Submission: Youth Justice and Child Wellbeing Reform across Australia

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ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.

About ANTAR

ANTAR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Nations Peoples. We do this primarily through campaigns, advocacy, and lobbying.

ANTAR is working to mobilise Australians to vote YES at the referendum for a First Nations Voice to Parliament enshrined in the Constitution, and for this to be complemented with a Makarrata Commission to drive agreement making and truth-telling processes across Australia.

We also engage in national advocacy across various policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including cultural heritage protection; justice reinvestment, over-incarceration and raising the age of criminal responsibility; anti-racism campaigns, native title and land rights, and closing the life equality gap.

ANTAR is a foundational member of both the Close the Gap Campaign and Change the Record Campaign Steering Committee, and an organisational and executive committee member of Just Reinvest NSW. ANTAR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTAR is a non-government, not-for-profit, independently funded and community-based organisation.

‘I should have been punished by my Elders not police. I should be taken to ceremony for one year to learn all the discipline. We have our own law.’

Young person in detention, aged 17[1]

‘Prison does nothing to rehabilitate young people. It only perpetuates cycles of trauma and leads to further youth offending. Prison is no place for a child.’

June Oscar, Aboriginal and Torres Strait Islander Social Justice Commissioner[2]

Introduction

Thank you for the opportunity to provide commentary on reform of youth justice and related systems across Australia, based on evidence and the protection of human rights.

It is widely known that Australia continues to uphold laws, policies and practices that impact negatively on the rights and well-being of children and young people and fail to serve the wider public interest.[3]

As a non-partisan advocacy organisation working for justice, rights and respect for First Nations peoples, ANTAR is particularly concerned about the overrepresentation of Aboriginal and Torres Strait Islander children in child protection and youth justice statistics across the country. 49 percent of young people aged 10–17 under youth justice supervision are from Aboriginal and Torres Strait Islander backgrounds.[4]

It is a statement of fact that systems of detention, care and child protection in Australia have not only largely failed to address the challenges faced by children and young people in care and detention, they have in some cases

[1] Royal Commission into the Protection and Detention of Children in the Northern Territory (2017): 108
[2] Australian Human Rights Commission, ‘Governments must urgently address youth justice crisis’, Joint Statement
[3] Australian Human Rights Commission, Call for Submissions
[4] Rethinking Australia’s Youth Justice System by Embracing Child Rights, Centre for Social Impact.

exacerbated these problems.[5] This is particularly true for Aboriginal and Torres Strait Islander children, who face unique challenges of intergenerational trauma, institutional racism and disadvantage in addition to the larger range of issues affecting children engaged with the criminal justice system (CJS).

Aboriginal and Torres Strait Islander youth are 4.5 times more likely to have contact with the CJS than their non-Indigenous counterparts.[6] Between 2017 and 2021, First Nations youth aged 10–17 years were 16 to 25 times more likely to be detained than non-Indigenous youth.[7] Criminal justice institutions tend to trap First Nations people in ongoing cycles of re-imprisonment.[8] This is particularly true - and particularly damaging - for children and youth, for whom contact with the CJS in the early chapters of their lives often further entrenches them in a cycle of poverty, instability and incarceration.[9]

All children in Australia, including children who commit criminal offences, are entitled to have their human rights protected. These rights are set out in international human rights treaties, in particular the UN Convention on the Rights of the Child (CRC). Further, Article 21 of the The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) outlines that:

> States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.[10]

UNDRIP also recognises "in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training,

[5] Royal Commission into the Protection and Detention of Children in the Northern Territory (2017): 9.
[6] Allard T et al. Police diversion of young offenders and Indigenous over-representation. Trends & issues in crime and criminal justice no. 390. Canberra: Australian Institute of Criminology (2010): 4.
[7] 'Youth detention population in Australia 2021' Australian Institute of Health and Welfare (2021)
[8] Chris Cunneen, 'Surveillance, Stigma, Removal: Indigenous Child Welfare and Juvenile Justice in the Age of Neoliberalism', *Australian Indigenous Law Review*, vol. 19, no. 1, (2015): 42
[9] Donald, B. B. 'Effectively addressing collateral consequences of criminal convictions on individuals and communities' *Criminal Justice*, vol. 30, no. 4 (2016): 33.
[10] United Nations Declaration on the Rights of Indigenous Peoples, United Nations.

education and well-being of their children, consistent with the rights of the child".[11]

It is ANTAR's view that culturally safe and community-led pathways of restorative justice, rehabilitation and reintegration of First Nations children who have committed offences or are at risk of doing so are fundamental aspects of the 'upbringing, training and education of children', and are thus ultimately the right and responsibility of First Nations communities and families to determine, consistent with the rights of the child. It is our firm belief that decisions about the discipline of First Nations children should be made by their communities.

