

30 June 2023

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National Children's Commissioner
Australian Human Rights Commission

By email: youthjusticereform@humanrights.gov.au

Dear Commissioner for Children's Rights,

Youth Justice and Child Wellbeing Reform across Australia

Thank you for the opportunity to provide input into the Youth Justice and Child Wellbeing Reform Project.

The National Justice Project (NJP) is a not-for-profit human rights legal and civil rights service delivering legal action, advocacy, education, and collaborative projects. Our mission is to fight for justice, fairness and inclusivity by eradicating systemic discrimination. Together with our clients and partners, we work to create systemic change and amplify the voices of communities harmed by government inaction, harm and discrimination in healthcare, immigration detention, prisons and juvenile detention, and policing.

We endorse the submission of the Partnership for Justice in Health, as well as other member submissions.

In considering our submissions, we refer you to the following NJP papers that provide more detail on the elements we cover in this submission:

- [NJP Position Statement on Discriminatory Policing](#)
- [NJP Position Statement on Over-Incarceration and Deaths in Custody](#)
- [NJP Position Statement on Health Justice](#)
- [NJP Submission to Raise the Age of Criminal Responsibility](#)
- [NJP Submission to the Judicial Impartiality Review](#)
- [Health Inquiry into Health Outcomes and Access to Health and Hospital Services in rural, regional, and remote New South Wales](#)
- [Submission to the NSW Law Reform Commission - Open Justice Review](#)
- [Submission to the NSW Select Committee on the High Level of First Nations People in Custody Oversight and Review of Deaths in Custody, Oversight and Review of Deaths in Custody](#)

The urgency with which the Commission needs to not only consider the issues and rights breaches raised in this Project but commits to work with government to take real action to adequately resource the organisations best placed to remedy rights breaches cannot be overstated.

What factors contribute to children's and young people's involvement in youth justice systems in Australia?

i. Discriminatory Policing

The Royal Commission into Aboriginal Deaths in Custody identified the over-policing of First Nations communities as a primary reason for the criminalisation and over-incarceration of First Nations people and the unacceptably high rates of First Nations deaths in police and prison custody.¹

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, including First Nations children and young people.

Contact with police, particularly at a young age, perpetuates a cycle of disadvantage and ongoing contact with police and the legal system. Across Australia, 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.

ii. Systemic discrimination and the criminalisation of First Nations children and young people

Discrimination is an endemic problem in Australia which permeate throughout public systems and services, with harmful and at times fatal consequences.

Systemic racism, including racial profiling and other discriminatory police practices directly contributes to the criminalisation and over-incarceration of First Nations children and young people.²

First Nations children and young people:

- are imprisoned at 22 times the rate of their non-Indigenous counterparts³
- account for 54% of all children in youth prisons (despite being 6% of 10–17-year-olds)⁴
- face higher rates of violence and abuse by police officers and prison staff⁵
- are more likely to be targeted by police and subjected to racially biased over-surveillance, monitoring⁶ and strip searches⁷
- are more likely to be charged, refused bail, convicted, and sentenced⁸
- are 187% more likely to reappear in court⁹
- are less likely to be diverted away from the legal system by police¹⁰
- account for over 90% of all children in out of home care in the Northern Territory (2020-21)¹¹

iii. Criminalisation and over-incarceration of people with disability

More than one in five First Nations children live with disability and it is accepted that these figures are under-representative.¹² First Nations people with disability are 14 times more likely to be imprisoned than the general population.¹³ Since 1991, over 40% of deaths in custody have involved First Nations people with disability.¹⁴

First Nations children living with cognitive and/or psychosocial disability are more likely to be criminalised¹⁵ and have substantially higher rates of contact with police than their non-indigenous counterparts. First Nations children who have been imprisoned also face higher rates of violence and abuse by prison staff and police.¹⁶

iv. Criminalisation and over-incarceration of people experiencing mental ill-health

Nationally, over 75% of imprisoned children and young people are living with one or more mental illnesses.¹⁷ Across Australia, the demand for mental health care in custodial settings far exceeds service capacity, with patients being held in environments unsuitable for their needs.¹⁸ The causal link between incarceration and poor mental health is well established, with some studies showing that one third of incarcerated youth diagnosed with depression experienced its onset following incarceration.¹⁹ For First Nations children and

ⁱ In 2021, ninety kids talked to the Commission for Children and Young People about their first contact with police and the youth justice system: 72% were under 14 at the time of first contact and 42% mentioned having negative experiences in their first contact with police; 58 talked about physical and emotional mistreatment by police, including violence and sexually abusive behaviour.

young people the additional trauma from exposure to institutional violence, abuse and neglect coupled with removal from family, kin and Country has been found to further exacerbate these risks.²⁰

v. Remand systems and bail determinations

Bail determinations and conditions act as significant drivers for the over-representation of First Nations people on remand, with devastating consequences.

