

30 June 2023

Our ref: [LP:MC]

Confidential

Ms Anne Hollonds
National Children's Commissioner
Australian Human Rights Commission
[REDACTED]

By email: [REDACTED]

Dear Commissioner

Youth Justice and Child Wellbeing Reform across Australia

Thank you for the opportunity to provide comments to the Australian Human Rights Commission (**AHRC**) in relation to the National Children's Commissioner's (**Commissioner**) consultation on the Youth Justice and Child Wellbeing reform across Australia.

This response has been compiled by the QLS Children's Law Committee, Human Rights and Public Law Committee, First Nations Legal Policy Committee, and Health and Disability Law Committee, whose members are experienced practitioners with substantial expertise in this area.

The Society has been a long standing advocate for reform in the youth justice and criminal justice systems. In our advocacy, the Society has always been mindful to balance the need for community safety and to protect children in the youth justice process.

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

The Society has raised concerns regarding any proposed law reform, including the potentially disproportionate impact on at risk young people. Young people and children who come into repeated contact with the criminal justice system are extremely vulnerable: they tend to have high rates of trauma, abuse and neglect, poorer health and are more likely to have a history of alcohol and drug use and dependence. These are some potentially significant contributing factors in the community¹. There is a strong correlation between out-of-home care, youth detention and adult incarceration².

The Society also draws attention to the over-representation of First Nations children and young people who make up nearly 6% of the total youth population between the ages of 10 and 17

¹ Law Council of Australia, The Justice Project: Children and Young People (Final Report, August 2018) 7, 13-14.

² Ibid 5, 12; Law Council of Australia, The Justice Project: Prisoners and Detainees (Final Report, August 2018) 18.

years³. Despite this, First Nations young people in this demographic account for over half of the children in youth detention at 56%⁴.

In contrast with non-Indigenous Australians, young First Nations Australians aged 10-17 were 26 times more likely than young non-Indigenous Australians to be in detention from the June quarter 2022⁵. For unsentenced detention, young First Nations Australians were 17 times more likely to be detained than non-Indigenous Australians, and for sentenced detention the rate was 19 times higher for young First Nations Australians⁶.

There are many factors that contribute to the ongoing disadvantage faced by children and young people, including: complex trauma, health, disability, poverty, or housing. First Nations young people are disproportionately impacted by the effects of intergenerational trauma from colonisation, discrimination and racism, systemic failures of the justice system and paternalistic government policies.

Capacity

The majority of people with disability who come into contact with the criminal justice system have varying forms of cognitive disability, including intellectual disability, acquired brain injury, autism spectrum disorders, and foetal alcohol spectrum disorders⁷. People with a disability should be afforded their right to equal recognition before the law⁸, the right to access justice⁹, the right to liberty and security of person¹⁰, the right to freedom of torture or cruel, inhuman, or degrading treatment or punishment¹¹, and the right to freedom from exploitation, violence and abuse¹². The Royal Commission¹³ found that without the appropriate support in the community for people with a disability, they are routinely and systematically forced into criminal justice interventions and institutions that are rarely supportive of persons with a disability¹⁴. Effective treatment of offenders with a disability is pivotal on the precise identification of the underlying mental impairment, and appropriately tailoring solutions to the individual. If left untreated (i.e. if interventions are not individualised) evidence-based and validated, recidivism is inevitable.

Intergenerational Trauma

A contributing factor of First Nations youth entering the youth justice system is the failure to adequately address the historical, or intergenerational trauma as an underlying cause of First Nations youth moving in and out of youth detention and finding themselves in prison as they mature. The impact of colonisation that resulted in forced removals of First Nations people from

³ Australian Institute of Health and Welfare, 'Aboriginal and Torres Strait Islander People' Youth Detention Population in Australia (Web Report, 13 December 2022)

<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2022/contents/understanding-youth-detention-in-australia/aboriginal-and-torres-strait-islander-people>.

⁴ Ibid.

⁵ Australian Institute of Health and Welfare, 'Rates' Youth Detention Population in Australia (Web Report, 13 December 2022) <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2022/contents/aboriginal-and-torres-strait-islander-young-people/rates>.

⁶ Ibid.

⁷ Eileen Baldry, Leanne Dowse & Melissa Clarence (2012). People with mental and cognitive disabilities: pathways into prison. Sydney: University of New South Wales; Baldry E, McCausland R, Dowse L & McEntyre E (2015) A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System, Sydney: University of New South Wales.

