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Reply To: Adelaide

Your Reference:
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28 June 2023

Ms Anne Hollands
National Children's Commissioner
Australian Human Rights Commission
Via email: youthjusticereform@humanrights.gov.au

Dear Commissioner,

Re Youth Justice and Child Wellbeing Reform across Australia

The Aboriginal Legal Rights Movement is the Aboriginal Legal Service of South Australia. We are an Aboriginal Community Controlled Organisation with legal practice areas working across youth justice and child protection. In our criminal practice we represent children and young people involved in the criminal justice system. We also run South Australia's Custody Notification Service (CNS) which is required to be notified by police every time an Aboriginal person, including a child or young person, is arrested. In our civil practice we work with families involved with the child protection system. We represent parents and caregivers of children involved in this system, but as our submission will highlight, due to the failures of this system, we find we are often also forced to advocate for the children in many of these matters.

We welcome your project into Youth Justice and Child Wellbeing Reform across Australia. As you will see from our submission there are many areas in vital need of urgent reform in order to improve the lives of Aboriginal children and young people in South Australia

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

Firstly, it must be acknowledged that Aboriginal children and young people are vastly overrepresented in South Australia's youth justice system and the child protection system. The reasons for this are many and varied, but the ongoing impacts of colonisation are at the forefront. The entrenched disadvantage, structural racism and the impact of multi-generational dispossession and breaking apart of families all put Aboriginal children at greater risk of contact with the youth justice system. The statistics are alarming and damning:

Aboriginal children and young people comprise approximately 5 per cent of the total population of children and young people aged 0-17 in South Australia. Aboriginal children and young people are vastly overrepresented in the child protection and youth justice systems, representing 36.7 per cent of children and young people in care, and 51.8 per cent of the average daily population in Kurlana Tapa Youth Justice Centre.[1]

[1] Guardian for Children and Young People and Training Centre Visitor, *Snapshot of South Australian Aboriginal Children and Young People in Care and/or Detention from the Report on Government Services 2021*, p.2.

Overwhelmingly for our young clients, involvement in the youth justice system is often precipitated by or occurs concurrently with interaction with the child protection system. Most often, interaction with the child protection system means suffering from the failures of that system. These failures are multi-generational and systemic. Involvement with the child protection system is one of the most likely predictors of children and young people becoming involved in the youth justice system.

The intergenerational impact and trauma of the child protection system on Aboriginal children and their families cannot be overstated. In South Australia, we see a significant failure of the Department of Child Protection (DCP) in applying the Aboriginal Child Placement Principle (ACPP) in violation of section 12 of the *Children and Young People (Safety) Act (2017)*. Failure to apply the ACPP violates our clients' rights to connection with their culture – a fundamental pillar of strength for Aboriginal children, their families and communities. In practice, these failures separate siblings, rob children of their right to experience and be surrounded by their culture, and fail to understand Aboriginal family dynamics, parenting practices and child rearing responsibilities. A severe lack of understanding within the DCP of Aboriginal child rearing practices and Aboriginal kinship has left many Aboriginal children in culturally unsafe and unsupportive placements once removed from their parents. The absence of a safe and supportive family environment is a significant source of trauma for children, and for many of our clients we witness the multi-generational impact of these traumas and how it leads children to become involved with the criminal justice system.

DCP continuously fail to meet the needs of children in their care, often with the result that they become involved with the youth justice system, and always with negative impacts to their wellbeing. For instance, many children are placed in unsafe environments where they are subject to further abuse and/or neglect with DCP failing to conduct sufficient checks on these most vulnerable children.[2] Residential care represents a particularly problematic choice of placement for children under the guardianship of the Chief Executive of DCP. Research conducted by the South Australian Guardian for Children and Young People and Training Centre Visitor shows that children in residential care are often subject to such unstable and uncertain environments that they engage in offending behaviour due to a preference to be held in youth detention rather than residential care facilities.[3] The behaviours of children and young people who have experienced significant trauma, abuse and/or neglect are viewed as offending behaviour rather than indications of dysfunction or distress and dealt with by the police and youth justice system, instead of referral to support services. They are often then released back into the same environment from which the criminal charges arose and the cycle continues without support services for the child or young person in distress. Alternatively, they are remanded in custody when residential care facilities will not accept them back into their services. This is a significant departure from the requirement that children are only detained as a matter of last resort, and shows that DCP do not act in the best interests of children under their guardianship.

