

NJP POSITION STATEMENT: Discriminatory Policing

EXECUTIVE SUMMARY

National Justice Project position on Discriminatory Policing¹

The National Justice Project ('NJP') believes that everyone has the right to substantive equality and protection before the law, including safe and equitable access to justice free of racism and discrimination.

We recognise that in Australia, First Nations Peoples, people from culturally and linguistically diverse backgrounds, LGBTIQ+ people, people experiencing socioeconomic disadvantage, people living with disability and people experiencing mental ill-health are particularly vulnerable to discriminatory policing. The harmful impacts of discriminatory policing are often compounded by the multiple levels of racism and discrimination that people from diverse minority communities encounter when accessing and engaging with a wide range of public services, including the courts, health care, family and children services, legal services, housing, employment and education.

Discrimination is an endemic problem in Australia and these attitudes permeate throughout police forces, with harmful and at times fatal consequences. Police have a positive obligation to combat racism and discrimination and protect and promote human rights. Despite these obligations, the culture within police forces contributes to prejudicial police practices, such as biased profiling, aggressive over-policing, intimidation, harassment, abuses of power and excessive force, against people from diverse minority communities. These practices favour punitive measures over service to, and the protection of, the public.

Contact with police, particularly at a young age, perpetuates a cycle of disadvantage and ongoing contact with police and the criminal justice system. Across all Australian States and Territories, oppressive and overreaching legislation empowers police forces with unlimited authority, broad discretionary powers, secrecy and lack of accountability. As a result, police under the sanction of the state are empowered to act with impunity for the neglect, brutality and suffering they inflict.

The NJP denounces the lack of commitment by successive Federal, State and Territory governments to acknowledge, assess and address the systemic racism that pervades Australian police forces. Despite several attempts to reform police policy and practice, racist and discriminatory police practices remain unyielding. Reforms that limit police powers, promote transparency and accountability and prioritise community-based responses, with a focus on prevention, diversion and support rather than a police response, are urgently needed.

¹ The NJP Position Statement on Discriminatory Policing is part of a series of position statements. Please also see: NJP Position Statement on Health Justice; NJP Position Statement on First Nations Overincarceration and Deaths in Custody; and NJP Position Statement on Immigration Detention.

PRIORITIES & RECOMMENDATIONS

Overarching recommendations

1. Police should not be empowered to act without restraint or accountability as this power is frequently exercised discriminatorily. Legislation must recognise and address the broader impacts of discrimination of all forms and hold governments, law enforcement and the criminal justice system to account for the systemic discrimination perpetuated by their harmful policies and practices.
2. Eradicate racist and discriminatory policing and enforce police accountability by ending the practice of police investigating police and by legislating for independent investigations of deaths in police custody. All cases of police use of lethal force should be thoroughly, independently, impartially, transparently and promptly investigated, and those found responsible should be brought to justice.
3. Regulate the weaponisation of police forces and mandate the use of force and firearms as a last resort, including strict accountability for failing to comply.
4. Alternative emergency response that prioritises de-escalation, compassion and safety must be made available for people experiencing domestic and family violence, people living with disability and people experiencing mental ill-health.
5. Children deserve special protection and do not belong in prisons. Nationally, the minimum age of criminal responsibility should be raised from 10 years (an age that disproportionately impacts First Nations children) to at least 14 years for all offences, consistent with medical and scientific evidence pertaining to child and adolescent neurodevelopment and in line with international standards.²
6. Enhanced complaint and redress mechanisms, ensuring these are person-centred, trauma-informed and better attend to the intersectional nature of discrimination.
7. Build and maintain nationally consistent data on police practices, including measurements of discriminatory policing, with the results published annually and utilised to implement evidence-based reforms.

Discriminatory policing

8. Governments have a responsibility to assess, acknowledge and address the systemic racism within police forces across all Australian States and Territories. Significant reforms are urgently needed to eliminate discriminatory police practices, including the over-policing, harassment and criminalisation of First Nations Peoples, people from culturally and linguistically diverse backgrounds, LGBTIQ+ people, people living with disability, people experiencing mental ill-health and people experiencing socioeconomic disadvantage.
9. Amend the statutory provisions to stop over-policing, police harassment and arrests for offensive language, public intoxication, fine defaults and restrict the over-policing of minor offences causing unnecessary criminalisation.

² United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 49(a); Australian Human Rights Commission, *Children's Rights Report 2019* (2019) 244-5; AHRC, *Children's Rights Report 2016* (2016), 187.

10. Adequate funding and supports for community legal services and community-controlled support and advocacy organisations.
11. Ongoing police training on unconscious bias and cultural competency for all groups that experience police discrimination.

