



## **Youth Justice and Child Wellbeing Reform Across Australia**

Submission to the Australian Human Rights Commission

June 2023

### **About Change the Record**

Change the Record is Australia's only national First Nations-led justice coalition. We are a coalition of legal, health, human rights and Aboriginal and Torres Strait Islander Community-Controlled Organisations (ACCOs).

Change the Record has two key objectives - to end the mass incarceration of First Nations peoples and the disproportionate rates of family violence experienced by Aboriginal and Torres Strait Islander women and children.

### **Our Submission**

Reform of the youth justice system has been a key focus of Change the Record's work since our formation. We are a founding member of the national Raise the Age Campaign Alliance and a member of the campaign's steering committee. We are also a member of the Partnership for Justice Health, and wholeheartedly endorse our Partnership's submission.

Our work emphasises the importance of:

- Investing in our communities and ACCOs to provide culturally safe and responsive support services, early intervention, prevention and healing programs;
- Shifting control and resources away from the criminal legal system and into community-based alternatives to policing and prisons;

- Ending the incarceration of children and young people, including by raising the minimum age of criminal responsibility to at least 14 years of age and closing youth prisons;
- Ensuring First Nations communities have control over the care and support of our children, with a particular emphasis on ending the forced removal of our babies and children from our families and communities;
- Ending the disproportionate poverty and housing precarity experienced by First Nations peoples; and
- The fundamental need for governments to genuinely commit to enabling Aboriginal and Torres Strait Islander self-determination and to addressing and redressing ongoing colonisation, dispossession and systemic racism.

Our submission has a primary focus on the impact of the criminal legal system on First Nations children and young people. Change the Record has produced several reports and policy documents aimed at decarceration of and ending violence against Aboriginal and Torres Strait Islander children and adults relevant to this project.

For further detail on the issues discussed below, we suggest the Commission also consider:

- Change the Record's ['Blueprint for Change'](#), updated in 2022, containing detailed recommendations and 12 overarching principles for reducing incarceration of First Nations peoples and violence against First Nations women and children.
- Change the Record, NATSILS and the Human Rights Law Centre's 2022 submission on Australia's state party report to the United Nations Committee Against Torture, ['Ending Human Rights Abuses Behind Bars'](#), which includes a focus on inhuman and degrading treatment of incarcerated children and young people.
- Change the Record's 2021 report ['Pathways to Safety'](#), where we discuss the drivers of and community-based solutions to violence against First Nations women and children.
- Change the Record's 2022 submission to the Victorian parliament's [Inquiry into children affected by parental incarceration](#).
- The Raise the Age campaign's interactive map of [Alternatives to prison](#)

**Responses to prompting questions:**

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

As the Commission is aware, the mass incarceration of First Nations children and adults is the result of a multiplicity of systemic and structural factors which are mutually reinforcing and have their basis in historical and ongoing colonisation and dispossession.

The core reason for children and young people’s involvement in youth justice systems is, quite obviously, the criminalisation of children. Australian jurisdictions make an active choice to criminalise children as young as 10 years old, and to dedicate an immense amount of resources to punitive, carceral responses to children and young people in crisis rather than responses focused on care and healing.

Aboriginal and Torres Strait Islander children are disproportionately criminalised by the racially discriminatory criminal legal system. Our children are more likely to be stopped and questioned by police, to be arrested rather than given a formal warning, to be taken into custody and held instead of being summonsed to appear in court, and more likely to be remanded in custody instead of being bailed.<sup>1</sup> The low age of criminal responsibility is a key driver of Aboriginal and Torres Strait Islander children’s contact with the criminal legal system.

We know that children involved with the criminal legal system disproportionately face marginalisation and hardship, including:

- Having a parent who has been held in adult custody;
- Having a diagnosed or suspected mental health issue;
- Having a diagnosed or suspected disability;
- Experiencing or being at risk of homelessness and housing instability;
- Being involved with child protection systems;
- Disengagement from education.

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<sup>1</sup> Commonwealth of Australia, ‘Doing Time - Time for Doing - Indigenous youth in the criminal justice system’, 2011, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, p200-205, <<https://www.aph.gov.au/binaries/house/committee/atsia/sentencing/report/fullreport.pdf>>.

The worst response to a child in crisis is to punish and isolate them from their communities, families and friends. The medical evidence is clear that any engagement with the criminal legal system causes harm to a child - from police contact right through to deprivation of liberty in youth detention.

Early contact with the criminal justice system is a major risk factor for future involvement with the system, and results in a higher prevalence of mental and physical illness, disability, homelessness and premature death later in life.<sup>2</sup> Imprisoning children can compound and worsen trauma and developmental delays. Incarceration increases children's risk of depression, suicidality and self harm and damages emotional development. Isolation and solitary confinement can have severe, long-term and irreversible impacts on a child's health and wellbeing.<sup>3</sup>

We echo the Partnership for Justice Health submission's comments about the criminalisation of First Nations children with cognitive impairment and psychosocial and intellectual disability, and its commendation of our colleague Dr Scott Avery and the First Peoples Disability Network's research to the Commission.

