

30 June 2023

Ms Anne Hollonds AOM  
Human Rights Commissioner for Children  
GPO Box 5218  
SYDNEY  
NSW 2001



**By email:** [youthjusticereform@humanrights.gov.au](mailto:youthjusticereform@humanrights.gov.au)

Dear Ms Hollonds,

## Youth Justice and Child Wellbeing Reform across Australia

We wish to commend your office on embarking on this important national conversation and inquiry into youth wellbeing and the intersectional nature of welfare, child protection and contact with the youth justice system for far too many Australian children.

We note of course, the extreme over representation of First Nations children in contact with these systems and while our responses are generalised in some aspects, it is imperative to centre all analysis of these issues on the intersections and myriad factors which compound this context for First Nations children, families and communities. At the heart of this review is the traumatic and ongoing colonisation of Australia and the daily barriers and juggles that many First Nations parents, communities, children and young people face in navigating disempowering and culturally unsafe responses; in order to ensure children stay safe and well in their family of origin and community.

## About Transforming Justice Australia

Transforming Justice Australia (TJA) is a community-based survivor oriented restorative justice practice for sexual abuse. We offer restorative practices for people in community and impacted by the criminal legal system. We are trauma-informed, intersectional and restorative in our approach and place value on survivor voice, dignity, accountability, choice and hope. To preface our submission, we wish to provide some background information on restorative frameworks.

*Restorative practice* is the 'way of working with others' that underpins any human collaboration, of which restorative justice or family group conferencing in the child protection system, is but one example. Restorative practices uphold the importance of nurturing healthy relationships emphasizing respect; inclusivity; participation; choice; collaboration and consensus-led decision-making. Common examples of restorative processes include conference, group meetings, information sharing, meetings, facilitated dialogue and while there may be instances where a restorative justice approach is not suitable or desired - everyone deserves a 'restorative approach' in co-habiting, co-working, in any institutional/organisational and service interactions and especially in the aftermath of harm.

Restorative approaches in response to traumatic or serious harmful events can produce better outcomes for all participants; and even if, in cases of child protection matters – removal of children is an possible, or inevitable outcome – the pathway to this process can be paved with restorative elements and relational, strength-based approaches that offer dignity, empowerment and shared decision making – pieces that take time, care and connection – and which restorative approaches provide a strong foundation.

*Restorative justice* is underpinned by the theory that when a harm or trauma occurs, the person responsible for the harm has responsibilities and obligations, and the person harmed has rights and needs. In practice, restorative justice processes create an opportunity to safely bring together the people impacted by a crime, through facilitated direct or indirect communication which fosters empowerment, accountability and healing for those who choose this justice option.

Restorative justice has resonating power in the child protection, family and sexual violence context because crime (family and sexual violence abuse) hurts, justice must heal; and the foundations of restorative justice are based on the interconnectedness of humankind – connections which have the power to harm, and also to offer healing and recovery.

*“... traumatic events destroy the sustaining bonds between individual and community. Those who have survived learn that their sense of self, of worth, of humanity, depends upon a feeling of connection with others...”*

#### What is a survivor-oriented approach?

A survivor-oriented approach prioritizes the voice, needs and choices of the person harmed and the survivor’s safety, dignity and rights are at the centre of any action or decisions; our restorative processes are trauma-informed, culturally-safe, age-appropriate and provide multi-sector services and support.<sup>1</sup>

#### What is a community-based approach

A community-based approach appreciates the factors contributing to the causes of crime/harm and understands such harms as located within social structures, hierarchies, systems and institutions which need to be understood, and may need to be challenged, dismantled or reformed.

Our approach acknowledges that family and community members often hold dual roles – as supporter and as someone who has also been harmed or is responsible for harm and that family and community are also impacted - emotionally, spiritually and psychologically; and therefore, also experience harm individually and collectively. The practices developed and implemented by TJA draw on this broader community context,<sup>2</sup> and seek to account for this secondary or ancillary harm.

We use an *intersectional lens* which means that factors such as the age, gender, class, race, socio-economic status, disability and cultural and linguistic characteristics are not considered in isolation of each other, but that factors exist in myriad combinations and this may compound the impact of harm. Our approach is individual and flexible and considers survivor and community needs and responses, on a case-by-case basis drawing from individual circumstances of the people involved.

