



## **Submission to the National Children's Commissioner's *Youth Justice and Child Wellbeing Reform across Australia* project**

### **Acknowledgment of Country**

Youth Law Australia acknowledges the Traditional Owners and Elders of the Bedegal People of the Eora Nation and all the other custodians of the land on which we work. We pay our respects to their Elders past, present and emerging, and commit ourselves to the ongoing journey of Reconciliation.

### **About us**

1. Youth Law Australia (YLA) is an accredited national community legal service that is dedicated to helping children and young people understand their legal rights, and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time, and receive free and confidential legal advice and help.
2. We are dedicated to addressing human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

### **Introduction**

3. We welcome the announcement that the National Children's Commissioner's (the Commissioner) is conducting a project that 'investigates opportunities for reform of youth justice and related systems across Australia, based on evidence and the protection of human rights'. We also welcome the focus on prevention and early intervention for children and young people exhibiting 'offending' behaviours.<sup>1</sup>
4. In our view, youth justice is one of the areas that poses the greatest threat to children's rights in Australia,<sup>2</sup> including:
  - a. the best interests of the child as a primary consideration in all actions concerning children (Article 3, Convention on the Rights of the Child)

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<sup>1</sup> We endorse the view in UNSW Centre for Crime, Law & Justice, *Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: 'A Best Interests' Response*, September 2021 (available at: [Microsoft Word - CCLJ Best Interests Response Report September 2021.docx \(unsw.edu.au\)](#)) that the language used to describe relevant behaviours in this space is important. The authors in that report write: 'It is challenging to describe the behaviours which currently bring young children into contact with the youth justice system in a way that avoids labelling them 'criminal', without trivialising such behaviours. In this report we adopt the phrase 'offending behaviour' on the basis that, although imperfect, it accurately captures the transgressions for which a replacement response is required.' See page 6, footnote 9.



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### **Youth Law Australia**

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- b. the right of children to life, survival and development (Article 6, Convention on the Rights of the Child)
  - c. the right of children to family relations (Articles 8 and 9, Convention on the Rights of the Child)
  - d. the right of children to protection from all forms of physical, mental or emotional violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (Article 19, Convention on the Rights of the Child)
  - e. the right of children with disability to special care and support (Article 23, Convention on the Rights of the Child)
  - f. the right of children to health (Article 24, Convention on the Rights of the Child)
  - g. the rights of children to education (Article 28, Convention on the Rights of the Child)
  - h. the right of children under arrest or in detention to prompt access to legal and other appropriate services (Article 37, Convention on the Rights of the Child)
  - i. the right of children who commit a crime to be dealt with by measures without resorting to judicial proceedings where appropriate and have their human rights and legal safeguards respected (Article 40, Convention on the Rights of the Child).
5. For the reasons set out in this submission, we would like to see the Commissioner:
- a. recommend that governments in all states and territories commit to raising the minimum age of criminal responsibility to 14 as a matter of priority
  - b. recommend that Australia replaces the current criminalisation approach with an entirely new response to children and young people engaging in offending behaviour, consistent with our international human rights obligations, international best practice, and existing evidence about what is in the best interests of children, families, and communities
  - c. recommend and advocate for a national inquiry supported by governments at all levels to provide Australia with a pathway for reform
  - d. amplify and prioritise the voices of children and young people, and particularly Aboriginal and Torres Strait Islander young people, with lived experience of the criminal justice system
  - e. work with governments and state and territory children's commissioners and advocates to change the national conversation on this issue
  - f. make interim recommendations to increase supports and services for children and young people engaging in offending behaviours, and decrease the involvement of young people in the criminal justice system.
6. We would welcome the opportunity to participate in further consultation on these important issues.

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

7. The factors that contribute to offending behaviours in young people are well documented, and for this reason we will address them only briefly here. They reflect the profound disadvantages faced by many of the young people who come into contact with criminal justice systems. They make for sobering reading, and underscore the inappropriateness of Australia's current criminalisation approaches to offending behaviour exhibited by children and young people.