Overcrowded and poorly maintained housing is also a key contributor to adverse educational and emotional outcomes for First Nations children living in remote communities, and increases the risk of distress and violence in the home<sup>4</sup>. It is well-established as a cause of poor physical and mental health and a major risk factor for increased spread of infectious diseases, including ear infections leading to permanent hearing loss. Hearing loss is significantly disproportionately experienced by First Nations children and adults in contact with the criminal legal system, particularly in the Northern Territory.<sup>5</sup>

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<sup>2</sup> Australian Institute of Health and Welfare 2019. Young people returning to sentenced youth justice supervision 2017-18. Juvenile justice series no. 23. Cat. no. JUV 130. Canberra: AIHW; AIHW (2013) Young People Aged 10 – 14 in the Youth Justice System, 2011-2012, AIHW, Canberra; Chris Cunneen, Arguments for raising the minimum age of criminal responsibility (2017)

<sup>3</sup> Baldry, E. and Cunneen, C., 'Locking up kids damages their mental health and leads to more disadvantage. Is this what we want?', 21 June 2019, The Conversation, <<https://theconversation.com/locking-up-kids-damages-their-mental-health-and-sets-them-up-for-more-disadvantage-is-this-what-we-want-117674>>.

<sup>4</sup> Liotta, M. (19/02/2018), [Overcrowding leads to poorer health outcomes for Aboriginal and Torres Strait Islander peoples](#), newsGP feature, Royal Australian College of General Practitioners.

<sup>5</sup> Vanderpoll, T. & Howard, D., 2020, [Massive Prevalence of hearing loss among Aboriginal inmates in the Northern Territory](#), Indigenous Law Bulletin. Lawford, E., 13/10/2016, [Hearing impairments forcing Aboriginal kids into detention: commission hears](#), NITV News.

**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?**

We refer the Commission to our *Blueprint for Change* and encourage the Commission to review the recommendations of our papers and submissions linked at the beginning of this submission.

In short, key reforms to youth justice systems that should be urgently implemented to reduce harm include:

- Raising the minimum age of criminal responsibility to 14 in all jurisdictions and ending the detention of children and young people, ensuring children and young people in crisis are referred to community-based, culturally-responsive, caring interventions and trauma-informed, age-appropriate accountability mechanisms;
- Banning the use of solitary confinement, spit hoods and mechanical restraints against children in custody;
- Banning routine strip-searching of children in custody and strip-searching of children by police;
- Ending targeted surveillance of children and young people, including ending and preventing the use of GPS tracking of children and young people and abolishing NSW's racist Suspect Target Management Plan;
- Bail and sentencing reform in all jurisdictions in both the youth and adult criminal systems, ensuring at a minimum:
  - The repeal of reverse-onus provisions in bail laws;
  - A presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk;
  - That bail laws contain an explicit requirement that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment;

- The offences of committing an indictable offence while on bail, breaching bail conditions and/or failure to answer bail are repealed;
- Bail and sentencing decisions take into account historic and systemic factors contributing to the mass incarceration of Aboriginal and Torres Strait Islander children and adults, and consider the impact of imprisonment of care-givers (including remand) on dependent children;
- Lack of suitable or stable accommodation is not a contributor to refusal of bail or inability to meet bail conditions.

Child protection systems must be overhauled to embed Aboriginal and Torres Strait Islander control over decision-making at all stages of intervention and ensure adherence in practice to the Aboriginal and Torres Strait Islander Child Placement Principle. This should include:

- Making family decision-making processes available to all families at the earliest opportunity;
- Community-based child safety structures to drive prevention strategies;
- Legal, counselling and support services provided to parents and children at the earliest opportunity; and
- Monitoring child well-being and input into decision-making about children's welfare.

As an urgent measure, we have called for all jurisdictions to establish mandatory Aboriginal and Torres Strait Islander child protection notification and referral systems, modelled on the Custody Notification Service.

### **Multidisciplinary panels**

Change the Record advocates for the establishment of multidisciplinary panels to respond to children in crisis or at risk of reaching crisis point in an individualised, therapeutic and needs-based framework. There will not be a 'one size fits all' solution to the needs of children and their families, however in our view there is a clear need for easily-accessible multidisciplinary support pre-crisis, without the threat of coercion or detention.

It is critical that harmful behaviour, or crisis, is not seen as a necessary trigger for the provision of support. That is how the criminal legal system currently operates and it fails our children and families by not responding adequately to individual and community needs until significant hardship has already occurred. The way government responds to, and funds, services needs to

be reoriented to focus on prevention, early intervention and holistic responses rather than crisis response.

The establishment of a multidisciplinary panel where children can be referred if they come into contact with police, or if their behaviour raises concerns within the home, community or school, is an essential part of both diverting a child away from the criminal legal system and ensuring that the appropriate assessments, identification of needs and referrals to relevant services occurs.

For multidisciplinary panels to work effectively it is crucial that their primary role is to assist and strengthen families, and identify the needs of - and appropriate supports for - the child. The process should be confidential and limited to the service providers in the room (each of which must be there with the consent of the child and family), unless consent is given for further referrals, and must not involve referrals to the child protection system. To do so risks alienating families and children who fear their engagement will result in removal.

