that any interaction with the criminal justice system may have on young people. Early support and intervention can provide the appropriate level of structure, counselling, and supervision needed for these individuals to genuinely understand the consequences of their actions and make lasting changes

Punitive responses have proven and continue to prove as an inappropriate and ineffective method to prevent recidivism. There are numerous studies to suggest that punishing children does not work and is not a trauma-informed approach to care and prevention.⁸ The focus should be on ensuring they have safe and equal access to housing, education and social support services.

The Victorian Government recently passed the Youth Justice Act. Whilst initially it appeared promising (for example it implemented special measures to address the over-representation of Aboriginal and Torres Strait Island children in the criminal legal system), it backtracked raising the

⁷ Working Together Action Plan to End the Over-Representation of Particular Groups of Young People in the Criminal Justice System October 2023 p19.

⁸ For one such study see: Micere Keels, Annual Review of Criminology *Responding to the Trauma That Is Endemic to the Criminal Legal System: Many Opportunities for Juvenile Prevention, Intervention, and Rehabilitation* Annu. Rev. Criminol. 2024. 7:329–55

age of criminal responsibility to 12 years of age (rather than 14 years). It also implemented tougher bail changes, created new police powers over 10- and 11-year-olds, introduced electronic monitoring of children 14- to 17-year-olds and retained prosecutorial consent for court ordered diversion.

We support national reforms to improve early intervention, prevention and diversion away from harmful and ineffective punitive responses and towards supportive and evidence-based community support programs that work.

Along with our colleagues in the sector and co-members of the Smart Justice for Young People Coalition we ask that the Senate Committee recommends that the Australian Parliament:

Recommendation 1: Raise the age of criminal responsibility to 14 with no exceptions in line with the Raise the Age coalition and Change the Record's recommendations.

Recommendation 2: Ensure no children are detained in adult prisons and raise the age of detention to 16.

Recommendation 3: End the over-representation of over-policed groups of children in criminal legal systems by implementing recommendations from Smart Justice for Young People's Working Together Action Plan

Recommendation 4: Reform youth bail laws by implementing Poccum's Law⁹

Recommendation 5: Ban the use of spit hoods, strip searches and isolation for all children in detention

Recommendation 6: Improve diversion away from criminal systems to community supports.

Recommendation 7: Appoint a National Taskforce responsible for rolling out systemic improvements across all states and territories in line with Australia's international obligations consistent with the Australian Human Rights Commission's *Help Way Earlier* report.

Recommendation 8: Commit to First Nations self-determination and community control in youth justice.

We refer to and endorse the Federation of Community Legal Centres (VIC) submission to this Inquiry for further discussion on the above recommendations.

⁹ Victorian Aboriginal Legal Service, *Poccum's Law: The Blueprint for Bail Reform* (March 2023) (Poccum's Law Blueprint).

Further Comments and Recommendations

Empowerment through education

*The likelihood of a child or young person progressing from the Children’s Court to the adult criminal jurisdiction was found to be associated with age at ‘entry’ into the criminal courts – those who were first sentenced at an earlier age were more likely to reach the adult court system than those who were first sentenced at a later age.*¹⁰

We support an approach which protects rather than punishes young people at risk of encountering the justice system. The key to reducing crime is shifting focus away from punishment towards evidence-based initiatives that prevent crime before the damage is done.

Community legal education plays a vital role in contributing to this. Through our programs, we see value in educating young people on their legal rights and responsibilities. In some instances, young people do not even realise that their issue is legal in nature or that they can and should seek help from a lawyer. Our community engagement work with young people not only seeks to increase knowledge of the law, but also aims to de-mystify the justice system and encourage help-seeking behaviour.

Recommendation 9: That the Government prioritises supporting CLCs to deliver tailored community legal education and engagement to young people, in order to empower young people with increased knowledge of their legal rights and responsibilities, and where to go to get help if needed.

Accessibility and early intervention

From our outreach work, we also see the importance of ensuring free legal assistance is accessible. Young people often do not have the means or confidence to reach out to a legal service at their own initiative. By offering outreach services, integrated into locations where vulnerable young people are already accessing, young people may be encouraged to take early action in de-escalating and resolving their legal issues with the help of a lawyer. This early intervention is critical to prevent the often-unnecessary escalation of legal issues and consequently a young person’s contact with the criminal justice system.

We see value in integrated services such as our Sporting Change program where our lawyer is within easy proximity to young people at the school. The onsite presence also allows for simpler cross-referrals and secondary consultations between our lawyer and the well-being team, paving the way for a holistic approach to dealing with the young person’s issues. *‘The implementation of flexible funding models that support innovation, nurture and extend promising practices and prioritise learning for improvement and accountability has the potential to extend the capacity and reach of services.’*¹¹

¹⁰ Sentencing Advisory Council *Reoffending by Children and Young People in Victoria* 2016 p xii.