8. For example, the Justice Health and Forensic Mental Health Network and Youth Justice Young People in Custody Health Survey 2015 found that of the young people surveyed who had been in contact with Youth Justice in NSW:
  - a. almost half had been exposed to a past traumatic event
  - b. almost 70 percent had experienced childhood abuse or neglect, and almost 30 percent had experienced severe childhood abuse or neglect
  - c. one in six had a potential intellectual disability, which is nearly five times higher than the general population prevalence,<sup>2</sup> and 80 percent had below average language skills
  - d. more than 80 percent had at least one mental health disorder
  - e. 21 percent had been in care before they turned 16 (children who have experienced out-of-home care are over-represented in the criminal justice system)<sup>3</sup>
  - f. only 27 percent were going to school before they were placed into custody.<sup>4</sup>
9. It is significant to highlight that nationally, in 2021-2022, 60 percent of 10-17 year-old children in 'youth detention' (that is, prisons for children), 52 percent of 10-17 year-old children under community-based supervision and 51 percent of 10-17 year-old children under youth justice supervision, were Aboriginal or Torres Strait Islander persons.<sup>5</sup>
10. As a 2020 report by the Australian Institute of Criminology noted: 'A significant proportion of the young people in the Australian youth justice systems come from challenging home circumstances, including dysfunctional family environments, histories of familial offending, exposure to family violence, unstable accommodation or homelessness and socio-economic disadvantage of poverty.'<sup>6</sup>
11. It is important to emphasise that contact with the criminal justice system is itself a factor that contributes to young people having further involvement with that system. As the researchers at the UNSW Centre for Crime, Law and Justice Report have observed:

*Contact with the criminal justice system routinely does children (and the wider public) more harm than good. It is 'criminogenic': it produces rather than reduces 'offending behaviour'.<sup>7</sup>*
12. It follows that the overarching cause of children and young people coming into contact with the criminal justice system is that current systems and services are not adequately or appropriately identifying and responding to their needs.<sup>8</sup>

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<sup>2</sup> See [Youth Justice Disability Action Plan \(nsw.gov.au\)](https://www.nsw.gov.au/youth-justice-disability-action-plan).

<sup>3</sup> See Centre for Crime, Law & Justice, UNSW, *Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: 'A Best Interests' Response*, September 2021 (available at: [\\*Microsoft Word - CCLJ Best Interests Response Report September 2021.docx \(unsw.edu.au\)](#)), p 39.

<sup>4</sup> [2015YoungPeopleinCustodyHealthSurveyFactSheets.pdf \(nsw.gov.au\)](#).

<sup>5</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2021-22*, March 2023, p. 11. Available at: <https://www.aihw.gov.au/getmedia/3fe01ba6-3917-41fc-a908-39290f9f4b55/aihw-juv-140.pdf.aspx?inline=true>.

<sup>6</sup> Garner Clancey, Sindy Wang and Brenda Lin, *Youth Justice in Australia: Themes from recent inquiries*, Australian Institute of Criminology, No. 605, October 2020, p 6.

<sup>7</sup> Centre for Crime, Law & Justice, UNSW, *Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: 'A Best Interests' Response*, September 2021 (available at: [\\*Microsoft Word - CCLJ Best Interests Response Report September 2021.docx \(unsw.edu.au\)](#)), p 6.

<sup>8</sup> See Centre for Crime, Law & Justice, UNSW, *Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: 'A Best Interests' Response*, September 2021 (available at: [\\*Microsoft Word - CCLJ Best Interests Response Report September 2021.docx \(unsw.edu.au\)](#)), p 6.

**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?**

13. The current approach of the criminal justice system to children and young people in Australia is compounding the trauma and disadvantage experienced by some of our most vulnerable children and young people. It is failing to identify and respond to their complex needs including those arising from disability, trauma, and mental illness. It is not keeping our communities safe or giving families the supports they need to keep children safe, at home and in school.
14. These failings are so systemic, and so serious, that there needs to be a wholesale change to the way we respond to children and young people who exhibit offending behaviours. Reforms to existing systems that keep in place their architecture, cultures and underpinning philosophies ('tinkering') will not result in the change that is needed.
15. A new approach is needed that:
  - a. prioritises responding to the complex needs of and disadvantage experienced by children and young people who engage in offending behaviour, and gives effect to their human rights
  - b. gives families the services and supports they need to support the child or young person, and to stay together where possible
  - c. reduces the involvement of children and young people with police and other components of the criminal justice system wherever possible
  - d. respects and gives effect to the self-determination of Aboriginal and Torres Strait Islander peoples, and enables their young people to stay connected to their families, communities and country
  - e. in cases of very serious or harmful behaviours, balances the rights of the child or young person concerned with those of the victim, their families, and the community (acknowledging that victims may also be a child or young person).
16. **For children aged between 10 and 14:** Youth Law Australia has long been calling for the minimum age of criminal responsibility to be raised to 14 across Australia. We refer to submissions we have made to various inquiries in recent years, all of which address similar issues to those raised in the current project, including:
  - a. Submission of Youth Law Australia to the Minimum Age of Criminal Responsibility (MACR) Survey by the Tasmanian Commissioner for Children and Young People (2021)<sup>9</sup>
  - b. Submission of Youth Law Australia to the ACT Government Minimum Age of Criminal Responsibility (MACR) Discussion Paper (2021)
  - c. Submission of Youth Law Australia to the Queensland Community Support and Services Committee on the Criminal Age (Raising the Age of Responsibility) Amendment Bill 2021<sup>10</sup>
  - d. Submission of Youth Law Australia regarding Doli Incapax and Raising the Minimum Age of Criminal Responsibility to the Australian Council of Attorneys-General in February 2020.<sup>11</sup>