ANTAR wishes to stress that countless inquiries, submissions, meticulously researched policy papers and royal commission reports have been prepared on the topic of overrepresentation of First Nations young people in detention, with many if not all finding that the failings of current youth justice systems across the country are systemic and structural. As such, it is imperative that we preface all policy recommendations with the reminder that any and all facets of our current youth justice system - including related systems of child protection and out-of-home care - which are not designed in consultation with and led by First Nations peoples according to their laws, customs and the respective needs of their particular communities, contribute to a culturally inappropriate system that maintains its colonial order of control through child removal, incarceration and the negation of meaningful First Nations self-determination.

Aboriginal and Torres Strait Islander people know what is best for protecting their peoples, their lands and their children. To effect positive, lasting outcomes in youth justice reform, governments must ultimately consistently and genuinely be led by, and invest in, Aboriginal and Torres Strait Islander solutions.[12]

Such solutions are already underway around the country in the form of holistic anti-violence programs, justice reinvestment, community restorative justice groups, Elder-led circle sentencing[13] and First Nations courts such as Youth

[11] ibid
[12] 'Leadership and Legacy Through Crises: Keeping our Mob safe' Close the Gap (2021): 6.
[13] Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas and Rowena Lawrie 'Circle Sentencing in NSW: A Review and Evaluation' (2003)

Koori Court,[14] as well as self-policing initiatives such as bare foot patrols.[15] These are culturally appropriate initiatives that have potential to empower communities and respect First Nations self-determination.[16] They require more generous and consistent funding, resourcing and support.

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

There has been exhaustive research on the root causes driving young people's involvement in youth justice systems, as well as their re-imprisonment and recidivism. It is crucial to recognise that much of the contact of Aboriginal and Torres Strait Islander children and youth with the CJS arises because of differences in treatment of First Nations and non-Indigenous persons under the system, rather than because of differences in behaviour.[17]

While it is important to pay attention to and, where possible, mitigate individual risk factors for youth involved in criminal behaviour such as disability, mental health issues, and barriers to housing and employment,[18] research suggests that the clearest indicators of risk of interaction with the criminal legal system are overwhelmingly structural: that is, poverty and disadvantage, as well as involvement in the child protection system and family violence (itself a symptom of the intergenerational trauma that has been caused by the structure of settler colonialism). Thus it is ANTAR's position that the focus on early intervention strategies for youth must be accompanied by systemic reform to - or abolition of - paternalistic, punitive and colonial systems of child protection, policing and youth detention.

[14] Youth Koori Court, Children's Court NSW
[15] It should be noted that the narrow focus of some night patrols on immediate crime prevention on do not address the underlying social causes of crime; however, they do provide a mechanism to address community safety and may address criminalization by diverting young people from antisocial or criminal activity. For more, see: John Scott, Elaine Barclay, Margaret Sims, Trudi Cooper & Terence Love, 'Critical Reflections on the Operation of Aboriginal Night Patrols' *The Palgrave Handbook of Criminology and the Global South* (2018)
[16] Cunneen 2007; 2015
[17] Jeff Borland and Boyd Hunter, 'Does Crime Affect Employment Status? The Case of Indigenous Australians' Economica, New Series, Vol. 67, No. 265 (2000): 124.
[18] Change the Record Blueprint for Change report, (2022): 8.