⁸ Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12.

⁹ Ibid, art 13.

¹⁰ Ibid, art 14.

¹¹ Ibid, art 15.

¹² Ibid, art 16.

¹³ ...Into Violence, Abuse, Neglect and Exploitation of People with Disability.

¹⁴ Ibid, p 7.

their ancestral lands, including the period of the Stolen Generations¹⁵. The remnants of intergenerational trauma continue to be experienced in many respects through racism, poverty, marginalisation, or failed government policies and initiatives that look to address the problem, rather than address the causes. These factors, among other things, must be addressed and acted upon with a trauma informed approach¹⁶.

Poverty

Poverty is an underlying factor of youth and vulnerable children who end up in the youth justice system, with youths raised in socio-economic deprivation are more likely to engage in anti-social behaviours. This extends to First Nations young people who experience significantly higher levels of poverty and disadvantage. Poverty hinders educational outcomes, decreases employment opportunities, and impairs access to social services, early intervention services and access to justice.

Discrimination and Racism

The more common contributors of First Nations young people in the youth justice system are discrimination and racism, which are exacerbated in the over policing, surveillance, and detaining of First Nations youth for minor offences. Negative attitudes and disregard toward First Nations youth from personnel are additional contributing factors.

The angst among First Nations communities is caused by the high prevalence of racial profiling and discrimination of First Nations youth. Consequently, they are more likely to be stopped by police, disproportionately charged for minor or simple offences, and receive harsher sentences.

Systemic racism is the central cause that underpins the youth justice system for First Nations youth. Consequently, First Nations youth are less likely to receive culturally appropriate care, services, early interventions, or diversionary programs. Thus, the inequalities of disproportionate representation of First Nations young people in detention centres. When there is a lack of funding to provide culturally appropriate services that support the needs of First Nations youth, there will be a lack of engagement from the youth and families (generally), and as a result, lack of intended outcomes from mainstream service providers.

2. 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?

Foster and Harness positive Relationships

There is a fundamental need to foster and harness positive relationships with vulnerable children and young people enveloped in the youth justice system. Frontline workers, advocates, program staff and administrators are pivotal in building these key positive relationships. With this in mind, youth offenders more often than not come from a disadvantaged background, where homelessness, intellectual and physical disability and other social factors contribute to their offending and recidivism.

¹⁵ 'Who are the Stolen Generations' *Healing Foundation* (Web Site) <
<https://healingfoundation.org.au/who-are-the-stolen-generations/#:~:text=The%20Stolen%20Generations%20refers%20to,mid%2D1800s%20to%20the%201970s>>

¹⁶ Dr Faye Scanlan, Anna Farrelly-Rosch & Helen Nicoll, 'Clinical practice in youth mental health: What is trauma-informed care and how is it implemented in youth healthcare settings?' *Orygen* (Fact Sheet, 2018) <https://www.orygen.org.au/Training/Resources/Trauma/Clinical-practice-points/What-is-trauma-informed-care-and-how-is-it-implemented/orygen_Trauma_informed_care_CPP>

First Nations youth require unique culturally appropriate support, in addition to embedding cultural values and knowledge that should be recognised in the justice system. The *Youth Justice Act 1992* (Qld) recognises the importance of diversity for youth and to consider the child's community¹⁷. Thus, First Nations values of the child's community should be central to their rehabilitation and throughout their care. Otherwise, when issues such as cultural and language barriers, racism, and discrimination arise, the associated harms may be compounded and entrench their disadvantage further while in the justice system and beyond.

To engage with the youth justice system effectively, First Nations youth need to feel culturally safe to respond to anyone. It would be necessary to harness and foster relationships where there is no sense of any power imbalance. There would be considerable benefit in utilising First Nations methods as a tool to facilitate *all* vulnerable children and young people, not just First Nations youth. First Nations culture is traditionally not exclusive, and one factor of youth offending has been the exclusion from mainstream.

Early Intervention

The youth justice system requires focus on prevention and early intervention measures, rather than punitive measures such as incarceration. To change or overcome a broken system, it is paramount to understand that the majority of youths in the justice system have experienced trauma, poverty, and disadvantage throughout their lives. It is well understood that youths and young people raised in broken homes and socio-economic deprivation are more predisposed than other young people to engage in lawbreaking behaviours.