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<sup>1</sup> Our Watch, *Practice Guidance: A Victim/Survivor-Centred Approach to Responding to Violence*; Agency Standing Committee. 2018. Gender-Based Violence Guidelines, <https://gbvguidelines.org/en/>

<sup>2</sup> Recognised by international frameworks such as Hollow Water, New York State, USA and Restorative Justice for Oakland Youth, Oakland San Francisco, USA.

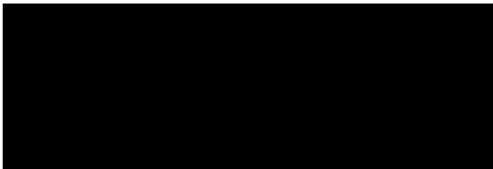
We endorse the use and wider application of restorative frameworks to respond to trauma and harm, which should be operationalized in and by communities, rather than situated statutory responses.

*"...The solidarity of a group provides the strongest protection against terror and despair, and the strongest antidote to traumatic experience. Trauma isolates; the group re-creates a sense of belonging. Trauma shames and stigmatizes; the group bears witness and affirms. Trauma degrades the victim; the group exalts her. Trauma dehumanizes the victim; the group restores her humanity.*

*Repeatedly in the testimony of survivors there comes a moment when a sense of connection is restored by another person's unaffected display of generosity. Something in herself that the victim believes to be irretrievably destroyed---faith, decency, courage---is reawakened by an example of common altruism. Mirrored in the actions of others, the survivor recognizes and reclaims a lost part of herself. At that moment, the survivor begins to rejoin the human commonality..."<sup>3</sup>*

Thank you for your consideration of our submission and we would be pleased to share more about our work and services if that is of interest to the Human Rights Commissioner for Children.

Yours faithfully,



Thea Deakin-Greenwood and Jane Bolitho  
Founders and Directors  
Transforming Justice Australia

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<sup>3</sup> Judith Lewis Herman *"Trauma and Recovery: The Aftermath of Violence - From Domestic Abuse to Political Terror"* (1992)

# TRANSFORMING JUSTICE AUSTRALIA'S SUBMISSION

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

Early childhood trauma or maltreatment or contact with statutory child protection systems are key indicators for young people's subsequent contact with youth justice systems in Australia. Additionally, the intersectional nature of legal, regulatory, judicial and child protections systems, means that an intergenerational pattern of contact results for not only the children of care leavers, but their grandchildren and subsequent generations. The literature in this area supports our anecdotal observations that children from child protection backgrounds come into contact with the youth justice system at an earlier age than other children (AIHW 2018b), and this younger onset is associated with an increased risk of progression to the adult criminal justice system (Chen et al. 2005).

For First Nations children, families and communities, the impact of racist, colonising policies of forced child removal are ongoing; the Stolen Generation is ongoing. The grandchildren of children removed through Stolen Generation face increased risk of ongoing contact with the child protection system, as are their children, their grandies and their great-grandies in generations to come. The intergenerational nature of contact with child protection systems may be hard to unpack in the daily workload of a case workers – but on a macro scale, can be seen through the metanalysis of Children's Court files, where a number of large-scale analysis<sup>4</sup> have compared the files of children appearing before the– care and crime divisions of the court. While the court no longer bundles all child court matters into a single court list – analysis of care and crime court files has shown troubling outcomes for child protection-involved youth including the over-representation in the criminal justice system: and that children who come to the attention of statutory child protection services due to abuse, neglect or parental incapacity are at least nine times more likely than other young people to offend and come under the supervision of youth justice services. The 'care-to-custody pipeline', or "cross over kids" phenomena peaks in youth detention centres, where more than half of the children detained are known to child protection services.

"Crossover kids" present with more serious offending profiles than other court-involved children; which inevitably leads to high risk of contact with adult correctional and legal systems. Lastly, it is extremely concerning that, many young people involved with child protection services and who subsequently leave the care of statutory child protection systems when attaining early adulthood; experience higher rates of physical and mental health problems, homelessness and early parenthood, alongside poorer education and employment experiences compared to their peers. The likelihood of these vulnerabilities resulting in a repeat experience for the children and grandchildren is worthy of policy makers at all levels; community members; the system as a whole and the country as a community pausing to reflect upon how our systems are failing to protect our children, their children and their grandchildren.