The following section outlines four main contributors to Aboriginal and Torres Strait Islander youth's involvement in youth justice systems.

i. Over-policing and surveillance

The vast overrepresentation of First Nations children and young people at all stages of the youth CJS is widely recognised as beginning with disproportionate police intervention.[19] Police function as 'gate-keepers' whose discretion wields the power to control who will enter the system and how they will enter, often to the disadvantage of First Nations youth.[20] Research shows that police intervene in situations involving First Nations people in "unnecessary and provocative ways", particularly for minor or non-violent offences.[21] Young Aboriginal and Torres Strait Islander offenders have a greater chance of being prosecuted by police and thus a lower chance of receiving a caution than non-Indigenous youth.[22]

Historically, policing was an instrument for controlling, limiting, denying or supervising First Nations entry into the white domain.[23] This has left a legacy of over-policing of First Nations people in the public realm and under-servicing within their own communities.[24]

First Nations youth are 2.9 times less likely to be cautioned than they are to appear in court.[25] This suggests that for First Nations young people, preventing initial contact with police is paramount.

ii. Involvement in child protection system

Entry of Aboriginal and Torres Strait Islander children into the child protection system must be understood within the context of the removal of children from

[19] 'Seen and heard: priority for children in the legal process' Australian Law Reform Commission Report 84 (1997)
[20] Chris Cunneen, Barry Goldson, Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' Current Issues in Criminal Justice 23 (2016): 173.
[21] For more on the role of policing in Indigenous incarceration see Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police,* Allen & Unwin (2001)
[22] Garth Luke and Chris Cunneen 'Aboriginal Over-representation and Discretionary Decisions in the NSW Juvenile Justice System' Australian Indigenous Law Reporter (1996)
[23] Harry Blagg, 'Models of Best Practice: Aboriginal Community Patrols in Western Australia' (October 2015): 15.
[24] ibid
[25] Troy Allard *et al.* 'Police diversion of young offenders and Indigenous over-representation'. *Trends & issues in crime and criminal justice* no. 390. (2010): 4.

their families under government policies of protection and assimilation, creating what has become known as the 'Stolen Generations'.[26]

Much research details the intersection between the child protection and youth justice systems, particularly where it concerns the over-representation of Aboriginal and Torres Strait Islander children and youth. Involvement in the child protection system is considered one of the clearest indicators of risk of interaction with the criminal legal system.[27] Young people involved in the child protection system are 12 times more likely than the general population to be under youth justice supervision.[28] Aboriginal and Torres Strait Islander young people are 16 times more likely to be involved in both systems than non-Indigenous young people.[29]

A longitudinal study of the child protection and juvenile justice nexus in South Australia noted that while the majority of child-protection involved youth do not become convicted offenders, the odds of convictions are significantly greater for those who had been placed in out-of-home care.[30] This significant overlap has traditionally been attributed to the impact of trauma on children and young people.[31]

The Royal Commission into the Protection and Detention of Children in the Northern Territory found that child protection systems failed to comply with the basic binding human rights standards in the treatment of children and young people.[32] Instead of families receiving the support and resources needed to care for their children, children were often removed from family and community with reports of inappropriate placements, dislocation from culture and a lack of support to acknowledge or address trauma.[33]

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[26] Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Australian Law Reform Commission Report 133 (2017): 73.
[27] Blueprint for Change report, Change the Record (2022): 6.
[28] Australian Institute of Health and Welfare Young people in child protection and under youth justice supervision 2015–16 (2017)
[29] ibid
[30] Malvaso et al. 'The child protection and juvenile justice nexus in Australia: A longitudinal examination of the relationship between maltreatment and offending', 2017: 32.
[31] Our Youth, Our Way: inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system, Commission for Children and Young People, Melbourne (2021): 296.
[32] The Protection and Detention of Children in the Northern Territory Final Report, Royal Commission into the Protection and Detention of Children in the Northern Territory (2017): 9.
[33] ibid

Children and youth reported feeling unsafe, lonely and out of place, with the next step often being contact with the CJS and ultimately detention.[34] These 'systemic failures' are not limited to the Northern Territory, with the Yoorrook Commission in Victoria hearing from the Department of Families, Fairness and Housing that systemic racism in the Victorian child protection system is leading to 'shamefully high rates' of removal of First Nations children. The Commission heard that approximately 60 percent of child protection notifications for Victorian First Nations families are unsubstantiated.[35]

iii. Institutional racism

In a comprehensive report on a rights-based approach to youth justice in Australia, Save the Children list institutional racism as one of the three top contributing factors as to why child rights are often limited across the youth justice system.[36] The report details a common pathway to youth justice detention, with systemic racism being deeply embedded in policing, including the use of practices such as strip-searching that are particularly likely to violate child rights, especially when applied in discriminatory ways.[37]