Although actual criminal offending by children is predominantly non-violent,²¹ a snapshot of children in youth prisons revealed that, at any one time, over 50% are on remand without having been convicted or sentenced.²²

vi. Failure to divert people away from the legal system

Diversion from custody: First Nations children and young people are less likely to be diverted away from the legal system by police²³ despite being roughly 13 times more likely to be placed under youth justice supervision orders.²⁴ Across Australia, legislation aimed at diverting children, and First Nations children, away from the legal system is failing.

Judicial Bias: A lack of gender, racial, social and cultural diversity in the judiciary results in decision-makers having limited ability to relate to the young people that come before the courts who have entirely different lived experiences. A lack of understanding, coupled with unconscious bias and prejudice leads to prejudiced decisions with harmful consequences for young people.

Police inappropriate First Responders: Encounters with police often involve elements of mental ill-health, disability, addiction, homelessness, and poverty. As a result, police have effectively become default first responders to a range of social and health issues that they are not properly qualified and experienced to handle, leading to excessive force and the criminalisation of social and health issues.²⁵

vii. Lack of culturally appropriate services for young people

The intersection of the above and other factors, including inadequate, discriminatory and culturally unsafe health care, education and other services, puts First Nations children and young people at unacceptable risk of coming into contact with police and the legal system at a young age.

Young people should be supported through culturally appropriate community-based responses, with a focus on prevention, diversion, and support rather than punishment. Children and young people with disability and mental health needs, and their families, are particularly vulnerable to inadequate, discriminatory and culturally unsafe services provided in custodial settings. Such measures are cruel, inhumane and degrading, in violation of international law.²⁶

Racism, discrimination and disempowerment, including in the health system, contribute to poorer health outcomes.²⁷ Mainstream healthcare services must be made responsive and culturally safe, and increased resourcing and support is required for Aboriginal Community Controlled Health Organisations (ACCHOs) to enable the delivery of culturally appropriate and adequate health services for First Nations youth, including in prisons and youth detention facilities.²⁸

There must be adequate ongoing funding for ACCHOs in the areas of health, diversion, prevention, education, housing, and other supports that deliver culturally safe and trauma informed services and that are community-led and focus on prevention, diversion, support and healing.

viii. The over-representation of First Nations children in out-of-home care

The strong link between contact with child 'protection' services and experiences of long-term socio-economic disadvantage, adverse health outcomes and subsequent contact with the legal system is well established.²⁹ First Nations children continue to be disproportionately over-represented in the out-of-home

care (OOHC) system across Australia. The increasing rates of First Nations children being removed from their families and communities presents profoundly troubling parallels to the Stolen Generations.³⁰

As at 30 June 2020, there were a staggering 21,523 First Nations children in OOHC across Australia,³¹ accounting for almost half of all children in OOHC.³² New South Wales alone accounts for one-third of First Nations children in OOHC.³³ Failing significant reforms, the number of First Nations children in OOHC nationally is projected to increase by 54% by 2030.³⁴

Ongoing connection to community, culture, Country and kin has been proven critical to the social and emotional wellbeing of First Nations children.³⁵ Despite this, First Nations children spend longer periods in OOHC³⁶ and are less likely to be reunified with their families compared with non-Indigenous children.³⁷ The rate of permanent care and adoption orders for First Nations children is escalating, with a significant majority being placed with non-Indigenous adoptive parents.³⁸ The rate of First Nations children placed with kin has also been steadily declining.³⁹

What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people? What are the barriers to change, and how can these be overcome?

i. Raise the Age

The minimum age of criminal responsibility must be raised to at least 14 years for all offences, consistent with medical and scientific evidence of child and adolescent neurodevelopment, and in line with international standards.