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<sup>9</sup> [Microsoft Word - YLA submission to MACR survey \(Tas\) 2021](#)

<sup>10</sup> [Submission-of-Youth-Law-Australia-Criminal-Law-Raising-the-Age-of-Responsibility-Amendment-Bill-2021-Qld.pdf \(yla.org.au\)](#)

<sup>11</sup> [Microsoft Word - Submission - doli incapax and MACR - Indigenous edit.docx \(yla.org.au\)](#)

17. Raising the minimum age of criminal responsibility to 14 would give effect to Australia's human rights obligations, address serious deficiencies in the laws that should give protection to children and young people in this group (principally *doli incapax*), and reduce the criminogenic impact of early engagement with the criminal justice system. There are a multitude of other reasons that are set out in the above submissions, and in other literature on this topic.<sup>12</sup>
18. **For young people aged between 15 and 18:** For similar reasons to those listed above, the response to young people aged between 15 and 18 who engage in offending behaviour should be to avoid involving the police and other components of the criminal justice system wherever possible.
19. We acknowledge that in some cases, offending behaviour by young people in this age cohort can pose serious safety risks to other children, families and communities. It can also cause lasting harm and trauma to others, for example where sexual abuse or other violent crime is involved. There may be instances where a criminal justice approach is appropriate when balancing the rights of the young person, with others (victims and communities). However, in our view this should be reserved for very serious and harmful behaviours, and in all other cases be replaced with a new approach that first identifies and assesses the individual, complex needs of young people who exhibit offending behaviours.

### 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?

20. We refer the Commissioner to *Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: A 'Best Interests' Response*, a 2021 report by researchers at the UNSW Centre for Crime, Law and Justice. This report investigated best practice responses to 'offending behaviour' by children under 14 years, including therapeutic, educational, and local community-based 'social support' alternatives to the current youth justice system in NSW', and related research.
21. This Report found that a non-criminalising response to 'offending behaviours' by young children is the most *effective* approach, and therefore, in the *best interests of the wider public* as well as the child concerned.<sup>13</sup>
22. It observed that 'Services and methods of intervention that are oriented towards physical and mental well-being, education and family support (as distinct from punishment) already exist in NSW'.<sup>14</sup> They exist in other jurisdictions as well. For example, the Foundation for Indigenous Sustainable Health (FISH) in WA Myalup Karla Waangkinny program has been recently developed and co-designed alongside Aboriginal and Torres Strait Islander men and women Elders, leaders and young people with lived experience. Once launched, the program will aim to

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<sup>12</sup> See for example Cunneen, C. (2017). Arguments for Raising the Minimum Age of Criminal Responsibility. Research Report, Comparative Youth Penalty Project, University of New South Wales.

<http://cyp.unsw.edu.au/node/146>; Nowak, M. (2019). United Nations Global Study on Children Deprived of Liberty. A/74/136, United Nations.

<sup>13</sup> Centre for Crime, Law & Justice, UNSW, *Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: 'A Best Interests' Response*, September 2021, (available at: [\\*Microsoft Word - CCLJ Best Interests Response Report September 2021.docx \(unsw.edu.au\)](#)), pp 6-7.

<sup>14</sup> Centre for Crime, Law & Justice, UNSW, *Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: 'A Best Interests' Response*, September 2021 (available at: [\\*Microsoft Word - CCLJ Best Interests Response Report September 2021.docx \(unsw.edu.au\)](#)), p 7.

give Aboriginal and Torres Strait Islander people aged 16-35 a place to heal and receive holistic support to break intergenerational trauma and prevents (re)engagement in the justice system.<sup>15</sup>