Likewise, a report by the Commissioner for Aboriginal Children and Young People in Victoria found that systemic racism is "at the heart of over-representation of Aboriginal children in the justice system", with youth in custody reporting being denied access to essential medical care and legal services, being physically and verbally abused, and feeling threatened if they chose to exercise their right to silence.[38] The report states that present over-representation of First Nations youth is not about their behaviour but rather "cannot be disconnected from Australia's racist history of systemic oppression, dispossession and discrimination".[39]

iv. Intergenerational trauma and social determinants of health

[34] Ibid, 9-10.
[35] Adeshola Ore, 'Racism is contributing to unsubstantiated child protection reports, Victorian commission hears', The Guardian, 11 May 2023.
[36] Putting children first: A rights respecting approach to youth justice in Australia, Save the Children/54 Reasons (April 2023): 16.
[37] Ibid, 31.
[38] Our Youth, Our Way, 33.
[39] Ibid, 39.

Social determinants of health are the non-medical factors that influence health outcomes, including poverty, education, unemployment, food insecurity, housing, access to affordable health services and many more.[40] In the context of the disparity between the health outcomes of Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians, these factors cannot be disentangled from a broader understanding of the collective trauma of colonisation and its intergenerational impacts.

Many First Nations youth and their families experience disadvantage across the domains of education, health, disability, violence prevention, employment, housing, poverty, and justice.[41] That these factors are significant drivers not only of health but of incarceration makes clear that reforms to the CJS alone are not sufficient to address the over-representation of Aboriginal and Torres Strait Islander young people in the youth justice system.

Intergenerational trauma impacts First Nations individuals, families, communities and cultures and is both compounded by and a driver of negative contact with the justice and related systems.[42] Without addressing intergenerational trauma and other social determinants of health, youth justice reform will remain incomplete.

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?

ANTAR outlines below four primary recommendations to be taken into consideration when examining how youth justice and child protection systems can better protect the rights and wellbeing of children and young people. Ultimately, it is our view that these systems have proven to be rife with institutional racism and violent legacies of control, silencing and assimilation of

[40] World Health Organization, 'Social determinants of health'
[41] Closing the Gap Annual Report 2022, 49.
[42] Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Australian Law Reform Commission Report 133 (2017): 44.

First Nations peoples and, as such, their fundamental inadequacies and limitations must be clearly acknowledged.

To the extent that youth justice systems are designed to be punitive instead of rehabilitative or restorative, they will prove to be structurally incapable of meaningful reform. It is our view that we must move on to other methods that are underpinned by trauma-informed therapeutic approaches, ethics of care, and respect for First Nations self-determination which is critical to improving youth justice outcomes.[43]

i. *Upfront investment in place-based and community-led justice reinvestment*

The total justice system costs of Aboriginal and Torres Strait Islander incarceration in 2016 were roughly $3.9 billion.[44] Of that, almost a quarter of a billion dollars was spent on Aboriginal and Torres Strait Islander youth.[45] States and territories youth justice expenditure has increased by 46 percent since 2014-15.[46] As investment in incarceration rises, so too do rates of Aboriginal and Torres Strait Islander over-representation.[47]

ANTAR recommends the redirection of funds currently allocated to youth detention toward early intervention community programs using principles of justice reinvestment that address known risk factors for First Nations youth, where "their issues with the law are either as a direct result of, or compounded by, the issues they face in their daily lives".[48] Justice reinvestment addresses these root causes and works on the principle that early intervention, prevention and rehabilitation are far more effective and cheaper than continuing to imprison the most marginalised members of our communities.[49]

[43] Chris Cunneen, Amanda Porter, Larissa Behrendt, 'Discussion Paper: Aboriginal Youth Cautioning', Jumbunna Institute for Indigenous Education and Research (2018): 18.
[44] Pathways to Justice, 127.
[45]Bianca Hall, 'Locking up Indigenous kids costs $236 million a year', Sydney Morning Herald, 16 March 2016.
[46] 'Putting Children First', 87.
[47] Fiona Allison 'Redefining Reinvestment. An opportunity for Aboriginal communities and government to co-design justice reinvestment in NSW'. Final Report. Just Reinvest NSW (2022): 8.
[48] Report: Koori Court effective for young offenders, Western Sydney University (2018)
[49] Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Australian Law Reform Commission Report 133 (2017): 131.

