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Submitted via email to: [youthjusticevic@parliament.vic.gov.au](mailto:youthjusticevic@parliament.vic.gov.au)

**Submission to the Standing Committee on Legal and Social Issues (Legislation and References): Inquiry into Youth Justice Centres in Victoria**

Thank you for the opportunity to provide a submission to the Standing Committee on Legal and Social Issues (Legislation and References) as part of the Inquiry into Youth Justice Centres in Victoria.

This submission has been prepared by Dr Kate Fitz Gibbon (Monash University, Victoria, Australia) and Dr Wendy O'Brien (Deakin University, Victoria, Australia). In our submission, we have drawn on our recent research examining youth justice and responses to children in conflict with the law in Victoria and elsewhere. More details about this research are provided throughout this submission.

Please find our submission attached to this letter.

We would welcome the opportunity to discuss with the Standing Committee any aspect of this submission or our wider research on youth justice and responses to children in conflict with the law.

Yours sincerely



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## **Submission to the Standing Committee on Legal and Social Issues (Legislation and References): Inquiry into Youth Justice Centres in Victoria**

This Inquiry represents an important opportunity to examine youth justice centres in Victoria in the broader context of legal responses to Victorian children in conflict with the law. Our submission is guided by the Terms of Reference provided by the Legislative Council on 10 November 2016 and, as such, it is structured into the following sections:

1. Matters relating to incidents including definitions, numbers and any changes to the reporting of incidents
2. The security and safety of staff, employees and young offenders at both facilities
3. Implications of incarcerating young people who have significant exposure to trauma, alcohol and/or other drug misuse and/or the child protection system, or who have issues associated with mental health or intellectual functioning
4. Additional options for keeping young people out of youth justice centres
5. The culture, policies, practices and reporting of management at the centres
6. The role of the Department of Health and Human Services in overseeing practices at the centres
7. Other relevant issues
8. Summary of Recommendations

We have also provided a list of relevant references cited throughout this submission.

### **1. Matters relating to incidents including definitions, numbers and any changes to the reporting of incidents**

It is extremely important that the terminology used to describe children in conflict with the law is chosen with great care. There is a wealth of criminological evidence to illustrate that labelling individuals as offenders has an adverse impact on their prospects for rehabilitation and reintegration into society. Children, by virtue of their youth, have a special capacity for rehabilitation and it is, therefore, particularly important that ill chosen labels do not impact on a child's understanding of their own worth and their potential for a meaningful life as a member of the broader community.

The role of the media and the language used in reporting on youth justice related issues is important here. The inflammatory nature of media reports about the recent incidents in Victorian youth justice centres has had a disproportionate, and damaging impact on community perceptions of safety and community perceptions about children and young people as dangerous and "out of control". References to children as "the worst of the worst" are unacceptable. It is also excessive and damaging to use the term "riots" to describe the behaviour management challenges within Victorian youth justice centres. These incidents

have complex causes, and to refer to these as “riots” apportion blame to children, without acknowledging the need to scrutinise other relevant issues, including infrastructure, staffing levels, training for staff, the culture among staff, and the treatment of children prior to, during, and subsequent to the incidents.

**Recommendation 1:** We recommend that the Committee demonstrate leadership by calling for the cultural change that will be required to end the use of pejorative terminology about children and incidents that arise in youth justice centres. Guidelines on terminology should be provided to justice sector staff as well as relevant media outlets. As part of those guidelines, we recommend that the Victorian Government participate in media interviews on the condition that media outlets use only language that appropriately, and correctly, describes children as children.

We anticipate that the Committee’s inquiries will include attention to preventative measures in order to redress the conditions in Victorian justice centres that have led to recent incidents. As part of this, we recommend that the Committee make thorough inquiries into what opportunities children had to raise concerns or make complaints, without fear of retribution, about the conditions of their detention prior to the incidents that have been misrepresented as “riots”. The detention of children should only occur as a measure of last resort, consistent with Article 37b of The Convention on the Rights of the Child (CROC). In instances where detention is absolutely necessary a child should be treated in a manner consistent with their human dignity and their prospects for rehabilitation. This includes, but is certainly not limited to, ensuring that children have opportunities to express their views on the matters that affect them, and to have their views meaningfully considered.