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<sup>4</sup> Susan Baidawi and Rosemary Sheehan "Cross-over kids, offending by child-protection involved youth" (2019) [https://www.aic.gov.au/sites/default/files/2020-05/ti582\\_crossover\\_kids-v2.pdf](https://www.aic.gov.au/sites/default/files/2020-05/ti582_crossover_kids-v2.pdf)

We endorse the submission made by the Community Restorative Centre.

## 2. What needs to be changed so that youth justice and related systems protect the rights and wellbeing of children and young people?

The National Framework for Protecting Australia’s Children and the National Plan to End Violence Against Women, and Closing the Gap provide unifying policy and priorities for the six states and two territories with jurisdiction over child protection. The 2021–2030 Framework addresses specific and important problems in order to achieve tangible improvements on key performance indicators. A number of child protection experts argue in favour of adding principles for community engagement and to review theoretical models that provide normative guidance for managing diverse harmful circumstances. A review of the Framework could centre on *“collective hope, restorative justice and responsive regulation” are useful for reigning in oppression, while accepting that some circumstances require the judicious use of state control.*<sup>5</sup>

Alongside these national policy approaches, we support and re-iterate the submission made by the Community Restorative Centre, that in addition to National policy approaches, many reviews into the youth justice systems in Australian states and territories have detailed serious human rights abuses and infringements related to:

- treatment of young people in prison; inhumane conditions;
- punitive environments; use of spithoods and restraints;
- use of isolation and solitary confinement; strip-searching of children; lack of education; imprisoning children in adult facilities and unlawful detention, amongst others.<sup>6</sup>

We note that these reviews and inquiries have also reported failings in relation to the systems’ capacity to address the needs of particularly vulnerable young people including: a lack of disability specific support and understanding of disability and complex support needs; lack of trauma-informed support; lack of case management. There have also been related specific problems relevant to staffing and the culture within youth justice systems, and within child protection systems likewise, including: the overreliance on the use of casual staff; a lack of training for staff; attrition of staff from the system resulting inconsistencies for families and children, serious misconduct by staff; frequent lockdowns due to staff shortages.

These reviews highlight there are systemic problems within youth justice and also, with child protection systems.

We support CRC’s submission that there should be a legislated requirement for governments to respond and commit to recommendations from government inquiries and accountability if they fail

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<sup>5</sup> Valerie Braithwaite and Mary Ivec “Listening, Learning and Collaborating Through an Inclusive National Framework for Protecting Australia’s Children”, *International Journal on Child Maltreatment and Neglect* (2021)

<sup>6</sup> Cunneen, C., Goldson, B. & Russell, S. Juvenile Justice, Young People and Human Rights in Australia. *Current Issues in Criminal Justice* **28**, 173–189 (2016). Clancey, G., Wang, S. & Lin, B. *Youth justice in Australia: Themes from recent inquiries*. (2020).

to do so. One key theme emerging from repeated reviews and inquiries is that prison **should be a measure of last resort** (in line with human rights frameworks which Australia is a signatory to)<sup>10</sup>, and that other non-custodial options should be fully explored, including community justice and restorative justice approaches.

Needs based funding and greater allocation of resources to support initiatives that attend to the complex needs of children especially where intergenerational trauma and disadvantage are present, is essential. We support Community Restorative Centre's submission on this point.

### 3. What are the barriers to change, and how can these be overcome?

We wish to reiterate the submission made by the Community Restorative Centre, that given the significant harm caused by the criminal legal system, and in line with international human rights agreements such as the United Nations Convention on the Rights of the Child, we note the importance of early intervention and diverting young people from the criminal legal system.

#### *Recommendation 1: Raising the minimum age of criminal responsibility*

The minimum age of criminal responsibility is the primary legal barrier to entry into the criminal legal system. We support calls by academics, community sector workers, and Aboriginal leaders to raise the minimum age of criminal responsibility to at least 14 years<sup>19</sup>. We note that a low age of criminal responsibility **particularly affects** vulnerable children. For example, Across Australian states and territories, of those aged 10 at their first youth justice supervision **81%** had also had an interaction with the child protection system<sup>3</sup>. We note that the system **does not work** for young children who have particularly high rates of reoffending. **62%** of younger children (aged 10-13 years) reoffend within 12 months, compared to 46% of older children (14-17 years).