This criminalisation of children can create a cycle of disadvantage and criminogenic behaviour, isolating them from family, community and support services and often causing complex health and wellbeing issues, including increased risk of suicide,⁴⁰ mental ill-health and trauma for young people.⁴¹

Holistic approaches that cater for children's needs and are tailored to their local context are needed.⁴² Justice reinvestment, restorative justice and culturally appropriate diversionary programs have been found to be more cost-effective responses to young offenders.⁴³ Community designed and led programs are best placed to support First Nations children and communities,⁴⁴ strengthen cultural connection and work to re-establish broken relationships.⁴⁵ Programs and diversionary strategies to prevent disadvantage in early childhood years, through rehabilitation, reintegration, and mental health care are also recommended.⁴⁶

ii. Prevent the discriminatory removal of First Nations children

Preventing the ongoing discriminatory and harmful removal of First Nations children from their families will protect the wellbeing of young people and their families, and help prevent their contact with the legal system. To stop this practice, meaningful changes are needed to overcome the causes, which are linked to multiple factors, including:

- cultural bias against parenting models, inadequate and inappropriate services and discriminatory treatment before the law⁴⁷
- discriminatory understanding of 'risk' and parenting⁴⁸
- poor access to safe housing, overcrowded housing, exposure to domestic violence and maternal and child health inequities⁴⁹
- socioeconomic disadvantage⁵⁰

The Aboriginal and Torres Strait Islander Child Placement Principle (ATSCIPP) involves five elements: Prevention, Partnership, Placement, Participation and Connection. The ATSCIPP is recognised as the 'cornerstone of Australian law and policy acknowledging the importance of family, culture and communication connections to [identity] and wellbeing'⁵¹ and is supposed to guide policy across Australia.⁵²

While the ATSCIPP has the potential to reduce and prevent removals, and minimise harm to the wellbeing of children and families, in reality it is not respected and applied appropriately.⁵³

First Nations mothers and babies have substantially worse health outcomes than non-Indigenous mothers and babies.⁵⁴ First Nations families are understandably apprehensive about accessing antenatal care for fear of intervention, a fear justified by the evidence confirming that First Nations infants are being removed at increased rates.⁵⁵

Reducing the over-representation of First Nations children in OOHC will require simultaneous community-led initiatives targeted at children entering, in and exiting care. Crucially, the evidence supports that the greatest effort needs to occur even earlier, before children are in contact with the system.⁵⁶

iii. Custodial Health and Safety

The sub-standard healthcare provided in prisons, and the lack of culturally safe and trauma informed care afforded to First Nations individuals within the healthcare and legal systems, is one of many factors contributing to deaths in custody.⁵⁷

Australian State and Territory legislation provides that people in prison have the right to timely access to healthcare of equitable standard to that which is provided in the community,⁵⁸ also known as the 'equivalence of care' principle.⁵⁹ The specialised needs of people in prisons, and First Nations people in particular, are well established.⁶⁰ Despite this, the quality of health care provided by governments and private contractors in custodial settings remains wholly inadequate to meet the health-related needs of people in prisons.⁶¹ The standard of care is particularly inadequate for people with multiple physical health, mental health, disability and rehabilitation needs. Instead, carceral environments function as warehouses, particularly for people from lower socio-economic circumstances, people with a history of trauma, people with addiction, people experiencing mental ill-health and people living with disability.⁶²

To achieve equitable healthcare for people in custody, governments must urgently address the inadequate and inferior services available in private and publicly operated adult and youth prisons and the long wait times for accessing what limited services are available,⁶³ including:

- access to medical professionals and facilities equitable to the broader community
- full access to Medicare, PBS and the NDIS, including access to culturally safe medical care and treatment.

iv. Numerous inquiries without action

The NJP welcomes the Commission's focus on the wellbeing of children. We must however emphasise that extensive resources and contributions have been made time and time again exploring these same issues. The means to address them have been repeatedly identified and continuously ignored.

We recommend the Commissioner consider the following:

- [Family is Culture](#)
- [Family Matters](#)
- [Wiyi Yani U Thangani](#)
- [Royal Commission into the Protection Detention of Children in the Northern Territory](#)
- [Royal Commission into Aboriginal Deaths in Custody](#)
- [AbSec](#)
- [Aboriginal and Social Justice Commissioner Reports](#)
- [Pathways to Justice Report](#)
- [Aboriginal and Torres Strait Islander Child Placement Principle](#)
- [Change the Record](#)
- [Select Committee Report](#)

v. Human Rights

Despite Australia's domestic⁶⁴ and international obligations,⁶⁵ many of the core human rights and freedoms are not adequately protected and promoted at the federal level and there is an inconsistent level of protection across Australian states and territories.⁶⁶

This patchwork of rights disproportionately impacts First Nations families and communities.