¹¹ Goodrick, D., Sampson, M., 2020, Meeting people where they are delivering integrated community legal services learnings from delivering integrated community legal services, Federation of Community Legal Centres, Victoria, Australia

Recommendation 10:

SMLS recommends that the Government support sustainable funding mechanisms for integrated service delivery to ensure access to legal assistance for vulnerable and disadvantaged young people. This includes allocating funding to the development, maintenance and sustainability of the partnerships between organisations.

Diversion and health-based approach

We support prioritising a service, education and health-based response to dealing with young people’s offending behaviour. We recommend an approach which prioritises diverting young people from the criminal justice system and ensuring any penalties imposed upon young people are not disproportionately onerous. Some examples of ways this may be achieved include:

- Removing the requirement for police informant and/or prosecutor consent for diversion to be granted;
- The development and retention of pre-court referrals and advice for parties to family violence matters heard at the Children’s Court¹²;
- Alleviating the excessive financial impact of fines that have been issued to young people.
 - We echo the Federation of Community Legal Centre’s view that fining children and young people to the same degree as adults fails to recognise the lesser moral culpability children have for their actions and their lower financial capacity to pay fines, creating an unnecessary risk of pushing young people into the justice system¹³; and
- Supporting any initiatives aimed at diverting young people from incarceration, including amendments to the *Bail Act 1977* to reduce the number of young people in remand and any initiatives to raise the age of criminal responsibility.¹⁴

Recommendation 11: We recommend law reform that prioritises a health-based approach to dealing with young people’s offending behaviour, to prioritise initiatives which divert young people from the criminal justice system and avoid incarceration.

Improving confidence in our justice system

Through our community development work with young people, we see that increased youth participation in social, economic, and civic life requires ongoing work on strengthening young people’s confidence in the justice system. Improved confidence in the justice system among young people cannot be achieved without a robust system of police accountability.

The over-policing and racial profiling of certain communities by Victoria Police is deeply concerning, despite being banned in 2015. The Racial Profiling Data Monitoring Project reveals that Victoria Police search data shows racial profiling is still occurring for those police perceive to be African, Middle

¹² Federation of Community Legal Centres Vic, 2022, *A just and equitable COVID recovery: a community legal sector plan for Victoria*, Melbourne. p 46

¹³ Federation of Community Legal Centres Vic, 2022, *A just and equitable COVID recovery: a community legal sector plan for Victoria*, Melbourne. p 44

¹⁴ See also Yoorrook Justice Commission, *Yoorrook for Justice Report, Report into Victoria’s Child Protection and Criminal Justice System* (2023), in particular Recommendations 27-44.

Eastern/Mediterranean, Indian and Asian with these groups more likely to be searched than White Victorians, with First Nations Victorians being *11 times* more likely to be searched.¹⁵ *If police are eleven times more likely to search a person they perceive to be Aboriginal than a person they perceive to be White — and the hit rates for searches of these groups are roughly the same — this means that Aboriginal people are eleven times more likely to be criminalised and enter the criminal legal system than White people as a consequence of police activities alone.*¹⁶ The consequence of this over-policing results in stigma, stereotyping, personal and professional impacts (e.g. affecting personal and professional relationships and employment) and physical and psychological harm.¹⁷ This is harm that a young person will carry through their lives, which further contributes to intergenerational trauma.

We recommend the independent monitoring and evaluation of police training on interacting with children and young people. We recommend complaints against police be investigated by a body independent of police such as a resourced and expanded Independent Broad-based Anti-Corruption Commission. We recommend increased accountability and transparency on police to ensure police are tailoring the exercise of their broad discretion appropriate to the young person's age and stage of development.¹⁸

Recommendation 12: We recommend the development of greater police transparency and accountability.

Law reform and advocacy

Through our community engagement, we consistently hear from young people of colour how negative stereotypes, largely perpetuated in the mainstream media, strongly hampers a young person of colour's ability to fully participate in social, economic and civic life. We urge the government to take leadership by consulting with young people of colour on what steps are needed to dismantle racism in Australia.

Given our centre's strong emphasis on community engagement, SMLS may also contribute to improving the lives of young people through its work in law reform and advocacy. CLCs such as SMLS are well placed for understanding the needs of young people, acting as an intermediary to advocate for their views and empowering young people to contribute to the issues that affect them.

Recommendation 13: We recommend support for organisations including CLCs to continue engaging in advocacy and law reform on behalf of and in collaboration with young people.

¹⁵ The Racial Profiling Data Monitoring Project <<https://www.racialprofilingresearch.org/>>

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Federation of Community Legal Centres Vic, 2022, *A just and equitable COVID recovery: a community legal sector plan for Victoria*, Melbourne p47