Research from UNSW on raising the minimum age of criminal responsibility to 14 years argued for a non-criminalising, multi-agency, best interests-oriented response with a central role for local community-based organisations. This should include services and methods of intervention that are oriented towards physical and mental well-being, education and family support.<sup>12</sup>

#### *Recommendation 2: Review the Young Offenders Act and comparable statutory schemes to remove barriers to diversionary and restorative justice options*

In NSW, the *Young Offenders Act* provides for warnings, cautions and Youth Justice Conferencing in New South Wales however, several barriers for young people exist as offences such as sexual assault, serious drug offences, breaches of apprehended violence orders, traffic offences and offences causing death, can be dealt with only by a court; which negatively impacts First Nations young people, people with cognitive, intellectual disability and children with unstable or unsecure accommodation, including children who are or have been the subject of child protection orders.

Given the significant harm caused by the criminal legal system, and in line with international human rights agreements such as the *United Nations Convention on the Rights of the Child*, we note the importance of early intervention and diverting young people from the criminal legal system.

We recommend a review of the youth justice practice and policy to attend to these barriers and to create more inclusive, community and restorative approaches that mirror the reforms in *Oranqa Taraniki (1989) New Zealand* (see discussion below).

***Recommendation 3: Fund access to free, culturally safe and accessible community-based treatment pathways for serious offence types***

We wish to draw attention to a specific context for children and young people charged with and/or convicted for serious violence including sexual offences, and while our specific expertise is in New South Wales, we note that similar barriers exist in other states aside from Queensland where referral into treatment can be directed by the court. We understand the Victoria operates a compulsory treatment order scheme, which we do not support as it conflicts with principles of self-determination.

While the children apprehended for serious and violent offence types thankfully represents a small percentage of the children before the NSW Children's Court – the needs and trauma histories of these children and young people are often complex, extensive and acute and without timely intervention (which we consider preventative) – these young people present a significant risk in the immediate context, to themselves, and as a consequence – to their families and others, if not supported with culturally relevant treatment and support.

In NSW the only free NSW Health provider of sex offender treatment (for either adults or children) is New Street Services.

New Street Services policies present particular barriers for children apprehended for sexual offending or serious crime, and the policy provides that a referral can be accepted if:

1. The young person is aged between 10-17 years; and
2. The behaviour has been reported, investigated and confirmed as harmful sexual behaviour; and
3. The young person has not been charged.

While we note that the policy provides that *"...it is possible to accept referral for a young person who has been charged with a criminal offence, provided that the criminal prosecution has been concluded. For example, a decision has been made not to proceed criminally, the young person has been convicted and completed the terms of any sentencing, or the Department of Juvenile Justice (DJJ) is no longer involved..."*<sup>7</sup>

It is reasonable to conclude that the young people excluded from treatment through the application of this policy (if before the Children's Court for sexual offence charges, for example) may be in the greatest need of this services and would benefit significantly from the trauma-informed, community-oriented and inclusive treatment services offered by New Street, which as part of their responses, includes restorative practice approaches. Additionally, while a provision enables referral at the

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<sup>7</sup> New Street Service Policy and Procedures, NSW Health published 2018  
[https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2018\\_035.pdf](https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2018_035.pdf)

conclusion of a sentence or legal proceeding – evidence suggests that the most salient time for engagement in therapy and the time where young people are likely to be most motivated to accept help would be at the point of charge, rather than at the point of release or where a conviction has been entered or sentence has been concluded.

In addition, that there is no public health setting aside from New Street for people at risk of committing, or who have committed sexual harm is a public health issue, a community safety issue and a child protection issue. This is the same across all states and territories in Australia. There is no free, state funded sex offender treatment services available in the community – unless the case has been apprehended and concluded by the criminal legal system and a referral or order for treatment has been approved by Corrective Services.

While our service is a survivor-oriented restorative justice practice for sexual assault, advocating for evidence based accessible and culturally safe treatment services for those responsible is a core tenet of a do no harm approach offered by restorative and community-centred approaches to violence and abuse.