**Recommendation 2:** We recommend that the Committee make thorough inquiries into what opportunities children had to raise concerns or make complaints without fear of retribution, about the conditions of their detention, prior to the incidents that have been misrepresented as “riots”.

## 2. The security and safety of staff, employees and young offenders at both facilities

Recent incidents in the Victorian youth detention centres and in the Barwon Adult Prison Facility demonstrate the need for evidence informed strategies to reduce the risks of violence that young offenders face in detention. This includes a review of facilities to ensure these are adequate for staff, visitors and young persons. Children and young people should be meaningfully consulted prior to new facilities being built, or existing facilities being altered.

Australian and international research has found that overcrowded and/or sub standard detention facilities can create increased risks for children in detention, including heightened risks of violence, increased likelihood of punitive measures being imposed (for example, lock

downs, solitary confinement and use of force), and reduced access to support services and educational programs. In the current Victorian youth justice climate these risks are ever apparent.

The security and safety of young persons in detention can only be ensured if those held are detained in an age appropriate facility and provided with age appropriate protections. Operational exigencies, such as those arising following the incidents at Victorian youth justice centres, do not justify the transfer of children into an adult prison facility, the use of violent measures against children in detention, or the denial of a child's access to education and support services.

**Recommendation 3:** Immediate action should be taken to ensure that no child is held in an adult prison facility in Victoria and that all children detained in Victorian youth justice centres are held in conditions that support children's dignity and their prospects for rehabilitation. A necessary component of this is ensuring that all children deprived of their liberty have full access to registered education programs, visitors, and support services, including cultural support services and therapeutic services specific to a child's individual needs.

Ensuring that no Victorian child is detained in an adult prison facility would bring Victorian youth detention practice into line with widely accepted international standards, including that established in the Convention on the Rights of the Child which expressly provides that all children must be detained separately from adults.

**Recommendation 4:** That the Victorian Government display leadership, nationally, by immediately and permanently desisting from detaining children in adult facilities. This would demonstrate to other Australian States and Territories that there is no justifiable reason why Australia should maintain a reservation to Article 37c of the Convention on the Rights of the Child.

It is also important to note that when a government intervenes to deprive a child of liberty, the government is then obliged to ensure that children are provided with the material, psycho social, and cultural supports necessary to ensure the child's wellbeing and ultimately the child's rehabilitation and reintegration into society. Children in youth detention require additional care and protection, as they have been removed from their natural supports. Article 20 of the Convention on the Rights of the Child provides that a child 'deprived of his or her family environment shall be entitled to special protection and assistance by the State'. With this in mind, we direct the Committee's attention to the conditions currently experienced by the children impacted by recent events in Victorian youth justice centres. Additional resources are required to ensure that these conditions be redressed, in compliance with the Convention on the Rights of the Child:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self respect and dignity of the child. (CROC, Art 39)

**Recommendation 5:** We recommend that the Committee direct urgent attention to the conditions currently endured by the children involved in recent events in Victorian youth justice centres, and that the Committee recommend that the Victorian Government make additional provisions to ensure that impacted children receive post trauma care.

### 3. Implications of incarcerating young people who have significant exposure to trauma, alcohol and/or other drug misuse and/or the child protection system, or who have issues associated with mental health or intellectual functioning

We note here the significant bank of Australian and international research which has consistently found that children in conflict with the law are disproportionately from disadvantaged backgrounds and have experienced adversity and trauma, including family violence, family disruption and poverty prior to their interaction with the criminal justice system. These children are at heightened risk of having also been in contact with the child protection system and/or have been exposed to alcohol and/drug misuse. We state this to emphasise the significant vulnerability of young persons who come in conflict with the law, including those held within Victorian youth justice centres.

We urge the Committee, and the Victorian government, to ensure that attention to the particular needs of vulnerable children is the primary consideration in the reform of youth justice policies and practices. Evidence based reform is essential to ensure that the reasons for children's disadvantage and vulnerability are addressed rather than introducing reforms which seek to criminalise such children. The Committee should work in close consultation with children's services, practitioners and academic experts to inform the development of, and long term resourcing for, such reform. A principled, and expert led, approach is required to ensure that children with welfare needs receive the supports they require within the community, so that the criminal justice system does not serve as the welfare system of last resort.