Evidence-based early intervention programs would address the underlying issues that contribute to youth offending and prevent or reduce the likelihood of them entering the youth justice system. It has been shown to be effective to reduce offending through an increase in education and skills to support them in making a positive choice for the future¹⁸. In addition, providing appropriate funding for community led and run programs, which are culturally appropriate to reconnect with identity, community, culture or country and language. The essence being to provide a sense of belonging, self-esteem and maintain a standing in the community.

Addressing offending by this vulnerable cohort requires significant and sustained early intervention services to address the pervasive social and economic causes of offending and divert high-risk young people from the criminal justice system. The Queensland Government's *Working Together, Changing the Sentence* report recognises that prevention, early intervention, increased support services and restorative justice reduce youth offending and reoffending, while detention increases the risk of children and young people reoffending, which inevitably leads to lifelong periods of incarceration¹⁹.

Consistent with the existing principles of the *Youth Justice Act 1992* (Qld), detention should be the last resort for children and if imposed, should provide the maximum safeguards and protections to minimise the adverse impacts of institutionalisation. Moreover, increased penalties are not an appropriate deterrent of offending or any criminal activity. It enhances recidivism. Unfortunately, in Queensland this has not come to pass, and youth detention is leaving young people scarred, angry, and more likely to reoffend²⁰.

¹⁷ *Youth Justice Act 1992* (Qld), Schedule 1, 14

¹⁸ Australian Government, Law & Justice: prevention and early intervention programs for Indigenous youth (2014) <<https://www.aihw.gov.au/reports/indigenous-australians/law-and-justice-prevention-and-early-intervention/summary>>.

¹⁹ Queensland Government, Working Together, Changing the Sentence, Youth Justice Strategy 2019-2023 (Report) <<https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/strategypdf>>

²⁰ Ben Smee, "Like Guantanamo": the children locked in solitary for weeks at a time in Queensland youth prison', *The Guardian* (online, 6 June 2023) <<https://www.theguardian.com/australia>>

Youth Justice Benchbook

In Queensland, QLS acknowledged the Youth Justice Benchbook as an excellent and comprehensive document that would be of great benefit to the profession. We had the opportunity to consider the resource that provides thorough analysis of the procedural requirements of court proceedings as well as very helpful practical information. In addition, the Benchbook provides insightful information regarding neurodevelopment issues.

Our members have emphasised that in preparing documents with respect to young people in the youth justice system, there are two central issues that should be kept front of mind:

- dual system children and young people who are in the child protection system (either on an order or with a child protection history); and
- disability/decision making impairment and meaningful access to NDIS funding (which is dependent on appropriate assessments and follow ups being undertaken and advocacy in terms of a plan's development).

Nonetheless, our members suggested that to enhance the Youth Justice Benchbook, there should be greater use or reference to the relevant provisions of the *Human Rights Act 2019* (Qld) (HRA), to address the interaction between the HRA and other laws, and in addition to any statutory requirements.

Our members' consideration should be given to the Victorian Children's Court Bench Book that sets out in depth the human rights issues from the Victorian Charter²¹.

3. 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?

Alternative Education and Diversion Programs

Educational programs like social and emotional wellbeing have proven to be positive by the reduction of youth offending²². The program aims to achieve the social and emotional wellbeing or 'competency' of children, that inevitably builds confidence, positive relationships, communication, engagement in school education, resilience with challenging tasks, and success in life²³.

Internationally, a pilot program facilitated in Western Ontario, the 'Social-Emotional Learning program', demonstrated this type of program reduces aggression, substance use, and emotional distress and improves prosocial skills²⁴. Various phases of the study in youth justice

[news/2023/jun/06/like-guantanamo-the-children-locked-in-solitary-for-weeks-at-a-time-in-queensland-youth-prison](https://www.legislate.qld.gov.au/legislation/news/2023/jun/06/like-guantanamo-the-children-locked-in-solitary-for-weeks-at-a-time-in-queensland-youth-prison)

²¹ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (29 July 2010).

²² Australian Institute of Health and Welfare, 'Social and emotional wellbeing' *Australia's children* (Web Report, 25 February 2022) <<https://www.aihw.gov.au/reports/children-youth/australias-children/contents/health/social-emotional-wellbeing>>

²³ Ibid.

²⁴ Amada J. Kerry 'Pilot and Adaptation of a Social-Emotional Learning Program in Youth Justice Settings' (PhD Thesis, The University of Western Ontario, 2019). Available at: <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=8740&context=etd>

settings and youth correctional settings, found that there was an increase in participation, where program staff indicated high levels of feasibility, acceptability, and many important adaptations²⁵.