The role of police must also be recognised in the factors that impact Aboriginal children's involvement in the youth justice system. Aboriginal children are significantly more likely than their non-Aboriginal peers to be referred to court rather than receive a caution, and significantly more likely to be arrested rather than issued with a caution or diversion.[4]

[2] See Coronor's Findings, Inquest into Death of Zhane Chilcott, published 2023.
[3] See Guardian for Children and Young People and Training Centre Visitor, 'A PERFECT STORM? Dual status children and young people in South Australia's child protection and youth justice systems', Report 1, November 2019.
[4] Change the Record and the Australia Institute, 'Raising the age of criminal responsibility', 2020, p.7.

Police often lack the skill set, training and demeanour to de-escalate situations or build trusting relationships with Aboriginal children and young people. Our clients have been subjected to too many heavy-handed arrests coupled with a hard-line approach to policing. At best, police behaviour evidences an inability to interact positively with young people with intellectual disabilities and/or mental health issues, at worst, Aboriginal children are targeted by police. The mindset and culture of police that Aboriginal children are "troublemakers" often leads to the escalation of interactions, placing children under arrest and more severe charges being laid against Aboriginal children, where non-Aboriginal children would likely receive a caution.

ALRM suggests that it would be appropriate for police to reconsider their commitment to the Royal Commission Into Aboriginal Deaths In Custody recommendations 234, 235, 236, 238, and particularly 239 and 240. It is those latter two recommendations that deal specifically with the principle of arrest as the absolute last resort in relation to Aboriginal youths and children. Correspondingly, these youths and children should not be detained in police lock-ups which is still a regular occurrence, contrary to recommendation 242.

So called "tough on crime" or "hard-line" policing and prosecution tactics which target Aboriginal populations have a significant impact on bringing children into contact with the youth justice system. Often these approaches are knee-jerk reactions to heightened community or media opinions rather than evidence-based responses to social issues. Over policing in areas with a high Aboriginal population, coupled with police attitudes that are heavy-handed or racist towards Aboriginal people inevitably lead more children into the youth justice system. By way of example the South Australian Police recently launched "Operation City Safe" in Port Augusta in May 2023, leading to the arrest of 24 children over just a two week period – a 243% increase on the prior month. This operation has been coupled with a policy of opposing police bail, even for very young children aged 10-12 years, meaning many children are then transferred from regional Port Augusta to metropolitan Adelaide to be remanded in Kurlana Tapa Youth Training Centre. Again, this is in direct contrast to the fundamental right that the detention of children should be one of last resort. It also separates children from their families, culture and country – one of the key drivers towards further contact with the justice system.

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?**

Immediately raising the age of criminal responsibility to 14 years without exceptions or carve outs is necessary to protect children from coming into contact with the justice system. This singular reform will ensure children aged 10-13 years old will be protected from the justice system. Extensive evidence exists to support this change, which is also supported by the majority of Australians.[5] Given the extreme overrepresentation of Aboriginal children in the youth justice system, this change will have a significant positive benefit on Aboriginal children. While several state and territory jurisdictions have made progress to increase the age of criminal responsibility, none have adopted an increased age of 14 years without exceptions – an approach which is out of step with medical evidence and international standards. The barriers to change here are a lack of political willingness to take a lead on this work, failure to undertake the necessary

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[5] See Change the Record and the Australia Institute, 'Raising the age of criminal responsibility', 2020 for a comprehensive outline of evidence.

background work to scope existing and develop new services to support 10-13 year olds engaging in harmful behaviours and to invest resources into those services.

How police deal with children, particularly during arrest and interviewing needs particular attention to ensure children's rights are not violated. We have seen our youngest clients arrested while asleep at home, removed from their homes and transported to police stations without clothes, and appear in hearings without clothes. The complete disregard for the most basic rights and respect towards those children are all too common examples of police attitudes towards Aboriginal children and their families. Police actions and attitudes like this seek to degrade, humiliate and entirely disempower Aboriginal children. The trauma caused by such actions is obvious, and yet it remains standard policing practice.