**Recommendation 6:** Victoria must invest in evidence based responses in both policy and practice to address the causes of disadvantage and vulnerability experienced by children, including by ensuring that child welfare and the building of community capacity are prioritised over mechanistic responses that too readily draw vulnerable children into conflict with the law.

The ongoing overrepresentation of Indigenous children at all levels of the criminal justice system demands that particular attention be paid to the solutions that Indigenous leaders propose for crime prevention, diversion strategies, and strengthening Indigenous communities.

**Recommendation 7:** As part of any forthcoming reform initiative, Victoria must engage and consult specifically with Indigenous community leaders to inform the development of a state wide strategy to reduce the overrepresentation of Indigenous children in the Victorian youth justice system.

#### 4. Additional options for keeping young people out of youth justice centres

A coordinated and well resourced prevention strategy is crucial to addressing the problems of over incarceration and overcrowding in youth justice centres. This requires the Victorian Government to take a principled approach, and implement cultural change across the whole of government to ensure that welfare responses, and community capacity building, replace practices that criminalise children in need. Our research demonstrates why Victoria must avoid punitive responses to childhood offending, such as the imposition of harsher penalties, the tightening of bail practices, and detaining children in adult jails. Measures such as these will only exacerbate Victoria's current youth justice crisis by further entrenching children in the criminal justice system. Community safety is not enhanced by criminalising vulnerable children. Justice reinvestment indicates that diverting funds into strengthening communities will provide tangible and enduring benefits, including increased community safety.

We recommend that the Victorian government invest in a wider review of evidence based primary, secondary and tertiary initiatives to reduce the number of young people held in youth detention specifically and more broadly the number of children in contact with the criminal justice system. Drawing on academic and practitioner expertise, this review should examine the merits of a range of alternative measures including, but not limited to, justice reinvestment, culturally appropriate and offence specific diversionary programs, therapeutic diversion, and holistic and genuine efforts to rehabilitate and reintegrate children, including therapeutic supports for children serving community based orders (on the latter see O'Brien 2011).

**Recommendation 8:** We recommend the Victorian government invest in a wider review of evidence based primary, secondary and tertiary initiatives to reduce the number of children in contact with the criminal justice system. This includes improved strategies for early identification of children in need of welfare supports.

Additionally, in considering what additional options could be introduced to reduce the number of young people in youth justice centres, we would urge the Committee to reconsider

the minimum age of criminal responsibility (MACR) in Victoria. The minimum age of criminal responsibility in Victoria as is the situation nationally is 10 years of age. We recommend that the Committee at an absolute minimum recommend legislative reform to increase the MACR to 12 years of age and, ideally recommend it be increased to 14 years old to better align with established international best practice.

The United Nations *Committee on the Rights of the Child* has recommended that the MACR be set at 12 years of age as an absolute minimum (UN CRC 2007: para. 32). Despite this, we highlight here with concern, that Victoria continues to impose criminal responsibility upon children under the age of 12 years old.

Our empirical research, conducted in 2016, revealed support among persons involved in the Victorian youth justice system for an increase in the MACR. In 2016 we conducted semi structured interviews with 48 Victorian legal stakeholders and youth justice advocates, including judicial officers, legal practitioners, professionals working with children's support services, youth justice conferencing professionals and child advocates. Interviews were conducted in the Melbourne Metropolitan area and in various regional Victorian sites. These interviews revealed broad based support for raising the MACR in Victoria. Persons interviewed acknowledged that the current legislated minimum age of criminal responsibility is too low and emphasised the need to divert very young children away from the criminal justice system to avoid criminalisation, stigmatisation, and additional harm to Victoria's most vulnerable children.

**Recommendation 9:** We recommend that Victoria move immediately to introduce legislation to increase the minimum age of criminal responsibility from 10 years of age to 12 years of age as an absolute minimum from which no exception can be drawn. To ensure better alignment between Victoria's youth justice response and international best practice, we recommend that the minimum age of criminal responsibility be increased to 14 years of age.