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

We support community-based and controlled initiatives such as those profiled by peak bodies such as SNAICC,<sup>8</sup> CREATE Foundation and locally in New South Wales – by the Community Restorative Centre for initiating community based responses to complex problems that intersect the child welfare, protection and justice silos.

In our work at [Transforming Justice](#), our survivor-oriented, community-based restorative justice practice responds to harm by working closely and individually with those harmed and their networks, and we follow their lead on including others who can support the justice needs and healing, which sometimes involves the person directly responsible for the harm. Our approach valued survivor voice, dignity, accountability, choices and hope.

In practice, restorative approaches provides the opportunity to attend to relationships; and offers space for repair to relationships that protect and provide resilience; and to attend to relationships that have been damaged through harm and abuse, without imposing outcomes on participants. Restorative justice bridges the accountability required by law and the healing required for future well-being. Restorative justice is widely used globally (Burford et al.,2019). Restorative justice has been recommended as a beneficial paradigm shift by the United Nations in the general context of dealing with violence against women and children (Office of the Special Representative of the Secretary-General on Violence Against Children, 2013); and was identified in the *National Plan to End Violence Against Women and Children*. In spite of this, our work receives no Government funding (State or Federal) and only a handful of community-based practices are openly responding

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<sup>8</sup> <https://www.snaicc.org.au/policy-and-research/child-safety-and-wellbeing/early-intervention-programs/>



to sexual abuse and complex harm (including Open Circle, Centre for Innovative Justice, RMIT; and some discrete youth justice conferencing schemes including in Queensland).

In our work, community-based approach means:

- that those who are affected by an issue are included as **central** in developing strategies related to addressing the issue and their own health, safety and well-being.
- the **skills, knowledge and lived experience** of community members and the resources within the community to find solutions to complex problems.
- the locus of impact of sexual abuse and family and domestic violence on the community of care and support surrounding the person harmed directly.
- the impacts experienced by people surrounding those directly involved and views these families, systems, organization and community as having the necessary capabilities to create an environment that can effectively prevent future harm.
- creating **safety** within a network, we believe that such communities can effectively prevent and address harm, raise awareness of the problem being address, guide and support each other in the future, through individual and collective paths to healing.<sup>9</sup>

In this way, our approach, differs from programs principally oriented to the youth or criminal justice system, and appreciates not only that many survivors never engage in such process, but also that relationships are at the core of a restorative approach as a source of strength and resilience and, which may need to repair.<sup>10</sup>

Importantly, a community-based approach can be differentiated from, yet can also be complementary or work alongside, a legal and institutional response to a crime.

Our work is emerging as we have only been open for referrals since November 2022, however our practices are gaining attention through word of mouth and we are hopeful to create a sustainable free service model available to children, families and communities across Australia. A number of individuals from different communities, cultural and faith backgrounds have engaged with our work and while our evidence is emerging, the changes noted anecdotally for them have been significant, affirming and empowering and importantly – have offered trauma-informed and survivor-centred approaches to their harm – in contrast to their experience within other legal or response systems.

Our hope is to create restorative opportunities for people impacted by harm of all ages, as well as their families and community. with trauma informed and intersectional responses to harm of all types – harm which is often channeled through statutory systems, but which in child protection matters and many other forms of abuse – are best situated within a community-based response. Our

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<sup>9</sup> Clements, Elizabeth - Hidden Water, New York City, New York. <https://hiddenwatercircle.org/our-approach>

<sup>10</sup> Pranis, K., (2001) "Restorative justice, social justice, and the empowerment of marginalized populations" in G. Bazemore & M. Schiff (eds), Restorative and Community Justice: Cultivating Common Ground for Victims, Communities and Offenders. Anderson Publishing, Cincinnati.

work is modelled on the restorative practices in New Zealand, Canada, Europe and United States. More information about our mentors and peer networks can be seen on our webpage.

### International examples of restorative frameworks operating in child protection settings

Family group conferences reflect, in their philosophy and emphasis on the participation of families, young offenders and victims, cultural sensitivity and consensus decision-making and, in their practice, a capacity to be translated into diverse social contexts and jurisdictions.