**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?**

23. There are multiple benefits to taking a national approach to reform in this area. These benefits include the following.
24. **A national approach to reform would assist Australia to better meet its international human rights obligations:** For example, since ratifying the United Nations Convention on the Rights of the Child in 1990, 'Australia has been repeatedly questioned by the United Nations Committee on the Rights of the Child' about its very low minimum age of criminal responsibility, and urged to raise it to an internationally accepted level of 14 years.<sup>16</sup> A new approach such as the one outlined in this submission promises to collectively give effect to a spectrum of internationally recognised human rights, including the rights of children and the rights of young people with disability.
25. **The policy issues, challenges and solutions are broadly similar across Australia:** Although there are local differences and nuances with some jurisdictions having more punitive and damaging approaches than others, all state and territory governments face similar policy issues in this area. This is illustrated by a 2020 report from the Australian Institute of Criminology, which analysed key reviews and inquiries into Australian youth justice systems to identify broad themes and trends that are pervasive throughout contemporary Australian youth justice systems.<sup>17</sup>
26. **There have been a high number of state and territory inquiries into youth justice which have not resulted in systemic change:** The Australian Institute of Criminology report identified 22 reviews or inquiries into youth justice across six Australian jurisdictions over a four-year period. It noted that many of these 'had been instigated by the occurrence of high-profile adverse incidents (such as riots) in youth detention centres'.<sup>18</sup> Yet, despite the high number of reviews and inquiries in this area, there has been very little substantive change to the underlying issues and systems.
27. **There is a need to move away from existing models, embedded structures and unhelpful rhetoric:** 'Law and order' rhetoric is a recurring feature of policy and reform debates in states and territories. This encourages the adoption of punitive approaches to children and young people engaging in offending behaviours. This appears to be less potent at the national level, and a national approach also has the advantage of being one-step removed from the existing models and embedded structures that require systemic change. To put it another way, adopting a uniform national approach will assist in recasting the policy issue as addressing the human rights and well-being of children, rather than addressing a 'crime problem'.
28. **There has been inadequate political will at the state and territory level:** Despite a consistent push to raise the minimum age across Australia for over a decade, there are still jurisdictions

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<sup>15</sup> Foundation for Indigenous Sustainable Health (FISH), Annual Report 2020-21, [https://fish.asn.au/wp-content/uploads/2022/01/2020-2021\\_FISH-Annual-Report\\_Web.pdf](https://fish.asn.au/wp-content/uploads/2022/01/2020-2021_FISH-Annual-Report_Web.pdf), pp. 51-58.

<sup>16</sup> Centre for Crime, Law & Justice, UNSW, *Replacing the Youth Justice System for Children Aged 10-13 Years in NSW: 'A Best Interests' Response*, September 2021 (available at: [\\*Microsoft Word - CCLJ Best Interests Response Report September 2021.docx \(unsw.edu.au\)](https://www.cclj.unsw.edu.au/wp-content/uploads/2021/09/CCLJ-Best-Interests-Response-Report-September-2021.docx)), p 9, FN 15.

<sup>17</sup> Garner Clancey, Sindy Wang and Brenda Lin, *Youth Justice in Australia: Themes from recent inquiries*, Australian Institute of Criminology, No. 605, October 2020, p 3.

<sup>18</sup> Garner Clancey, Sindy Wang and Brenda Lin, *Youth Justice in Australia: Themes from recent inquiries*, Australian Institute of Criminology, No. 605, October 2020, p 4.

that have not committed to raising the minimum age. There has been a dearth of leadership in this area.

29. **Reforms following the Royal Commission into Institutional Responses to Child Sexual Abuse illustrate the benefits of national leadership on strategic areas of importance** which have typically been the responsibility of state and territory governments. For example, there is now a National Office for Child Safety, a National Strategy to Prevent and Respond to Child Sexual Abuse, and National Principles for Child Safe Organisations.

## 5. Our recommendations

30. While the evidence points clearly to what is not working, and what needs to change, there remains significant policy work to be done to guide all governments on the path to reform, and to start the process of changing the national conversation around Australia's 'youth justice' systems.
31. We support the call the Commissioner has made previously for some form of national inquiry. That inquiry should have a broad terms of reference reflective of the complex societal, historical, environmental and individual issues raised by children and young people exhibiting offending behaviours.
32. We are pleased to read that the Commissioner plans to hold consultations with children and young people with lived experience of the criminal justice system, and to place their voices at the centre of what is proposed. The voices of these children and young people should also be integral to the design and processes of the proposed national inquiry. We submit, however, that the Commission should not require parent/guardian consent for Gillick competent young people who may wish to make a submission. This would best give effect to a young person's rights, recognise their evolving capacity and agency,<sup>19</sup> and avoid situations where a parent or guardian's involvement may not be protective or otherwise in the young person's best interests.

30 June 2023

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<sup>19</sup> See for example Georgina Dimopoulos, *Decisional Privacy and the Rights of the Child* (Routledge, 2022) 4 for discussion of these principles in a related context.