For a more detailed analysis of the need to increase the MACR in Victoria see O'Brien and Fitz Gibbon (2017, forthcoming). See also Fitz Gibbon (2016) on the need to ensure adequate legal protections for children in conflict with the law in the context of England and Wales.

## 5. The culture, policies, practices and reporting of management at the centres

Coinciding with the timing of this state led Inquiry, the Australian Government has announced its intention to ratify the Optional Protocol to the United Nations Convention against Torture and other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) by December 2017 (see Fletcher 2017). The OPCAT aims to establish comprehensive monitoring regimes for all detention and prison facilities among member states (for further details on OPCAT see Naylor 2016). The timing of the government's announcement is important in the

context of this Inquiry as it points to the need for Victoria to establish enhanced external mechanisms of accountability for all youth justice centres state wide. Given the inherently closed environments within which such facilities operate external monitoring and mechanisms through which accountability and transparency of practice can be achieved are essential to ensuring best practice.

**Recommendation 10:** We recommend that enhanced systems of accountability be established for all youth justice centres in Victoria, including greater scrutiny, prompt responses to reports from external monitors, and processes to ensure that children have to opportunity to provide reports to monitoring bodies.

## 6. The role of the Department of Health and Human Services in overseeing practices at the centres

We express our concern about the Victorian Government's decision to strip the Department of Health and Human Services (DHHS) of responsibility for youth justice in order to assign this to the Department of Justice and Regulation. The research interviews that we conducted in 2016 with Victorian legal stakeholders and those that regularly work with children in conflict with the law demonstrated strong support for therapeutic and welfare based responses to children. The majority of those interviewed were clear that they saw punitive responses to children as detrimental to children's wellbeing and to children's long term prospects for rehabilitation. The policy expertise relevant to youth justice is held within the DHHS, and it is inappropriate that children be subject to decisions made by the Department of Justice and Regulation, which is accustomed to responding to adult prisoners. There is great merit in closer alignment of welfare and youth justice responses. Joined up intradepartmental approaches to child protection and youth justice, facilitated by DHHS, offer greater likelihood that children will receive a welfare based or therapeutic response that diverts children away from the damaging and stigmatising impacts of criminal justice involvement.

**Recommendation 11:** We recommend that Victoria move immediately to revert the allocation of responsibility for youth justice back to the Department of Health and Human Services, with a commitment to resource a long term intradepartmental strategy on child protection and youth justice, facilitated by DHHS.

## 7. Other relevant issues

We note, with great concern, the Victorian opposition's October 2016 announcement advocating to remove the protection of anonymity for repeat young offenders (see Hosking and Thompson 2016). At the time the Shadow Attorney General announced the opposition's intention to push for reform of Children's Court practices to allow for the naming of repeat child offenders in 'exceptional circumstances'. This was justified on the basis of the public's

right to know outweighing the child offender's right to privacy. We strongly recommend that this line of reform is not pursued.

Our research, published in the *British Journal of Criminology* in 2016 (see Fitz Gibbon and O'Brien 2016a), sets out the dangers of 'naming and shaming' policies, including the breach of the child's right to privacy, increased stigmatisation, reduced prospects of rehabilitation and social integration, and sabotage of future employment opportunities. Drawing from the findings of empirical research conducted in England in 2015, we document legal practitioner and policy stakeholder views on the need to avoid using naming and shaming policies as a secondary form of punishment beyond the criminal sanction imposed.

**Recommendation 12:** We recommend that the protection of anonymity for offenders dealt with in the Victorian Childrens' Court jurisdiction be upheld in all circumstances and that anonymity orders for children have lifelong effect.

This recommendation should be read in the context of Australia's obligations at international law and the Victorian Government's obligations under the *Charter of Human Rights and Responsibilities Act* (2006). The United Nations *Convention on the Rights of the Child* and the *Standard Minimum Rules for the Administration of Justice* (The 'Beijing Rules') both establish the child's right to privacy, including during criminal justice processes. While not binding, the Convention and the Beijing Rules are considered internationally accepted minimum standards. Victoria should avoid introducing reform which directly opposes internationally accepted standards for the treatment of children in conflict with the law.