Diversionary programs should be central throughout each phase for vulnerable children who are at risk of entering, or are in, the justice system. The programs should be community based and led to prevent or reduce youth offending, and to divert young offenders away from reoffending. This approach far outweighs the punitive measure of detention that does not address the underlying causes of youth offending.

We are aware that the Aboriginal and Torres Strait Islander Legal Services Qld have a ThroughCare team which provide services to address recidivism²⁶. We suggest it may be helpful to consult with ATSILS about the benefits of this approach from a Queensland perspective.

First Nations ways

A Youth Justice program in Bourke, set up by the Aboriginal community, and supported by interested stakeholders from the community, including the police, has had positive outcomes in reducing youth offending. The central component to its success is that it is solely run and led by the Aboriginal community themselves with stakeholders also, committing themselves to the program.

The Bourke Tribal Council is the central decision-making and strategy setting body for Maranguka, created as a space to bring together the multiple Aboriginal language and cultural groups around Bourke. Based on key data about their community – like justice, health and demographic indicators – the Tribal Council developed a long-term strategy Growing our Kids Up Safe, Smart and Strong. Coming out of this are three key Working Groups through which the Aboriginal community and interested service providers work on strategies in three areas: early childhood, 8 to 18-year-olds and the role of men²⁷.

Hawaii has no girls in prison

Hawaii, as recently as 2021 has no girls in youth detention centres²⁸, and this is a result from programs being solely Indigenous community led and operated²⁹. In Hawaii, a cross-agency approach was adopted to promote system-of-care principles of community based, individualised, culturally and linguistically competent, family driven, youth-guided, and evidenced based services. Hawaii understood there needed to be buy-in from the community as a whole and government for its success³⁰.

²⁵ Ibid.

²⁶ 'Services' Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (Web Page) <<https://atsils.org.au/services/>>

²⁷ Mark Riboldi, 'What can we learn from justice reinvestment' Community Legal Centres NSW (Web Page, n.d.) <<https://www.clcnsw.org.au/what-can-we-learn-justice-reinvestment>>

²⁸ Cortney Sanders and Samantha Wing, 'Hawai'i Is Leading the Way for Girls' Youth Justice' Centre on Budget and Policy Priorities (Blog Post, 29 July 2022) <<https://www.cbpp.org/blog/hawaii-is-leading-the-way-for-girls-youth-justice>>

²⁹ Ibid.

³⁰ Edward Suarez et al, 'Project Kealahou: Improving Hawai'i's System of Care for At-Risk Girls and Young Women through Gender-Responsive, Trauma-Informed Care (2014) 73(12) Hawaii J Med Public Health 387-392. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4300548/>

4. 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 Society acknowledges that youth justice has a broad impact on our community, and we recognise the grief of victims and their families, as well as community expectation for steps to be taken to address youth crime. Through its long standing advocacy for reform in this area, the Society has always been mindful to balance the need to protect children and their human rights with the need to protect the community from harm.

The Society has suggested reforms to the Queensland Government, to which have been met with reluctance or no will. Accordingly, it would be beneficial that the Federal Government consider the proposals the Society suggested to set a national framework which States and Territories can utilise to introduce appropriate and effective ways to address youth justice issues.

By way of background, the Society suggested the Queensland Government review the effectiveness of the Joint Agency Protocol to reduce preventable police call-outs to residential care services with a view to:

- reducing the criminalisation of children in care;
- review the unimplemented recommendations of the Queensland Child Protection Commission of Inquiry and the barriers to implementation;
- increased Legal Aid, Aboriginal and Torres Strait Islander Legal Service and legal assistance sector funding for families responding to child protection Investigations;
- implement a transparent and accessible complaints mechanism in the child protection system; and
- undertake a culturally appropriate community conversation with Aboriginal and Torres Strait Islander children and young people about the issues affecting them particularly with respect to their interactions with the justice system.

The 'Project Kealahou' in Hawaii was a six year, federally funded program aiming at improving services and outcomes for female youth³¹. We acknowledge the approach taken by the NSW Advocate for Children and Young People in the report 'What Aboriginal children and young people have to say'. However, a standardised national framework will ensure accountability, cooperation, collaboration, and transparency.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED]

Yours faithfully

[REDACTED]
Chloé Kopilovic
President

³¹ Ibid.