We need meaningful human rights protections that ensure rights are guaranteed, protected and enforceable.

Can you identify reforms that show evidence of positive outcomes, including reductions in children's and young people's involvement in youth justice and child protection systems, either in Australia or internationally?

- [Warakurna](#)⁶⁷ is the first entirely Indigenous-run police station in Western Australia and employs strategies such as learning the local language and how laws intersect with Aboriginal knowledges and traditions. Connecting to community through the local culture has shifted community perception of the role of police, rebuilt trust and improved police-community relations and lowered crime rates.⁶⁸
- Justice Reinvestment such as the [Maranguka Justice Reinvestment Project](#) (MJRP) have reduced the overall crime rates in the Bourke area while providing substantial economic savings by diverting people away from the legal system.⁶⁹ An evaluation found that the MJRP saw a 23% reduction in police recorded incidence of domestic violence and a 31% increase in year 12 retention rates; a 38% reduction in charges across the top five juvenile offence categories; a 14% reduction in bail breaches; and a 42% reduction in time spent in custody.^{ii,70}
- The [Koori Youth Justice Program](#) aims to prevent offending or re-offending behaviour by ensuring that young Aboriginal people are connected to their families and communities and provided with access to the supports and services they require.⁷¹ An evaluation found it to be 'more engaging, inclusive and less intimidating than the mainstream court'.⁷²
- The [Youth Koori Court \(YKC\)](#) in NSW⁷³ is a modified process within the Children's Court process to better involve First Nations young people, their families, and the community in the court process.⁷⁴ An evaluation of the Parramatta pilot programme found it significantly reduced the average number of days spent in detention and concluded that it is 'an effective and culturally appropriate means of addressing the underlying issues that lead many Aboriginal and Torres Strait Islander young people to appear before the criminal justice system'.⁷⁵ The YKC was expanded to the Surry Hills Children's Court in 2019.⁷⁶
- The [Yiriman Project](#) is a youth project in the Kimberley, Western Australia developed by Elders from four local language groups. The project focuses on supporting and reconnecting young Aboriginal people to culture and Country to address issues affecting them, including self-harm and substance use.⁷⁷
- The [Denver STAR \(Support Team Assisted Response\)](#),⁷⁸ based in Denver, Colorado, launched mid-2020 in partnership with local health, mental health and police departments. It is closely modelled on the [CAHOOTS \(Crisis Assistance Helping out on the Streets\)](#) program⁷⁹ and responds to calls that have a mental health or substance use component. Staff are trained to de-escalate situations and connect individuals in distress with appropriate services.
- The [Balit Ngulu](#) program established by the Victoria Legal Service provides holistic support for First Nations young people interacting with the legal system. The service is based on a continuing assessment and support of legal and non-legal needs, including legal assistance, mental health and substance abuse care, and finances and housing.⁸⁰ Balit Ngulu seeks to strengthen cultural connection and address the needs underlying offending behaviour.

ⁱⁱ The project also saw a clear increase in the number of people gaining licences while the number of driving offences decreased. Its effectiveness can be attributed to its focus on targeting the underlying factors which may cause driving offences, such as lack of access to vehicles and supervisors, identification documents, and language and literacy issues which may be obstacles for written tests.

From your perspective, are there benefits in taking a national approach to youth justice and child wellbeing reform in Australia? If so, what are the next steps?

The well-documented and persistent systemic issues that cause some community groups to experience discrimination and oppression through the operation of public systems are not unique to the states and territories, or individual policy areas. A national approach provides more consistent monitoring, regulation and accountability opportunities. Further, consistent policy approaches across the nation will facilitate thorough evaluation and capacity to respond to issues.

National approaches are recognised as necessary in the development of national plans, and yet the responsibilities, policies and laws that dictate the day-to-day operation of those systems remain segmented by jurisdiction and policy silos. The causes of these issues and the methods to overcome them need not only a national approach but a coordinated, holistic, cross-sectorial strategy.

Thank you for the opportunity to contribute to this important work. Please don't hesitate to contact the National Justice Project if we can be of further assistance.

Yours sincerely,

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