We have witnessed many instances where children clearly ask for their parent, grandparent or responsible adult to be present during an interview and police deny this right. Records of interview show pressure is placed on children to keep going with an interview without the presence of an adult support person or legal advice. Under circumstances where a responsible adult cannot be found to advocate and protect the rights of the child police should terminate the interview. ALRM has been particularly concerned with a problematic program delivered by [redacted] which places a "neutral" adult in police interviews as the responsible adult. However, this adult does not have legal training, will not intervene to protect the child's legal rights during interview, and is not present as an advocate for the child. While such overstep and denial of rights by police means records of interview are ultimately thrown out during court proceedings, this does not prevent the child from having to experience the often traumatic, scary and disempowering experience of a police interview, having charges laid, potentially being denied bail and detained, and eventually appearing in court.

The lack of bail accommodation for youth means many of our young and most vulnerable clients are remanded in custody when a suitable and safe bail address cannot be found. However, the conditions in youth detention in South Australia continuously breach the rights of children and negatively impact their wellbeing. Kurlana Tapa has been rife with issues for many years now, which the Department of Human Services blame on staff shortages. These ongoing and severe staff shortages lead to children remaining confined to their rooms for up to 20 hours or more per day, cause issues with children communicating with their lawyers to provide instructions both over the phone or in person, and prevent children from attending appointments, including for serious health concerns. Children have also informed us that school lessons are also not held due to staff shortages. The Department of Human Services need to ensure, as a priority, that Kurlana Tapa is properly staffed to ensure the rights and wellbeing of children are upheld. If staff shortages are so dire that children are forced to remain confined in their rooms for such long periods of time with all the resultant rights breaches that flow on from this, then children should no longer be detained there until the service is fit for purpose.

Breach of bail is the most frequent offence children are charged with. ALRM proposes that it should be removed as an offence for children. It is often left to the discretion of police to place charges, and as noted earlier, police are significantly more likely to lay charges against an Aboriginal child than a non-Aboriginal child. In many instances the bail conditions are too onerous for children or not understood, and indeed the act leading to a breach of bail is not offending behaviour in and of itself. For example,

many children are arrested on breach of bail where bail conditions stipulate they must not frequent the CBD, but the child does not understand what "the CBD" is, or they need to travel through the CBD to attend school or other services. Similarly bail conditions such as not associating with co-accused, where those co-accused are relatives or attend the same school set children up to fail. Such conditions also do not recognise the lower level of maturity of young people, their vulnerability to peer pressure and risk taking behaviour – entirely normal developmental behaviour, but when coupled with the operation of the law and systemically racist police practices, these lead to extremely negative outcomes for our children.

The fundamental issue, however, is that bail used to be a proper means to ensure the liberty of the subject whilst facing criminal charges, but before either the establishment of guilt or innocence; it has now become an instrument of surveillance and control of Aboriginal youths by the oppressive police imposed bail conditions outlined above. The scenarios set Aboriginal children up to fail and almost guarantee their continued contact with the youth justice system.

The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory observed:

> "The consequences [of] criminalising all breach of bail can be counterproductive. It criminalises conduct that is not, of itself, criminal, such as not residing at a prescribed address. It can also lead to the entrenchment of children and young people in the youth justice and detention systems if they are detained as a result. A child may be detained for breach of bail, and subsequently found not guilty of the original charge. The Commission understands that there is no evidence that making breach of bail a crime deters young people from offending. The Northern Territory Police has noted that it has not reduced offending."[6]

There needs to be major overhaul and reform of the child protection system to prevent children going on to come into contact with the justice system. The Department of Child Protection must recognise the cyclical role their failures play in leading children towards the youth justice system. In particular, the failure to properly apply the Aboriginal Child Placement Principle or to undertake proper scoping efforts to ensure Aboriginal children can remain with their families and those adults with cultural responsibility for them, breaks down Aboriginal families and communities. Family law and child protection systems need to acknowledge the intricacies of Aboriginal culture, and the collective and community responsibilities associated with parenting. These systems must also contemplate, understand and work with the intricacies of Aboriginal families and their dynamics, kinship, and child rearing practices. As Dr Tracey Westerman outlines:

> "Aboriginal communities believe that it takes a whole community to raise a child and this means that it is commonplace for different caregivers to respond to the different emotional needs of the child – the collective arguably making it more likely that the child's innate temperament and personality style which is of biological and genetic origin can then be 'assisted' or responded to by a range of external caregivers."

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[6] *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (n 8) 293.