In addition to the above recommended legislative reform, we recommend a public education strategy be developed and a state wide public education campaign introduced to challenge the current punitive culture, including the perception that community safety requires that children face the full force of the state's criminal law.

**Recommendation 13:** Victoria develop and introduce a state wide public education campaign to challenge the current punitive culture with the aim of fostering a community understanding that the majority of children grow out of their offending behaviour and that criminalising children increases the likelihood of re offending.

## Summary of Recommendations

The state of Victoria has long been viewed as leading the way nationally in the area of youth justice. We welcome this Inquiry as an important opportunity for Victoria to address the current youth justice system crisis and demonstrate leadership at a time when several state and territory jurisdictions are reviewing and undertaking reform of responses to children held in detention specifically and children in conflict with the law, more broadly. We would urge the Inquiry to adopt an approach to reform that is evidence based and informed by the need

to return to a model of youth justice that upholds the rights of the child and is based on diversion and therapeutic approaches to juvenile justice.

**This submission makes the following specific recommendations:**

**Recommendation 1:** We recommend that the Committee demonstrate leadership by calling for the cultural change that will be required to end the use of pejorative terminology about children and incidents that arise in youth justice centres. Guidelines on terminology should be provided to justice sector staff as well as relevant media outlets. As part of those guidelines, we recommend that the Victorian Government participate in media interviews on the condition that media outlets use only language that appropriately, and correctly, describes children as children.

**Recommendation 2:** We recommend that the Committee make thorough inquiries into what opportunities children had to raise concerns or make complaints without fear of retribution, about the conditions of their detention, prior to the incidents that have been misrepresented as “riots”.

**Recommendation 3:** Immediate action should be taken to ensure that no child is held in an adult prison facility in Victoria and that all children detained in Victorian youth justice centres are held in conditions that support children’s dignity and their prospects for rehabilitation. A necessary component of this is ensuring that all children deprived of their liberty have full access to registered education programs, visitors, and support services, including cultural support services and therapeutic services specific to a child’s individual needs.

**Recommendation 4:** That the Victorian Government display leadership, nationally, by immediately and permanently desisting from detaining children in adult facilities. This would demonstrate to other Australian States and Territories that there is no justifiable reason why Australia should maintain a reservation to Article 37c of the Convention on the Rights of the Child.

**Recommendation 5:** We recommend that the Committee direct urgent attention to the conditions currently endured by the children involved in recent events in Victorian youth justice centres, and that the Committee recommend that the Victorian Government make additional provisions to ensure that impacted children receive post trauma care.

**Recommendation 6:** Victoria must invest in evidence based responses in both policy and practice to address the causes of disadvantage and vulnerability experienced by children, including by ensuring that child welfare and the building of community capacity are prioritised over mechanistic responses that too readily draw vulnerable children into conflict with the law.

**Recommendation 7:** As part of any forthcoming reform initiative, Victoria must engage and consult specifically with Indigenous community leaders to inform the development of a state wide strategy to reduce the overrepresentation of Indigenous children in the Victorian youth justice system.

**Recommendation 8:** We recommend the Victorian government invest in a wider review of evidence based primary, secondary and tertiary initiatives to reduce the number of children in contact with the criminal justice system. This includes improved strategies for early identification of children in need of welfare supports.

**Recommendation 9:** We recommend that Victoria move immediately to introduce legislation to increase the minimum age of criminal responsibility from 10 years of age to 12 years of age as an absolute minimum from which no exception can be drawn. To ensure better alignment between Victoria's youth justice response and international best practice, we recommend that the minimum age of criminal responsibility be increased to 14 years of age.

**Recommendation 10:** We recommend that enhanced systems of accountability be established for all youth justice centres in Victoria, including greater scrutiny, prompt responses to reports from external monitors, and processes to ensure that children have to opportunity to provide reports to monitoring bodies.

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**Recommendation 13:** Victoria develop and introduce a state wide public education campaign to challenge the current punitive culture with the aim of fostering a community understanding that the majority of children grow out of their offending behaviour and that criminalising children increases the likelihood of re offending.

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