Pivoting to a justice reinvestment approach requires abandoning the current crisis-driven, punitive responses to offending behaviour in favour of therapeutic, restorative and trauma-informed early interventions and community support to keep Aboriginal and Torres Strait Islander children and youth in their communities.[50] This is consistent with the Closing the Gap recommendation of structural reform which takes "a preventative and rehabilitative approach through justice reinvestment to child and adult incarceration".[51]

Aboriginal and Torres Strait Islander communities want to implement their own solutions to youth contact with the justice system that embody self-determination. This should be supported by a strong partnership with government and facilitate a shift in resourcing and decision-making, informed by First Nations definitions of reinvestment.[52]

ii. Raise the minimum age of criminal responsibility (MACR)

It is our view that one of the key strategies to ensure the rights of children and young people are protected is to avoid them having contact with the youth justice system to begin with, particularly during the vulnerable stages of childhood.

The age of criminal responsibility is the primary legal barrier to criminalisation and thus entry into the criminal justice system.[53] A low MACR disproportionately affects First Nations children who comprise the majority of children under the age of 14 years who come before youth courts in Australia and are sentenced to either youth detention or a community-based sanction.[54]

As such, ANTAR strongly recommends raising the MACR to at least 14 years of age for all children and youth without exception and as a matter of urgency. We note that Victoria has begun the process to raise the MACR from 10 years old to

[50] Our Youth, Our Way, 41.
[51] Leadership and Legacy Through Crises: Keeping our Mob safe, Close the Gap Report (2021): 6.
[52] Redefining Reinvestment, 4.
[53] Chris Cunneen, Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report, Comparative Youth Penality Project, University of New South Wales, Sydney. Available at (2017): 2.
[54] ibid

12, and to 14 years old by 2027.[55] Similarly, the ACT has introduced legislation to raise the MACR to 12 years on commencement, and to 14 years by 1 July 2025.[56] The MACR in all other Australian jurisdictions remains 10 years old.

In this, Australia is well behind global norms as well as binding international human rights standards under the UNCRC. The average minimum age of criminal responsibility in the European Union is 14 years where "there are no negative consequences to be seen in terms of crime rates".[57] Similarly, in some 86 countries surveyed worldwide the median age was 14 years.[58] This is based on general principles of best interests of the child and participation of the child enshrined in the UNCRC.[59]

The low MACR in Australia has drawn the attention of the United Nations' Committee on the Rights of the Child which has expressed its serious and ongoing concerns. In its Concluding Observations, the Committee urged Australia to raise the MACR to "an internationally accepted level" and "make it conform with the upper age of 14 years".[60]

The present age of 10 years old ignores robust evidence about children's neurological, cognitive, behavioural, emotional and moral functioning.[61] Science shows that "neural pathways remain incomplete until early adulthood", meaning children do not possess adult cognitive functioning and cannot be held criminally responsible.[62] Further, adolescent brain development research demonstrates that adolescence is a period of rapid change and strongly suggests that "most juveniles will 'grow out' of offending and adopt law-abiding lifestyles as they mature".[63] Evidence-based best practice suggests that young

[55] Keeping Young People out of the Criminal Justice System, Premier of Victoria.
[56] ACT Government, 'Raising The Age'
[57] Barry Goldson, 'Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales' Youth Justice 13, 2 (2013): 111-130
[58]Cunneen, 'Arguments for Raising', 4.
[59] Study on children's involvement in judicial proceedings, European Union
[60] Convention on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of Australia' (2019)

[61] Council of Attorneys-General – Age of Criminal Responsibility Working Group Review, Law Council of Australia (2020): 11.
[62] Wendy O'Brien and Kate Fitz-Gibbon, 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform' (2017) 17(2) Youth Justice 134, 143.
[63] Kelly Richards, 'What makes juvenile offenders different from adult offenders?'. *Trends & issues in crime and criminal justice* no. 409.

people need therapeutic responses based on ethics of care, not retributive and punitive style justice approaches.