Proper attention and respect needs to be given in child protection and family law proceedings to the child-rearing and collective practices of Aboriginal families in raising their children, and how applying collective and group decision making through these processes is fundamental to achieving positive outcomes for Aboriginal children, their families and communities. This is also consistent with the right of self-determination pursuant to the United Nations Convention on the Rights of Indigenous People (UNDRIP).

Decisions made within the child protection and youth justice systems must adhere to the Convention on the Rights of the Child (CRC) with respect to the rights of Aboriginal children. These decisions must ensure that decisions made within these systems are in accordance with an Aboriginal child's right to enjoy, profess and practise their culture, language and religion. A child's active involvement in their culture and language forms part of their identity and their lived experiences on country and in community. A child's connection and right to their culture must underpin all actions taken to address an Aboriginal child's safety and wellbeing, and when addressing harmful behaviour.

Adoption of Aboriginal Family Led Decision (AFLDM) making processes in child protection and family law matters would go a long way towards empowering Aboriginal families to stay intact, and to protect the rights of children to be safe, connected to culture and to self-determination. AFLDM should be adopted in legislation and the early intervention services that can assist Aboriginal families to stay together must be properly resourced. The dire over-representation of Aboriginal children in the child protection system shows a need for major reform. These reforms must recognise the deeply entrenched culture of bias that exist within child protection decision making. These biases and misunderstanding of Aboriginal family and child rearing practices lead DCP to make decisions that harm Aboriginal children. Divesting decision-making power through AFLDM to families, children, communities and Aboriginal Community Controlled Organisations that have a deep understanding of these practices and are committed to keeping children safe will go a long way towards reforming the current harmful practices undertaken by DCP.

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?**

International jurisdictions that have raised the age of criminal responsibility in line with scientifically recognised minimum standards have seen the rates of children in contact with the youth justice system decline without evidence of any negative impact on community safety.

ALRM supports reducing the limitation period for laying of charges against a child to 6 months, as operates in certain Australian jurisdictions. Police who have information sufficient to lay charges should lay those charges in a timely manner. At present, police in South Australia are allowed to hold pending charges without laying them for a period of up to 2 years. This is too long and acts as a barrier to children making positive changes.

Increase the availability of suitable bail accommodation for children, specifically Aboriginal children, to ensure they are not kept in custody due to a lack of an available suitable address. Detention of a child should always be as a last resort, however the lack

of suitable bail accommodation addresses for many children, who are often also in contact with the child protection system, means they are remanded in custody, where detention and the criminal justice system become normalised. Proper investment into culturally safe accommodation is required to prevent Aboriginal children being detained despite bail not being opposed by prosecution. Put simply, our concern is that children under the guardianship of the Chief Executive, are not granted bail because their guardian does not make sufficient efforts to ensure that they have safe and suitable accommodation.

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?**

Adopting a national approach to youth justice presents many opportunities for positive outcomes. This should be a rights-based approach, including the right to self-determination for Aboriginal people which recognises, supports, encourages and facilitates connection to culture within the justice, child protection and education systems. However, any national approach to reforms should not slow down states and territories that are already making progress in these areas.

While youth justice and child protection are systems within the purview of the states and territories, the Australian government still has a powerful role to play in the support services that must exist to support children and families to stay away from these harmful systems. Further investment in social services, affordable housing, mental health support, domestic and family violence and the Closing the Gap targets are needed to support children and their families and stop the generational cycle of harm that is all too common for our children.

Given the Federal Government's responsibility for international human rights obligations, a national approach, led by the Commonwealth Government can support the states to meet these obligations. In particular, further attention should be given to the full implementation of OPCAT, including facilitating a visit by the Sub Committee on the Prevention of Torture to youth detention facilities.[7]

At a national level Australia should also ratify the 3rd Optional Protocol to the CRC. This will allow children to seek international recourse for violations of their human rights where a state, territory or federal remedy has not been provided.

ALRM also supports Australia adopting a Human Rights Act and framework that clearly sets out rights to culture, self-determination and protects children from harm – including cultural harm.

[7] The SPT's visit to Australia was suspended in October 2022 due to obstructions it encountered in carrying out its mandate. In February 2023 the SPT ultimately terminated its visit to Australia.

Thank you for considering our submission to your important project on Youth Justice and Child Wellbeing Reform across Australia. If you would like to discuss any of the issues raised within our submission further, please contact [redacted], Legal Policy and Advocacy Officer, at [redacted] or on 8113 3777.

Yours faithfully

Chris Larkin
Chief Executive Officer