Transparency accountability and oversight

12. Law and policy reform to increase scrutiny and accountability for police misconduct. For example, police should be required to activate body-worn cameras at all times; and bodycam and CCTV footage should be retained and made available to individuals who make a complaint against police and corrections officers.
13. Nationally consistent reforms are urgently needed to remove discretionary powers for police in determining which offences are suitable for diversion. For example, introducing requirements for police to complete a 'Failure to Divert Declaration', detailing the precise grounds for failing to recommend diversion for review and approval by a Magistrate, would remove police discretion as to which offences are suitable for diversion.³
14. Establish an independent statutory body to provide truly independent oversight of police conduct and custodial environments.⁴
15. Expand the scope of the coronial jurisdiction to require that coroners consider and comment on broad systemic factors, including discrimination and bias by police forces with a view to prioritising the protection of lives and the prevention of death and injury, and for these to be applied consistently across all Australian States and Territories. Representation from affected communities must be sought throughout this process.
16. Expand the scope of the coronial jurisdiction to require coroners to investigate the conduct of police officers, to make appropriate recommendations and to refer for prosecution or discipline where their acts or omissions may have in any way contributed to the death of a First Nations person. Representation from affected communities must be sought, respected and prioritised at all times throughout this process.

Alternatives to police as first responders

17. Police need robust training to improve their response to domestic and family violence incidents in order to avoid escalation, re-traumatisation, criminalisation and harm of survivors. Police should be accompanied by, and be led by, professionals capable of prioritising the protection and support of violence-survivors.
18. Alternative emergency response teams must be established in all States and Territories to replace police in responding to incidents involving people living with disability and people experiencing mental ill-health to avoid unnecessary escalation, re-traumatisation, criminalisation and harm including death. Appropriately trained first responder teams will ensure that compassion, safety

³ Victorian Aboriginal Legal Service, Submission to Department of Justice and Community Safety, (April 2020) 5.
<http://www.vals.org.au/wp-content/uploads/2021/08/Sentencing-Act-Reform-Project-VALS-submission-FINAL.pdf>

⁴ See for example New Zealand's Independent Police Conduct Authority (IPCA), *Independent Police Conduct Authority Act 1988* (NZ) <<https://www.legislation.govt.nz/act/public/1988/0002/latest/whole.html>>.

and referrals to relevant health and social supports are prioritised for recovery-oriented, trauma-informed support and treatment.

Discriminatory policing of First Nations Peoples and communities

19. Increased funding and supports to expand and encourage diversion and justice reinvestment programmes that promote culturally safe and trauma-informed rehabilitation and healing.
20. Structured reforms to divert First Nations women from the criminal justice system by addressing the way police and the courts identify and respond to domestic and family violence, including increased funding for Aboriginal community-controlled organisations.
21. First Nations-led anti-racism and cultural competency education and training should be resourced and embedded,⁵ updated regularly and delivered on an ongoing basis to all agents of government, including but not limited to police, the courts, investigators, State/Territory corruption and complaints bodies, coroner's courts, teachers, social workers, health care providers and lawyers.
22. More ambitious government commitments, community-defined measurable targets and accountability measures to measure and respond to institutional discrimination in policing.
23. Urgently implement the recommendations from the Royal Commission into Aboriginal Deaths in Custody ('**Royal Commission**')⁶ and all relevant subsequent reports and inquiries into policing of First Nations communities,⁷ together with corresponding law and policy reforms, to strengthen the legislative framework for the right to self-determination of First Nations Peoples.

⁵ United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, 94th sess, 2610th and 2611th mtg, UN Doc CERD/C/AUS/CO/18-20 (8 December 2017). <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/CERD_C_AUS_CO_18-20_29700_E.pdf>; Wiyi Yanu U Thangani, Reconciliation Australia, *2021 State of Reconciliation in Australia Report* (2021) ('Reconciliation Report') <<https://www.reconciliation.org.au/publication/2021-state-of-reconciliation/>>; Concept Paper (n15).

⁶ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5.

⁷ See: Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No. 133, December 2017); Legislative Council of NSW, *Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody*, Report No 1 (April 2021) <[https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report No 1 - First Nations People in Custody and Oversight and Review of Deaths in Custody.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report%20No%201%20-%20First%20Nations%20People%20in%20Custody%20and%20Oversight%20and%20Review%20of%20Deaths%20in%20Custody.pdf)>; Australian Human Rights Commission, *Wiyi Yanu U Thangani (Women's Voices): Securing Our Rights, Securing Our Future* (Report, 2020) <<https://wiyiyaniuthangani.humanrights.gov.au/report/>>; Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) <<https://www.royalcommission.gov.au/system/files/2020-09/findings-and-recommendations.pdf>>; Human Rights Council, Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Australia, UN Doc A/HRC/WG.6/23/AUS/1 (7 August 2015); Human Rights Council, Report of the Special Rapporteur on the rights of Indigenous peoples on her visit to Australia, UN Doc A/HRC/36/46/Add.2 (8 August 2017).