iii. Amend legislation to provide that all First Nations youth offenders participate in pre-charge community-based diversion programs

In 2019, the UN Committee on the Rights of the Child urged Australia to "actively promote non-judicial measures, such as diversion, mediation and counselling, for children accused of criminal offences and, wherever possible, the use of non-custodial sentences such as probation or community service.[64]

When used, diversionary programs for youth are effective in reducing recidivism and preventing long-term involvement with the CJS.[65] In Victoria, there is "clear evidence… that diversion away from the court system has a positive impact in reducing reoffending for young people".[66]

While juvenile diversionary strategies like those initiated under the 1994 Young Offenders Act in Western Australia have been highly successful in reducing the overall level of juvenile contact with the system, it has been less successful in diverting First Nations youth.[67] Broader statistics confirm that First Nations young people do not get the benefit of diversion (including cautioning and conferencing) at the same rate as non-Indigenous young people.[68]

This suggests that existing diversionary mechanisms alone are not sufficient to extend the benefits of diversion to Aboriginal and Torres Strait Islander communities.

We recommend that culturally appropriate pre-charge diversion programs are more significantly invested in and developed in order to be available to all First

[64]United Nations Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of Australia', 1 November 2019
[65] Wilson, H. A., & Hoge, R. D. (2013). The effect of youth diversion programs on recidivism: A meta-analytic review. *Criminal Justice and Behavior, 40*(5) (2013): 497–518.
[66] Victorian Aboriginal Legal Service Submission to the Inquiry into Victoria's Criminal Justice System September (2021) : 162.
[67] The proportion of arrests involving juveniles in WA declined from 14.6% in 1994 to 11.1% in 2004. For more, see Harry Blagg 'Models of Best Practice', (2015): 16.
[68] Nancy Hennessy, '*Review of the Gatekeeping Role in the Young Offenders Act 1997*, Report to Youth Justice Advisory Committee, Sydney (1999)

Nations youth, as well as culturally relevant pre-charge measures including verbal and written warnings and cautions.

In particular, ANTAR recommends that First Nations youth are referred to 'On Country' diversion programs which utilise highly localised, whole-of-community approaches in the presence of Elders and are able to be responsive to local needs and priorities.[69] There is evidence to suggest that cautions are more powerful when they are delivered in a culturally safe way, which includes not only how the cautions are delivered but also the location in which they are delivered (ie. by Elders and other respected community leaders on Country).[70]

This recommendation is in line with Australia's international obligations, which state that arrest, detention or imprisonment of young people should be a last resort.[71]

iv. Commit to identifying and eliminating institutional racism

By far the greatest barrier to change in the protection of the rights and wellbeing of young people in youth justice and related systems is what underpins the broader settler colonial system and its carceral logics: pervasive structural racism.

Carceral logics refer to the variety of ways our bodies, minds, and actions have been shaped by the idea and practices of imprisonment.[72] By contrast, decarceration can be understood as "a constellation of alternative strategies and institutions, with the ultimate aim of removing the prison from the social and ideological landscapes of our society".[73]

It is ANTAR's view that the overrepresentation of First Nations children in youth justice and child protection systems - and the protection of the rights of children in these systems more broadly - cannot be decoupled from a process

[69] Chris Cunneen, Amanda Porter, Larissa Behrendt, 'Discussion Paper: Aboriginal Youth Cautioning', Jumbunna Institute for Indigenous Education and Research University of Technology, Sydney. 2018: 6.
[70] Ibid, 7. Further, in a 2019 report by the Advocate for Children and Young People (ACYP), First Nations youth reported that they prefer justice programs to be presented by First Nations workers as they have content involving traditional wisdom and cultural practices and can connect them to strong Elders, mentors and other cultural role models.
[71] UNCRC, Art 37(b)
[72] Rochester Decarceration Research Inititative, FAQs
[73] Angela Davis, *Are Prisons obsolete?* Seven Stories Press. (2003) :107.

of decarceration that is deeply led by the confrontation and elimination of structural racism.