In the New Zealand context, restorative practices such as family group conferencing (FGC) have been enshrined in the *Oranga Tamariki Act (1989)*<sup>11</sup> and reflect inclusive, Treaty-based, culturally relevant and community-controlled practices. **FGC** reflect, in their philosophy and emphasis on the participation of families, young offenders and victims, cultural sensitivity and consensus decision-making and, in their practice, a capacity to be translated into diverse social contexts and jurisdictions.

In addition to the formalisation of FGC, other processes such as alternative decision-making hierarchies and a shift away from punitive and carceral responses to child protection and youth related crime has resulted in a steady decline in the rate of children and young people placed into out of home care.

While rates of children in out of home care has been declining in Aotearoa for a number of decades, a key turning point was the introduction of *Oranga Tamariki Act (1989)*; and recent data has shown that since 2008 there has a 20% reduction in the proportion of children in OOH in Aotearoa which now sits at about 4.1 per 1000 children – about half the rate of Australian children in OOH.<sup>12</sup>

In practice, the changes meant that the strategic and meaningful partnerships are established between *Oranga Tamariki* (Ministry for Children) and hāpu, iwi and Māori organisations in order to:

- identify and engage with significant cultural groups, communities, elders and family members in decision-making for their children (as early as possible)
- support and/or facilitate community engagement and knowledge sharing
- assisting Oranga Tamariki staff to integrate appropriate cultural knowledge and practice into the decision-making processes, such as in the case consult and in the design of new services

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<sup>11</sup> *The Oranga Tamariki or Children's and Young People's Well-being Act (1989)* which provides: set out procedures for the removal of abused children from their parent's care, making the best interests of the child the first consideration. It also set out procedures for dealing with youth offenders, making arrest and imprisonment interventions of last resort. Although Police initially feared those restrictive provisions on their powers would cause problems, practical experience has not borne out those fears. The Act also provided for a Commissioner for Children.

The Act determines how the state intervenes to protect children from abuse and neglect, and to prevent and address child and youth offending. It represents how well our society cares for and supports our children and young people. The Act introduced principles that changed the way decisions were made about children and young people, enabling family to become partners in the decision-making process to resolve family issues.

<sup>12</sup> Peter D June "Primum non nocere: rethinking our policies on out-of-home care in Australia Are our child protection policies causing more harm to our most vulnerable children?" 2012  
[https://www.mja.com.au/system/files/issues/206\\_10/10.5694mja16.00864\\_adjusted.pdf](https://www.mja.com.au/system/files/issues/206_10/10.5694mja16.00864_adjusted.pdf)

- better involve whānau, hāpu and iwi (family and community) in child protection cases including in planning and decision-making, and
- delegate accountabilities and power.

While of course, coordination of child protection services and program delivery, policies, practices and approaches are significantly simpler in Aotearoa than Australia – given the smaller geographic region; smaller population; distinct residential areas; the inclusive, community centred and culturally led delegation of child protection responsibilities could easily be mirrored in Australia by identification and engagement with First Nations communities, families and elders in our distinct lands. communities and building partnerships within these with local community groups.

The reductions in the number of children in care could also be a product of changes in culture and leadership, organisational values and changes in site and regional leadership – a cultural shift which in an Australian context would require an openness to share or delegate power and long-standing hierarchies of state control.

Nonetheless, the reviews noted herein and elsewhere over the past decade have a echo for this approach, adoption of this require political will, courage and vision to believe and trust there is another way to respond to harm which rests on centering on community and cultural knowledge and a willingness to engage in real and meaningful power sharing.

#### **5. 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?**

We support this proposal. A national approach would properly situate the importance of child needs, interests and rights at a national level and would elevate the voices and experiences of children to an issue in the national public consciousness. A Ministry for Children could be established with distinct responsibilities for children, and to ensure that advocacy on children’s issues is managed within single portfolio – not spread across several as is currently the case.

In addition to this proposal, we suggest the establishment of a clearer set of values and principles to guide child protection policy and practice to ensure wherever and however possible – national consistency between the states and territories; and to ensure that the many reviews in youth justice, child wellbeing and child protection are implemented. We would also suggest the creations of a separate role for a First Nations Children’s Commissioner.

Thank you.