

## Victoria's Youth Diversion Scheme and the over-representation of Indigenous Youth in detention

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The vast majority of Indigenous people will never come into contact with the criminal justice system in Australia. However, Indigenous people remain over-represented in detention across all Australian jurisdictions. This over-representation is a complex and ongoing issue stemming from Australia's violent history of dispossession, assimilation policies and the forced disconnection from culture and community. While it has been established that the vast majority of underlying causes behind the over-representation of Indigenous people in Australia are external to the criminal justice system itself, the criminal justice system can play a role in addressing these underlying causes and in reducing the amount of Indigenous people in custody.

Custody being used only as a last resort is a principle which is supposed to underpin Australia's criminal justice system. This principle has been established at an international, national and state level and discussed and implemented numerous times by the courts. Yet despite this, Indigenous young people are over-represented in detention across all Australian jurisdictions. The over-representation of Indigenous people in Australia's criminal justice system is a problem that has become worse since first recognised in the 1980s and it is prevalent across Australia. It is widely accepted that this is due to a number of complex and inter-

secting issues that are compounded by institutionalised and systemic racism and discrimination. This issue is also significant among Indigenous children, who are even more likely than their adult counterparts to be in supervised detention. Indigenous children are also more likely to come into contact with the criminal justice system than non-Indigenous children and more likely to be in detention from a younger age.

While the rate of incarcerated Indigenous young people is lower in Victoria than other states, Indigenous children are still in detention at disproportionate rates. A significant number of the underlying causes behind the disproportionate over-representation of the incarceration of Indigenous young people are external to the criminal justice system itself. Factors such as health, mental health, educational, drug and alcohol abuse, intergenerational trauma, disconnection and a loss of culture are among these underlying causes that are integral to address in order to reduce the over-representation of Indigenous children in the criminal justice system.

Young people have been shown to have unique traits and offending behaviour when compared to adults. While most young people grow out of crime, research has shown that young people are more likely to re-offend than adults, with a small group of 'chronic offenders' being responsible for a disproportionate amount of offences. Further, the earlier a young person comes into contact with the criminal justice system, either as an offender or a victim, the more likely they are to have an involvement with the criminal justice system in the future. Despite the traits of young offenders and the complex underlying causes of offending many of them face, young people have been shown to have a unique capacity to be rehabilitated. However, detaining children has shown to greatly impede their likelihood of rehabilitation, cognitive development and future prospects. It appears that currently the criminal justice system is ill-equipped to deal with the unique needs of young offenders. It would therefore seem appropriate to look to alterna-

tive approaches to crime prevention that aim to address the underlying causes behind offending behaviour and to assist in addressing the main factors behind the over-representation of Indigenous youth in custody which are external to the criminal justice system.

In Victoria, postcharge/pre-plea diversion programs have been implemented as part of a justice re-investment approach to criminal justice. However, reform is needed to the current diversion scheme in Victoria to ensure that culturally appropriate and community led diversion programs are available and being granted equitably to Indigenous youth. Specifically, the power of prosecutorial veto should be removed, as this over-reaches the role of the executive arm of government and too easily allows for bias and inconsistency due to the nature of police discretion. Further, in supporting the principle of custody as a last resort, culturally appropriate and community led diversion programs must be available to meet the unique and often intersecting needs of young Indigenous participants. The proposed reforms may be a step towards achieving substantive equality for Indigenous youth under the current Victorian youth diversion scheme and reducing the over-representation of incarcerated Indigenous people in Australia.

This justice re-investment approach to crime prevention is a particularly promising approach to address the over-representation of Indigenous children in detention for two major reasons. First, as discussed, the main factors contributing to offending behaviour are external to the criminal justice system itself, and second, as this approach is 'place based', it would require the Victorian government to work with Indigenous communities to establish effective reform and policy change. The diversion scheme format in Victoria could be considered to form part of a Justice Re-investment approach and has shown promising results for young people so far.

However, reforms must be made to ensure that Indigenous children have access to diversion programs that are culturally appropriate and community led to truly be effective. Legislative reform is needed to the current model to remove the discretionary prosecutorial power to veto which, under the current scheme, can overrule any decision of a magistrate. The two main reasons for this contention are that, first, the nature of police discretion often works against the best interest of Indigenous people, especially Indigenous young people; and second, it is not the role of the executive arm of government to decide whether a person should or should not be punished or decide what orders a court can or cannot make. Reform that ensures that diversion programs are offered consistently and equitably to young Indigenous applicants is necessary for these programs to be effective in reducing the over-representation of Indigenous young people in the criminal justice system. However, there must also be a new approach adopted to the scope of programs that are offered to ensure that Indigenous youth have access to culturally appropriate and community-led diversion programs. Another proposed reform is to include a section in the *Children, Youth and Families Act* to empower Indigenous families and communities to have an active role in the diversion process, thereby placing positive pressure on government to ensure a wide range of culturally appropriate programs are developed that address the underlying problems. Diversion programs alone are unlikely to be the sole solution to addressing the problem of the over-representation of Indigenous youth in detention in Victoria. However, appropriate reforms should be implemented to ensure diversion programs can be equitably accessed, involve Indigenous communities in the process, are culturally appropriate and are addressing the underlying causes of exposure to the criminal justice system. This could be a more effective tool to divert Indigenous young people away from the criminal justice system in Victoria and become a step towards ensuring substantive equality for Indigenous children under the

current Victorian diversion scheme to ensure that custody is truly being used as a last resort.

### **About the author**

**Tim Morrell** is a recent law graduate with an interest in social justice and policy reform. The research conducted for his recent honours thesis was the basis for this article published on Writing. Interest in this particular issue and area of law was sparked after Tim did voluntary work in the community legal sector where he witnessed the current youth diversion scheme in practice.