Structural racism is a product of the logics of whiteness that are built into the structures and agencies which administer justice - that is, Australian law, policing, the correctional system, the child protection system and the courts.[74] To counter this, it must be considered a matter of urgent priority to invest heavily and consistently in First Nations community-controlled organisations, as per Outcome 17 b) of the 2020 Closing the Gap agreement, so that they may deliver high quality services to meet the needs of Aboriginal and Torres Strait Islander people across the country.[75]

In parallel, it is crucial that government agencies and their service delivery partners work toward dismantling systemic racism in the youth justice space as well as across all related systems. This is consistent with the Closing the Gap Agreement Priority Reform Three commitment to systemic and structural transformation of mainstream government organisations.[76] This can and should include (a) targeted changes in policy, practice, and law; (b) mandatory anti-racism education and training programs; (c) increased attention to intersectionality and (d) taking individual and collective responsibility for the roles we have as agents for radical change and anti-racism within our homes and workplaces.[77]

[74] See Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law' Griffith Law Review (2001); Chris Cunneen, 'Institutional racism and (in)justice: Australia in the 21st century' Decolonization of Criminology and Justice (2019).
[75] National Agreement on Closing the Gap, July 2020: 3.
[76] Ibid, 11.
[77] For more on evidence-based recommendations to work toward eliminating systemic racism in the criminal legal systems, see Najdowski, C. J., & Stevenson, M. C. (2022). A call to dismantle systemic racism in criminal legal systems. *Law and Human Behavior, 46*(6), 398–414. and West AE, Conn BM, Preston EG, Dews AA. 'Dismantling Structural Racism in Child and Adolescent Psychology: A Call to Action to Transform Healthcare, Education, Child Welfare, and the Psychology Workforce to Effectively Promote BIPOC Youth Health and Development'. J Clin Child Adolesc Psychol. (2023): 427-446.

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?

There is compelling evidence of positive outcomes in the reduction of young people's involvement in youth justice systems when First Nations-led solutions are invested in and implemented.[78] These can be drawn upon when considering reform.

i. Nowra Circle Sentencing

Circle sentencing was introduced on a trial basis at Nowra in 2002 as an alternative sentencing process based on a model used with First Nations communities in Canada. While it still sits within the traditional CJS, it actively engages First Nations communities and Elders, and allows for community-control of the process that includes customary law principles.[79] In circle sentencing, a Magistrate hands over proceedings to the Elders, who lead discussion and recommend sentencing orders.[80]

A review of the Nowra circle sentencing process found that Aboriginal communities were empowered and that the process was actively recognising traditional Aboriginal authority structures in the local area.[81] A 2020 study by the NSW Bureau of Crime Statistics and Research found that Aboriginal people who participate in circle sentencing have lower rates of imprisonment and recidivism than Aboriginal people who are sentenced in the traditional way.[82]

[78] For a comprehensive list of Australian and International diversion practices, programs and initiatives, please see Table 3.1 in Cunneen, C., Porter, A. and Behrendt, L. Discussion Paper. Aboriginal Youth Cautioning, Jumbunna Institute for Indigenous Education and Research, UTS, Sydney (2018): 36. For international examples based on restorative justice, see the following case studies: (1) the Tsuu T'ina First Nation Court, (2) the Rangatahi Youth Courts and (3) the Tulalip Healing and Wellness model.
[79] Circle Sentencing in NSW, 4.
[80] Gail Wallace, 'Nowra Circle Sentencing - Seven Years Down the Track' Indigenous Law Bulletin 13 (2010)
[81] Circle Sentencing in NSW, 51.
[82] 'New Circle Sentencing Evaluation finds positive results', BOCSAR.

Circle sentencing is now available in 12 NSW Local Courts. In March 2023, the NSW government announced a $4.2 million investment into circle sentencing across 12-20 regions as part of a larger injection into justice reinvestment.[83]

ii. Maranguka Justice Reinvestment project, Bourke NSW

In 2013, Bourke became the first major site in Australia to implement a First Nations-led place-based ('On Country') model of justice reinvestment, the Maranguka project.[84] The scope of the work undertaken by Maranguka and the Bourke Tribal Council is very broad, taking a 'life-course' approach which targets issues likely to push Aboriginal people into the justice system that arise from a child's earliest years into adulthood.[85] Maranguka operates as a community hub and establishes community-led, multi-disciplinary teams to address the underlying causes of crime.[86]