Services must be authorised to apply flexibility in respect of eligibility restrictions, and must be empowered to intervene early with adequately funded service responses that focus on both the child themselves as well as the environment within which the child is situated to best support children and young people to move through periods of crisis and have their needs met.

### **Barriers to change**

In our view, the most significant barrier to change is a lack of political will on the part of governments and their bureaucracies to do what's needed to shift institutional responses to crisis situations from punishment to care. We reject common excuses raised by governments for inaction, particularly suggestions that fiscal constraints prevent investment in people and communities, and essential infrastructure like public housing. We note such a constraint doesn't appear to apply to spending on police and corrections.

**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?**

The Raise the Age campaign has produced [a map of services and programs](#) designed to support children and families at risk of involvement with the criminal legal system. Adequately funding such programs, enabling their expansion, and empowering communities to create their own support and diversion regimes should be a priority.

In Chapter 7 of [her report into raising the age of criminal responsibility](#), commissioned by the ACT government, Emeritus Professor Morag McArthur provides examples of potential approaches to youth justice reform, including the use of multidisciplinary panels as recommended by the Change the Record Coalition.

**Safe, stable and secure housing**

Safe, secure housing is a human right, a crucial determinant of health and wellbeing, and a strong protective factor against family violence and exposure to the criminal legal system. The importance of appropriate housing to improving the health and wellbeing of First Nations peoples is well established and accepted by government and civil society, and acknowledged in the inclusion of a housing target in the National Agreement on Closing the Gap.

A major concern raised by women and girls in the whole-of-life *Wiyi Yani U Thangani (Women’s Voices): Securing our Rights, Securing our Future Report* led by Social Justice Commissioner June Oscar was inadequate maintenance and repair of social housing, particularly in the bush.<sup>6</sup> The report found “[t]he chronic shortage of social housing stock across Australia has left Aboriginal and Torres Strait Islander women and their families struggling in overcrowded and inadequate living conditions, unable to keep themselves and their families safe and secure, and with the constant threat of homelessness if they cannot find a way to make ends meet.”<sup>7</sup>

We have heard repeated concerns from police across jurisdictions about the difficulty they face when they come into contact with a young person exhibiting challenging behaviours where that young person does not have a safe environment they are able to return to, or where they do not have stable accommodation to which they are willing to return. Providing safe, supported

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<sup>6</sup> Australian Human Rights Commission and Oscar, J. et al (2020), [‘Wiyi Yani U Thangani \(Women’s Voices\): Securing Our Rights, Securing Our Future’](#), Australian Human Rights Commission (2020), p300.

<sup>7</sup> *ibid.*, p304.



accommodation to children and young people in this age bracket who may come into contact with law enforcement or other services, and require somewhere safe to stay, is essential.

**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?**

Change the Record advocates for a national approach to youth justice which is principled, trauma-informed, rights-based and antiracist. A coordinated national approach could ensure the implementation of evidence-based systemic reform which is consistent across jurisdictional borders.

The Standing Council of Attorneys-General is currently engaged in discussion and consensus-building on national approaches to justice policy in several areas, as it should. However, if national consensus is built on unprincipled, unevidenced approaches, states and territories with higher ambitions should move forward with rights-based reforms.

An important factor in a national approach is the Commonwealth providing national leadership and committing the national resources needed to ensure our children's freedom and wellbeing. As such, we consider important next steps to be for the federal government to:

- Bring legislation to amend the Commonwealth Crimes Act to raise the age of criminal responsibility for federal crimes to at least 14, without exception;
- Review and implement all relevant outstanding recommendations from the report of the Royal Commission into Aboriginal Deaths in Custody and the Bringing Them Home report;
- Ensure First Nations community-controlled early intervention, prevention, crisis, healing and support services are fully funded to match demand and geographical spread;
- Enshrine international human rights instruments in domestic law, including the UN Convention on the Rights of the Child, Declaration on the Rights of Indigenous Peoples, Convention on the Rights of Persons with Disabilities, and Convention on the Elimination of All Forms of Discrimination Against Women;
- Ensure the Commonwealth is in faithful and effective compliance with protocols and instruments relevant to criminal legal systems, in particular the Beijing Rules, the

Mandela Rules, Bangkok Rules, and the Optional Protocol to the Convention Against Torture;

- Expand access to Medicare, the PBS and NDIS to all people who are incarcerated;
- Invest directly in public and community-controlled housing and community-controlled homelessness services to address housing precarity and housing poverty at the scale required to meet need;
- Ensure no child is forced to grow up in poverty by implementing an unconditional, liveable basic income, whether through the existing social security system or through its reform. The immediate first step should be increasing all Centrelink payments to at least the Henderson poverty line and abolishing mutual obligations and partner & parental income tests.

Through the Yoorrook Justice Commission in Victoria, we have also seen how truth-telling can drive change, influence governments to walk back from punitive, tough-on-crime rhetoric and policy, and demonstrate the power and strength of our people and our culture. We support the establishment of a First Nations-led national truth-telling process, as well as Treaty and a Voice to Parliament.

We thank the Commission for the opportunity to contribute to this project.