Preliminary feedback provides strong indication of the benefits of whole-of community approaches to justice which include relationship building, improving processes and improving community safety.[87] It is important to note that community-led justice reinvestment programs like Maranguka do not define their success based on quantifiable justice-related targets alone. Nonetheless, outcomes have been very positive, with a 2017 impact assessment reporting a 23% reduction in police recorded rates of domestic violence, a 31% increase in Year 12 retention and a 42% reduction in days spent in custody. The same report calculated that this saved the NSW economy $3.1 million through the impact of the justice system and broader local economy.[88]

There are many other incredible initiatives that cannot be expanded on here. For more, please see footnotes.[89]

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[83] Jared Cross, 'Justice reinvestment, circle sentencing and Koori court funding to address justice system gaps' National Indigenous Times, March 2 2023
[84] Allison, F. 'Redefining Reinvestment. An opportunity for Aboriginal communities and government to co-design justice reinvestment in NSW'. Final Report. Just Reinvest NSW (2022): 2.
[85] Ibid, 7.
[86] 'Unlocking the Future: Maranguka Justice Reinvestment Project in Bourke, Preliminary Assessment'. September 2016, i.
[87] Discussion Paper: Aboriginal Youth Cautioning, 72.
[88] Just Reinvest, 'About'
[89] For more information on the use of barefoot/community patrols as an alternative to policing, see: The role of community patrols in improving safety in Indigenous communities Resource sheet no. 20, Closing the Gap Clearinghouse July 2013. See also Scott, John, Sims, Margaret, Cooper, Trudi, & Barclay, Elaine

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?

It is clear that despite recent state-specific efforts toward reform aimed at supporting prevention and early intervention, and reducing the number of children across the country involved in the youth justice system, something is not working. In our view, a fundamental paradigm shift is needed.

Applying a holistic, systems thinking approach to the youth justice system reveals the importance of considering child rights across all aspects of the system, from prevention to post-detention support.[90] Pivoting toward a national restorative justice, decarceration-focused approach is critical if we are to see the rights and wellbeing of children protected.

A rights-based approach to youth justice reform will require involvement from the Australian Government and a coordinated national approach to youth justice reform. It is a factor of our Federated system that the Australian Government has the resources to help lead and encourage the State and Territory jurisdictions.

From a systems perspective, these changes must be implemented cohesively across jurisdictions and at a national level, as in the case of Canada's *Youth Criminal Justice Act.* Adopted in 2003, and together with a package of decarceration-focused reforms, Canada saw a subsequent 87 percent reduction in the number of youth in custodial facilities over eighteen years and a 73 percent decrease in youth imprisonment.[91]

ANTAR strongly recommends that the Australian Government develop national standards to reflect research and international best practice through a

(2021) Night patrols: Mobilising collective efficacy in Indigenous communities and Harry Blagg and Giulietta Valuri, Self-policing and community safety: the work of Aboriginal Community Patrols in Australia. For more on circle sentencing in NSW, see 'Circle Sentencing in New South Wales: A Review and Evaluation'; and on successful cautioning for Aboriginal youth, see: Cunneen, C., Porter, A. and Behrendt, L. (2018) Discussion Paper. Aboriginal Youth Cautioning, Jumbunna Institute for Indigenous Education and Research, UTS, Sydney.

[90] Rethinking Australia's Youth Justice System by Embracing Child Rights, Centre for Social Impact.
[91] For more, see: Cheryl Marie Webster, Jane B. Sprott & Anthony N. Doob, The Will to Change: Lessons from Canada's Successful Decarceration of Youth, 53 LAW & Soc'y REV. 1092 (2019): 1092.

community co-design process.[92] The development of national youth justice standards and a national approach to the minimum age of criminal responsibility would serve to unite states and territories in their efforts to reform the system.[93]

Conclusion

We commend the Australian Human Rights Commission, led by the National Children's Commissioner, for undertaking this review. As we've noted in this submission, there have already been countless reviews, royal commissions, independent inquiries and studies that have produced libraries of reports and recommendations. Hopefully this exercise moves the dial toward reform that is informed by First Nations communities for the wellbeing of Aboriginal and Torres Strait Islander youth that deserve Australia's very best.

[92] Putting Children First, 9.
[93] 'Rethinking'